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THE
GROTIUS SOCIETY

(Founded in London in 1915 for the Study and Advancement of International Law)

2 KING'S BENCH WALK, THE TEMPLE, LONDON, E C, 4

TRANSACTIONS FOR THE YEAR 1948

PROBLEMS OF
PUBLIC AND PRIVATE
INTERNATIONAL LAW

VOLUME 34

LONGMANS GREEN AND CO
LONDON. NEW YORK. TORONTO

1949

LONGMANS, GREEN AND CO., LTD.
6 & 7, CLIFFORD STREET, LONDON, W.1.

ALSO AT MELBOURNE AND CAPE TOWN

LONGMANS, GREEN AND CO., INC.
55, FIFTH AVENUE, NEW YORK, 3.

LONGMANS, GREEN AND CO.
215, VICTORIA STREET, TORONTO 1.

ORIENT LONGMANS LTD.
BOMBAY, CALCUTTA, MADRAS.

Checked 1965

Checked 1969 CHECKED 1958

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THE GROTIUS SOCIETY is a British Society founded in London in 1915 for " the study, discussion and advancement of public and private international law and to make suggestions for their reform."

In accordance with the Resolution passed by its Executive Committee in 1916, the Society does not hold itself responsible for any of the opinions expressed in the discussions, papers or reports published in its "*Transactions*." Such opinions must be treated as purely individual unless stated to be made in the name of the Society as such.

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THE GROTIUS SOCIETY
EXECUTIVE COMMITTEE

APRIL 14, 1948

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Offices of the Society :

2 KING'S BENCH WALK, THE TEMPLE, LONDON, E.C.4.

THE GROTIUS SOCIETY

RULES

1. The name of the Society shall be " THE GROTIUS Name and Society." Seat.

It shall be a British Society and its meetings are intended to take place in the United Kingdom.

2. The objects of the Society shall be to afford Objects. facilities for the study, discussion and advancement of public and private international law and to make suggestions for their reform.

3. The Society shall consist of members, associate Members. members, corresponding members and honorary members. Corporations, Institutions and Associations, as well as individuals, are eligible for election to the Society.

4. Without prejudice to the position of the existing members, corresponding members and life members of the Society and except so far as is provided in rule 9, the election of all classes of members of the Society is entrusted to the Executive Committee.

5. Candidates for election must be proposed and seconded by members of the Society, and must be persons who in the opinion of the Executive Committee are qualified to further the objects of the Society.

6. Except so far as these Rules may provide otherwise, all members of the Society must be British subjects.

7. Persons who are not British subjects and who Associate are habitually resident in the United Kingdom, and Members. who desire to associate themselves with the work of the Society, may be elected as associate members of the Society.

The number of associate members elected subsequently to the adoption of these Rules shall not exceed the figure fixed from time to time by the Annual General Meeting of the Society on the recommendation of the Executive Committee.

Associate members of the Society pay the same subscription and have the same privileges as members.

Correspond-
ing mem-
bers.

8. Persons who are not British subjects and who are habitually resident outside the United Kingdom and who are desirous of associating themselves with the work of the Society may be elected as corresponding members of the Society.

The number of corresponding members elected subsequently to the adoption of these Rules shall not exceed the figure fixed from time to time by the Annual General Meeting of the Society on the recommendation of the Executive Committee.

Persons who have been elected as corresponding members of the Society previously to the coming into force of these Rules and who are qualified under Rule 7 may be transferred without further election by the Executive Committee to the list of associate members.

Corresponding members of the Society pay the same subscription and have the same privileges as members.

Honorary
Members.

9. Persons who have rendered signal service to the cause of international law, or to the interests of the Society, may, irrespective of their nationality, be elected Honorary members of the Society. The election of an Honorary member shall be made at the Annual General Meeting of the Society on the recommendation of the Executive Committee.

Honorary members pay no subscription to the Society, but in other respects are entitled to all the privileges of members.

Officers.

10. The Officers of the Society shall be the President, the Vice-President, the Honorary Treasurer, the Honorary Secretary or Secretaries, and the Honorary Librarian, and shall be elected by the Annual General Meeting. They shall hold office for one year, but shall be eligible for re-election at the Annual General Meeting of the Society. Subject to any resolution of the Society at the Annual General Meeting, no officer of the Society other than the Treasurer, the Secretary and the Librarian shall hold office for more than two consecutive years.

Expenses
and Sub-
scriptions.

11. The expenses of the Society shall be met from the subscriptions and from such funds as the Society may by donation or otherwise acquire.

The annual subscription of each member shall be not less than £1.—An individual member of the Society shall be entitled on payment of a composition subscription of £10 to become a life member.

Any member whose subscriptions are three years in arrear and who fails to pay the amount due when requested to do so may be struck off the list of members by the Executive Committee and shall thereupon cease to be a member.

The subscriptions and all other property acquired for the purposes of the Society shall be deemed to be vested in the officers of the Society as trustees for the members.

12. The affairs of the Society shall be managed by Management. an Executive Committee consisting of the officers of the Society and of the past Presidents and of ten additional members elected annually by the Society at the Annual General Meeting.

Subject to the control of any General Meeting of the Society, the Executive Committee shall be entitled to take on behalf of the Society any action which it holds to be conducive to the interests of the Society.

At any meeting of the Executive Committee the presence of four members shall constitute a quorum.

The Executive Committee shall present a report of its proceedings to the Annual General Meeting of the Society.

Casual vacancies among the officers or among the other members of the Executive Committee may be filled by co-option of the Executive Committee until the next Annual General Meeting.

13. The Annual General Meeting of the Society shall be held on April 10, being the birthday of Hugo Grotius, or on such other convenient day in April of each year as the Executive Committee shall fix.

14. The Executive Committee may delegate representatives to attend conferences at home or abroad dealing with subjects within the objects of the Society.

15. The Society shall publish annually a volume containing a record of the *Transactions* of the Society and of its activities during the preceding year.

The preparation of the volume shall, subject to the

control and responsibility of the Executive Committee, be entrusted to an Editorial Committee to be appointed by the Executive Committee.

Library.

16. The books belonging to the Society and constituting its Library shall be under the general supervision of an Honorary Librarian.

The Honorary Librarian shall have charge of the cataloguing of the books and of the expenditure of such sums as the Executive Committee may allocate for the maintenance and extension of the Library.

Amendment of Rules.

17. A proposal for the amendment of the Rules of the Society must be submitted to the Annual General Meeting. The text of the proposed amendment shall be circulated to the members with the notice convening the meeting.

No amendment shall be regarded as adopted unless two-thirds of the members present at the meeting vote in favour of it.

(Rules adopted by the 28th Annual General Meeting of the Society on April 5, 1943.)

ANNUAL GENERAL MEETING

The Thirty-third Annual General Meeting of the Society was held at Niblett Hall, 3, King's Bench Walk, Temple, on Wednesday, April 14th, 1948, at 4.0 p.m. under the chairmanship of Sir Cecil Hurst, President of the Society.

Minutes.—The Minutes of the 32nd Annual General Meeting held on April 15th, 1947, were approved and signed by the Chairman.

Annual Report.—The Annual Report of the Executive Committee for 1947 as printed and circulated to the members was submitted to the Meeting and approved.

Statement of Accounts.—The Statement of Accounts for the year ended December 31st, 1947, audited by Messrs. Farrow, Bersey and Co., Chartered Accountants, was submitted to the Meeting and approved.

The Chairman reported on the activities of the Society during the past year. They had been very satisfactory. He personally had thoroughly enjoyed his term of office, having received nothing but kindness. He had for some time past been anxious to resign from the Presidency of the Society which he had occupied now for eight years, but the fact that he felt obliged to take leave of his presidential duties would not mean that he would be losing interest in the future of the Society.

He then referred to the International Law Conference of 1947 which had resulted in valuable contributions to international law. It had been preceded by a dinner, honoured by the presence of the Lord Chancellor, Professor Basdevant, Vice-President of the International Court of Justice at The Hague, and Professor Norman MacKenzie, President of the University of British Columbia.

There was a new feature in the life of the Society. The Chambers at 2, King's Bench Walk which for so many years had been the home of the Society, jointly with the International Law Association, had been surrendered to the Benchers of the Inner Temple. But the latter had graciously offered to the Society the opportunity of meeting in the Niblett Hall at 3, King's Bench Walk, which had the advantage of being able to house a much larger assembly.

The study of International Law in Great Britain was becoming more widely diffused, and this was shown by the success of the Society's International Conferences and the publication of the first

numbers of the "International Law Quarterly," to which he had referred in his Presidential Address of last year.

With regard to the election of officers for the ensuing year, the Chairman proposed with unanimous approval the election of the present Vice-President, Sir Arnold D. McNair, C.B.E., K.C., LL.D., as President of the Society, while Sir Cecil Hurst was elected Vice-President.

On taking the Chair, Sir Arnold McNair thanked the members of the Society for the honour conferred upon him. When three years ago he had resumed the attendance at the meetings of the Society, he had been impressed with the new vitality of the Society. Everyone knew to whom this was due. He thanked Sir Cecil for the great services he had rendered to the Society and expressed the hope that it would be possible to maintain in the Society the high standard which his predecessor had been able to achieve.

He hoped that the proposed Law Conference in July, 1948, would prove a success in view of the increasing number of interested members of both branches of the profession.

Elections.—The following were unanimously elected to serve on the Executive Committee of the Society for the ensuing year.

Officers :—President. Sir Arnold McNair ; Vice-President : Sir Cecil Hurst ; Hon. Secretary Mr. C. John Colombos, LL.D., Hon. Treasurer : Mr. Kenneth S. Carpmael, K.C. ; Hon. Librarian Mr. Arthur Jaffé :

Members.—Mr. W. E. Beckett, K.C., Professor N. Bentwich, Professor G. C. Cheshire, Mr. C. G. Dehn, Sir Harold Duncan, K.C., Dr. Eric G. M. Fletcher, Dr. V. R. Idelson, K.C., Mr. William Latey, Mr. Richard O'Sullivan, K.C., and Professor C. H. M. Waldock in lieu of Professor Keeton who had resigned his office.

The Chairman reported on the programme of the International Law Conference 1948 to be held at Gray's Inn Hall, London, on July the 10th.

The programme would comprise the "Concern of International Law with the individual" (Paper by Mr. Richard O'Sullivan, K.C.) and the "Legal Aspects of State Shipping" (Paper by Sir William L. McNair, K.C., LL.M.). The Conference would be preceded by a dinner to be given by the Society in Gray's Inn Hall on Friday, 9th of July, when the principal speakers would be Lord Schuster, G.C.B., C.V.O., K.C., and the Rt. Hon. Lord du Parc, P.C.

The Chairman finally appealed to the members to make their subscriptions in the form of seven years' covenants. Thirty members had already signed such deed of covenant and forty-seven members had agreed to make a separate payment of 15/- for the Society's Annual "Transactions."

The Annual Meeting was followed at 4.30 p.m. by a paper read to the Society by Mr. William Latey, M.B.E., on "Conflicts of Law in Divorce and Nullity."

REPORT OF THE EXECUTIVE COMMITTEE FOR 1948

The Executive Committee held seven meetings in 1948. During the same period, seven papers were read to the Society, all of which are printed in Part II of this volume. Part I is devoted, as usual, to the Proceedings of the International Law Conference held at Gray's Inn, London (by kind permission of the Treasurer and Masters of the Bench of the Honourable Society of Gray's Inn) on July 10th. The Conference was preceded by a dinner given by the Society at the same Inn on July 9th, at which the principal speakers were Lord Schuster and the Right Hon. Lord du Parc.¹

Elections.—Sir Arnold D. McNair, C B.E., K.C., LL.D., was elected President of the Society at the Annual General Meeting held on April 14th, in succession to Sir Cecil J. B. Hurst, G.C.M.G., K.C.B., K.C., who was elected Vice-President.

Ordinary Members.—Sixteen new members were elected during the year as follows :—Miss Marguerite Backhouse, B.L., Dr. Max H. Bresch, LL.B., Mr. E. A. S. Brooks, Colonel Henry Norman Edwards, M.B.E., Mr. Gershon Ellenbogen, Mr. Oliver Otto Fisher, B.A. Professor Harold Cooke Gutteridge, K.C., LL.D., Mr. James Angus Hornby, M.A., LL.B., Colonel Richard Lumley Hurst, Dr. O. Kahn-Freund, LL.M., Mr. Jerrold Norman Kemp, Dr. Kurt Lipstein, Ph.D., Sir William Lennox McNair, K.C., LL.M., Mr. Andrew Rankin, B.A., B.L., His Honour Judge P. L. E. Rawlins and Professor Percy Henry Winfield, K.C., LL.D.

The Society records, with regret, the death on the 4th October, 1948, of Mr. C. G. Dehn, a valued and energetic member of the Executive Committee. By his Will, Mr. Dehn bequeathed a legacy of one hundred pounds to the Society. In making this bequest, he provided that the legacy should be used in such manner as the Executive Committee might determine, but with the suggestion that it might serve as a nucleus for an Endowment Fund for the advancement of the objects of the Society. To this fund members of the legal profession and others in the United Kingdom who desire to promote these objects, should be invited to contribute.

¹ Printed at pp. 62 *et seq. infra*

Transactions of the Society.—In view of the increasing cost of printing and binding, the Executive Committee decided in February that in future members wishing to receive the annual “ Transactions ” of the Society should be asked to pay 15/- for the volume, and that 25/- should be the price for non-members. It was further decided that the circular letter announcing this decision should be accompanied by a seven years’ Covenant to be signed by those members wishing to do so, thus enabling the Society to recover the income-tax on the annual subscriptions of one pound.

The Society wishes to express again its thanks to the Carnegie Endowment for International Peace for the annual renewal of its grant in aid of the Society’s publications. It is regretted that this grant came to an end in June, 1948, owing to a change in the policy of the Endowment which is now directed to supporting directly the United Nations and the study of questions directly related to that centre of interest rather than to the support of other agencies of international law and international relations. The Society must record its high appreciation of this support by the Carnegie Endowment during a long period of years.

The Society’s thanks are also due to the British Council for the purchase of a number of copies of volume XXXII of the Society’s Transactions.

The Accounts for 1948 are submitted herewith.

ARNOLD D. MCNAIR

April, 1949.

THE GROTIUS SOCIETY

RECEIPTS AND PAYMENTS ACCOUNT FOR THE YEAR ENDED 31st DECEMBER, 1948.

RECEIPTS.		PAYMENTS	
	£ s. d.		£ s. d.
Annual Subscriptions	131 14 0	Printing and Binding Charges	302 12 5
Share of Grant from Carnegie Endowment (Six months) (since discontinued)	92 16 0	Library Expenses, Typing and Reporting the Society's Meetings	54 12 6
Sales of Literature	185 8 1	Office Expenses—	
Interest received on 3½% War Stock	21 0 0	Assistant Secretary's Honorarium (Three Months)	25 0 0
Legacy—C G Dehn, Deceased	100 0 0	Accountancy Charges	5 5 0
Donation	1 18 3	Postage and Stationery	28 12 0
		Petty Expenses	6 10 8
			65 7 8
			422 12 7
Balances at 31st December, 1947, brought forward—	£532 16 4	Balances at 31st December, 1948, carried forward	
Cash at Bank and In Hand	172 0 9	Cash at Bank and In Hand	282 4 6
£600 3¼% War Stock (at cost)	628 9 3	£600 3¼% War Stock (at cost)	628 9 3
			910 13 9
			£1,333 6 4

We have examined the above Receipts and Payments Account of The Grotius Society for the year ended 31st December, 1948, with the Books and Vouchers produced for our inspection, and certify it to be in accordance therewith.

53, NEW BROAD STREET, LONDON, E.C.2.
16th March, 1949.

(Signed) FARROW, BERSEY, GAIN, VINCENT & Co.
Chartered Accountants.

PRESENTATION OF HIS PORTRAIT TO SIR CECIL HURST

The Grotius Society presented on the 20th December, 1948, a portrait of himself to Sir Cecil Hurst, in recognition of his eminent services as President of the Society from 1940 to 1948. The presentation was made by the Rt. Hon. Viscount Jowitt, Lord Chancellor, at a reception held by the Society in the Middle Temple Hall, London. The portrait is the work of Mr. William Dring, A.R.A.

LORD JOWITT said : I am honoured by being asked to come here today to present this portrait to a great lawyer, and a very dear friend. After some years of practice at the English Bar, Sir Cecil entered the Foreign Office as Assistant Legal Adviser in 1902, becoming Senior Legal Adviser in 1918. He remained in the Foreign Office for 27 years. And what years they were ! He attended the Second Hague Peace Conference of 1907, the International Naval Conference of 1908 in London, which produced the Declaration of London of 1909, and in 1912 the British American Claims Commission, and throughout this whole period, he was representing this country in various International Conferences. And then came the First Great War and the League of Nations and anyone who knows anything about the drafting of its Covenant, will know that it was the Hurst-Miller draft which gave it body and form. He then became a regular member of the U.K. Delegations to the meetings of the Assembly and Council of the League, and then in 1925 came the Locarno Treaties and throughout all this time, it was not only the technical skill which Sir Cecil displayed, but the courtesy and fairness with which he did his work which made him such a powerful advocate for his country and enhanced its standing at Geneva and elsewhere during that phase of international life. In 1929, he was elected the British Judge of the Permanent Court of International Justice in succession to the first Viscount Finlay. Of that Court he was a member until 1946 and its deeply

respected President from 1934 to 1936. There were some at the time who thought that it was a mistake to send to the Court anyone so closely associated with the Foreign Office. Those who said so at the time have lived to realize that they made a profound mistake because everyone acknowledges that Sir Cecil lived up to the highest traditions of British Justice.

During 1943 and 1944, Sir Cecil was Chairman of the United Nations War Crimes Commission which collected and sifted the mass of evidence upon war crimes in preparation for the series of trials which are now happily nearing their end. Although his main contributions to the actual work of International Law have come from his daily work as a practitioner and a judge, he has ever been mindful of the need of encouraging the academic and literary side of his profession. He was one of the founders in 1920 of the British Year Book of International Law, and one of its editors for eight years, and he still is, I believe, a member of its Editorial Committee. Two years ago he took the lead in establishing the International Law Quarterly, and I am glad to think he still remains Chairman of its Board. He has made valuable contributions to the science of international law. He was President of the Grotius Society from 1940 until last April. So it comes about that the Grotius Society have determined to show their respect and regard for him by commissioning Mr. Dring to paint this portrait and I am bound to say that he has got him in one of his sterner and more judicial moods, but I think it is a good portrait. Sir Cecil, as the years go by, may be old, but he still retains that great quality of youth,—the faith and enthusiasm that law, order and justice, resting on public opinion, will eventually triumph in this war-scarred world. Some of you may think that the prospect of these ideas being accepted is remote, but I can see no other alternative which is going to get this world out of this appalling muddle. He has also retained the ability to pursue and accept new ideas. Some of his ideas in international law seem to me to be revolutionary. If I had advanced them when I sat for an examination in international law at Oxford, a considerable number of years ago, I would have got no marks whatsoever. His paper to this Society of two years ago on “A Plea for the Codification of international law on new lines” has exercised a wider influence than any

other contribution on this subject. By his determination to spread knowledge of international law, he has succeeded in placing the Grotius Society upon a new and, I hope, permanent level of influence and usefulness.

He and I have been fellow Benchers of this Inn for twenty years and during that time all those who have been privileged to be on the Middle Temple Bench have learned to love him, respect him, and have the highest regard for the integrity of the principles for which he stands. As a humble member of the Grotius Society, and as a still humbler member of this Bench, I count it a great privilege to pay my tribute to a man whom we all like to honour.

SIR CECIL HURST said, in reply : This is not an occasion on which anybody can with great ease find words in which to express his thoughts, but I feel sure you will believe me when I tell you that both to me and to the members of my family whom you have been kind enough to ask here today, this kind thought of the Grotius Society in getting Mr. Dring to paint my picture and to present it to me is one which we shall all value and remember the whole of our lives. I, as the Lord Chancellor was kind enough to say, have spent some time as a member of the Court at The Hague and there it is the custom that any man who has to fill the post of President of the Court is expected to leave behind him a portrait for the edification of those who come after him. So before now I have had to undergo the severity of sittings by a portrait painter and I must confess I have found very much greater pleasure in the sittings which Mr. Dring was kind enough to give me than I did when I was sitting for the portrait which now hangs in the Palace of Peace at The Hague.

It is extremely kind of all the members of this Society to give me this portrait. I am only too pleased to have been able to do something for the cause of International Law during the time that I have been associated with the Grotius Society. The Lord Chancellor spoke about enthusiasm but just at the moment a little enthusiasm is just what is needed. We are now facing new trends in international relations, but I am sure that international law is bound to acquire an increasing importance in the changing world. One of the difficulties

which we have to contend with at the present time is that international lawyers are so few. Only two years ago some of us listened to an admirable speech by Sir Arnold McNair about the urgent need for the wider teaching of International Law. I do hope that one of the last things I may ever do for the Grotius Society is to see what I can do to encourage a better and greater teaching of international law. Younger men are required to continue the work and the world would be a better, happier place if their number could be enlarged.

But let me come back to my own feelings of pleasure, and I am sure all my family who are here today will agree with me when I say that I am most grateful to the members of the Grotius Society for having given us this very permanent record of what little I have been able to do.

SIR ARNOLD MCNAIR, who presided, said :—Before we separate I have two things to say, and the first is to you, my Lord Chancellor. I want on behalf of the Grotius Society to thank you most warmly for acceding to our request that you should be the instrument of the presentation of this portrait to Sir Cecil Hurst. We asked you because in honouring him, we wanted to make that honour as great as possible, and we felt certain that your presence and your words would enhance that honour. But I should like to add that we did not ask you merely by reason of the high office you hold. We also asked you because in the last three and a half years since you assumed your office, time after time, you have gone out of your way to stress the importance of International Law and to emphasize the fact that it is only on the basis of International Law that we can restore peace and equilibrium to a tottering world. And the second thing is this. Master Treasurer, would you be so kind to convey to your fellow Benchers our thanks for allowing us to meet in this beautiful and historic Hall, and also for the arrangements in which you have participated in preparing for us this very pleasant function.

PART I
PROCEEDINGS OF THE
INTERNATIONAL LAW CONFERENCE
1948

THE GROTIUS SOCIETY

PROCEEDINGS OF THE INTERNATIONAL LAW CONFERENCE, 1948

Held in Gray's Inn, London, on the 10th July, 1948.

President: SIR ARNOLD D. McNAIR, C.B.E., K.C., LL.D.,
President of the Society.

FIRST SESSION

THE PRESIDENT in welcoming the Society to the Inn of which Alberico Gentile was a member, said :

I wish to say a few words on the present position of International Law and our duty in regard to it and to contrast the present moment with a corresponding time after the first World War. If we compare the Charter of the United Nations with the Covenant of the League, we find in the later document a much clearer recognition of the necessity of developing International Law. Article 13 of the Charter lays upon the General Assembly the express duty of initiating studies and making recommendations for the purpose of "encouraging the progressive development of international law and its codification," whereas nothing corresponding to that is to be found in the Covenant.

Last September the General Assembly established an International Law Commission, and in September of this year the members of the Commission will be appointed. Notice that today we are removed from the date of the cessation of hostilities by only three years, whereas nearly six years had elapsed since the Armistice of November 11, 1918, when the League established its Commission to prepare for the codification of International Law.

How will the International Law Commission set about its task ? That is a matter which will be closely watched by all of us. I derive much hope from the Article 15 of the Statute of the Commission. This Article makes it clear that the Com-

mission will have in mind the difference between two entirely different processes—"the making of new law" and 'the writing down of existing law', that is, codification in the true sense of the word. I sincerely hope that the Commission will realise that any attempt at codification of any particular part of the law must be preceded by a very careful restatement of the law, and will avoid any attempt at codification until such a restatement has by use and by the lapse of years acquired general approval.

I need not remind you of the paper entitled 'A Plea for the Codification of International Law on New Lines', which my predecessor Sir Cecil Hurst read to this Society in October 1946. That paper received a wide publicity and is undoubtedly one of the few academic studies which have really influenced opinion. Amongst international lawyers whom I have met abroad, I have not met one who does not say that Sir Cecil Hurst is absolutely right, and that any general attempt at this stage at codification by Government representatives would be folly. I sincerely hope therefore that the International Law Commission will distinguish clearly between these two sides of its work. It will receive many requests to submit to the Assembly draft Conventions for the creation of new law. But as regards existing law, I hope that it will abstain at this stage from preparing draft Conventions and will set on foot a co-ordinated movement for a scientific and non-official Restatement of existing law. In this work they ought to enlist the co-operation of the leading Societies concerned with International Law in every country, such as the Institute of International Law, the International Law Association and the Grotius Society. Excellent models exist in the method of the American Restatement of (Private) Law and in the Harvard Research on International Law. I am sure that many of us would gladly co-operate in such a task.

There are other ways in which International Law can be developed. Between the two world wars the Permanent Court of International Justice made some notable additions to the *corpus* of International Law in its 30 Judgments and 27 Advisory Opinions, as is apparent from Sir Eric Beckett's article in the *British Year Book of International Law* of 1930 and Professor Lauterpacht's little book on "The Development of International Law by the Permanent Court." The International Court of Justice cannot hope to surpass this contribu-

tion, but may be able to imitate it, given the chance. But it cannot make bricks without straw. We must have patience. It takes some time, after a convulsion such as the World has passed through, to resume the normal machinery of the settlement of international legal disputes. Litigation, as every practitioner knows, is a laborious process, and Foreign Offices are still grappling with the aftermath of war. But it helps us to be patient if we remember that the first decision of the Permanent Court (an Advisory Opinion relating to the International Labour Organisation) was given in July, 1922, more than three-and-a-half years after the Armistice, while the first decision of the new International Court (which, however, has been fully constituted and ready for work since 1946) was given in March, 1948—less than three years from the “ unconditional surrender ” of Germany.

THE CONCERN OF THE INTERNATIONAL LAW FOR THE INDIVIDUAL

By RICHARD O'SULLIVAN, K.C.

It is an honour for the Grotius Society to meet on the premises of Gray's Inn which is not the least ancient of the Inns of Court. And it is a particular honour to be invited in this place to open a discussion on *The Concern of the International Law for the Individual*. The Inns of Court are the home of the common law whose achievement was to create in England a society of free men living in the fellowship of a free community. "What is distinctive of medieval England", said Maitland in a famous lecture, "is not Parliament, for we may everywhere see assemblies of Estates; nor trial by jury, for this was but slowly suppressed in France, but the Inns of Court and the Year Books that were read therein, we shall hardly find their like elsewhere".

All around us here today, and in others of the Inns of Court, is a scene of material destruction. In a recent lecture on "Law and Custom" at the University of St. Andrews, Lord Macmillan drew attention to what he called the supersession—and what we may call the spiritual destruction—of the common law:—"The lover of our ancient laws and institutions, which we have inherited from our fathers, cannot but look on with some dismay at the process which we see daily in operation around us whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for the usages and customs of the people, but are dictated by 'ideological theories'. There will soon be little of the common law left either in England or in Scotland, and the Statute-book and the vast volumes of statutory rules and orders will take its place. The work of our Courts is more and more concerned with the interpretation of often unintelligible legislation, and less and less concerned with the discussion and development of legal principles. It is of vital importance that the new policy while truly promoting liberty by securing better conditions of life for the people, should not in its zeal for interference deprive them of their initiative and independence which are the nation's most valuable assets".

Is it possible to relate these two things, in appearance disparate : the supersession and decline, on the one hand, in our municipal system, of the old common law ; and, on the other hand, the new concern of international law for individual and human rights ? I think it is possible to relate these things. The new concern for individual and human rights is the response of international law to the failure of our municipal systems of law, in theory or in practice, to afford adequate protection to what are now called " Human Rights and Fundamental Freedoms." And the failure of our municipal law to afford adequate protection for individual human rights and fundamental freedoms was due everywhere (one may suggest) to the elimination of old conceptions of natural law and justice on which, in particular, the common law was founded. *Naturam expelles furca, tamen usque recurret.* Drive out of the door of municipal law the conceptions of natural law and justice, and the protection that the enforcement of these ideas affords to the lives and liberties of individual citizens, and you will find that these conceptions return through the window of international law. The conception of individual human rights and fundamental freedoms is rooted in the conception of natural law. The intention of Article I of the United Kingdom Draft of an " International Bill of Human Rights " is to integrate this conception of human rights and fundamental freedoms into the general principles of law recognized by civilized nations.

Before the impact of the ideas which arise out of the new concern of international law for the individual, the English constitution and English law-making opinion had ceased to recognize or to guarantee individual human rights and fundamental freedoms. In the current edition of May's Parliamentary Practice it is said : " The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government : But Parliament is not controlled in its discretion, and when it errs, its errors can only be corrected by itself . . . The power of Parliament is so transcendent and absolute, as it cannot be confined for causes or persons within any bounds." This doctrine of the omnipotence of Parliament is orthodox constitutional and legal doctrine. In the year 1935 an eminent Oxford scholar, Mr. Wilfred Greene, K.C. (as he then was), illustrating the virtue of omnipotence stated in argument before

a Joint Select Committee of both Houses, that Parliament "could pass an Act tomorrow that all persons over the age of one year should be put to death." In a volume on "The Chief Sources of English Legal History," published about the same time, a distinguished Cambridge scholar referred to the work of Sir John Fortescue, *De Natura Legis Naturæ*, as a book 'of interest to students of historical jurisprudence on a topic which has long since had its brains knocked out.'¹ The doctrine is pointed in a speech made by Sir Hartley Shawcross, K.C., M.P., Attorney General: "Parliament is sovereign; it can make any laws. It could ordain that all blue-eyed babies should be destroyed at birth; but it has been recognized that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, those laws will be supported and can be enforced."²

To the school of thought in England which, exalting the omnipotence of Parliament, denies the existence of a system of natural law, and of inalienable human rights and fundamental freedoms, there is a corresponding school of thought in the United States. "The intellectual basis of the legal theory of natural law and natural rights," says John Dewey, "has been undermined by historical and philosophical criticism." Professor Maxey underlines the statement: "There are of course no such things as inherent and inalienable rights. They are purely a figment of the imagination, wish-fulfilment in political thinking . . . Only by collective action can men lay down universal rules of conduct and give them body and viability. The attempt to trace human rights to any other source is sheer fantasy."³ Professor Albert Kecourek finally declares that "Natural law and an ultimate standard of justice . . . are examples of illusion on illusion."

Here is the culmination of legal positivism, of the sterile jurisprudence of the 19th century. "This modern doctrine," writes an American critic, "has accepted Hobbes' concept of the State as Leviathan; the doctrine of Hegel and Nietzsche,

¹ More recently the same learned writer has described the law of nature or of reason as 'a vision of some ethical abstraction' to which, it seems, the founders of the common law 'wished to make the law conform.'

² *The Times*, May 13th, 1946.

³ Maxey, *Political Philosophies*, 1938; pp. 207-8.

the dogma of State Omnipotence which has become the dominant and most dangerous dogma of modern legal thought." In April, 1945, Justice Robert Jackson of the Supreme Court of the United States, boldly attacked 'a current philosophy that law is anything that can muster the votes to put in legislation or directive or decision backed up with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with the higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary to authority.' These fashionable modes of thought, says Dean Pound, have ideas of their own: "but they are ideas of give-up. They lead to political absolutism, whether such absolutisms are Fascist under the form of a kingdom or of a dictator-led republic, or Communist under a dictator, or administrative-bureau-ruled under the form of a democracy does not greatly matter. In such regimes there is no place for law as distinguished from laws and administrative orders. There is no place for a taught tradition of ideals to which experience is moulded by reason and reason is tempered by experience." Elsewhere Dean Pound says that natural law "is a presupposition of one type of philosophy of law—the oldest, longest continued, and most persistently enduring type, and the one with the most notable achievements to its credit in legal history." In a decision of the Supreme Court of the United States in 1946, Justice Douglas said: "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Non sub homine sed sub Deo et sub lege* is appropriately the motto carved on Langdell Hall in the Harvard Law School.

The revival of natural law concepts, which was heralded by Sir Frederick Pollock in a famous essay, and which was quietly proceeding in the schools of law and politics in Europe and America ever since the early years of the twentieth century, received a fresh impetus from the excesses of Nazism and Fascism and Bolshevism. The spectacle of thousands of men, women and children being thrust out of house and home, and held and tortured in concentration camps, or driven to slave labour or into exile as refugees and displaced persons, offended the innate sense of justice and of right of reasonable persons everywhere. The municipal lawyers of so many nations having failed in their duty to affirm and to enforce the rule of right

over against the theory and practice of State Omnipotence, it fell to international lawyers to come and defend and safeguard the lives and liberties of ordinary men and women in all the lands. And so it came about that the Preamble to the Charter of the United Nations reaffirmed faith in fundamental human rights, in the dignity and worth of human personality, in the equal rights of men and women and of nations large and small. Accordingly, one of the prime "Purposes" of the United Nations is to achieve 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. The General Assembly of the United Nations is to initiate studies and make recommendations for the purpose of (*inter alia*) promoting and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Economic and Social Council is likewise directed to set up commissions and to make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all.

The inclusion in the Preamble and in the Purposes of the Charter of the United Nations of words which link international law and justice, and which reaffirm respect for and faith in human rights and fundamental freedoms for all is an encouragement and an inspiration to those who adhere to the old tradition of natural right and of natural law ; and who see in the reaffirmation of this tradition a means of limiting the excesses of State sovereignty vis-a-vis citizens or foreigners or stateless persons.

The Preamble to the United Kingdom Draft of an "International Bill of Human Rights" recites that all men are members of communities and as such have a duty to respect the rights of their fellowmen equally with their own ; and that the just claims of the State, which all men are under a duty to accept, must not prejudice the respect of man's right to freedom and equality before the law, and the safeguard of human rights which are primary and binding conditions of all just government. The Preamble also states that the denial of human rights and fundamental freedoms endangers the general welfare and friendly relations among nations, and that the

enjoyment of such rights and freedoms by all persons must be secured by international law and protected by the organized community of States. In accordance with these principles, Article I of this Draft obliges all parties to the Bill to recognize human rights and fundamental freedoms and proposes to incorporate these rights and freedoms in the general principles of law recognized by civilized nations. Article 2 of the Draft obliges every State to secure to all persons under its jurisdiction the enjoyment of these human rights and fundamental freedoms ; and an effective remedy at the hands of an independent judiciary for any violation of those rights or freedoms, even by persons acting in an official capacity.⁴

The incorporation of human rights and fundamental freedoms as part of the ' general principles of law recognized by civilized nations ' gives life and meaning to words which, as they appeared in Article 38 (c) of the Statute of the International Court of Justice and, at an earlier time, in Article 38 (iii) of the Statute of the Permanent Court of International Justice were thought by some to lack real content and significance. This identification of human rights and fundamental freedoms with their source and spring in the principles of natural law and reason thus marks a significant step in the development of international law.⁵ It restores international law to its origins in the philosophy of the medieval schoolmen. In a recent article on *Vitoria and International Law* Professor Brierly has written that " Gentilis deliberately severed international law from its medieval origins. He was a forerunner of the rise of

⁴ As to the abandonment of " the fatal identification of sovereignty with might," see McIlwain, *Growth of Political Theory in the West*, p. 387.

⁵ Henry of Bracton declares that servitude, by which one man is subjected to the dominion of another, is against natural right and justice (*contra naturam*). For him, the institution of slavery is an offence against natural law : " In hac parte jus civile vel gentium detrahit juri naturali." In the *De Laudibus* of Sir John Fortescue, the Chancellor explains to the Prince : " I want you then to know that all human laws are either laws of nature, customs, or statutes, which are also called constitutions . . . The laws of England in those points which they sanction by reason of the law of nature, are neither better nor worse in their judgments than are all laws of other nations in like cases. For, as Aristotle said in the Fifth Book of the Ethics, natural law is that which has the same force among all men.

legal positivism, of the process of secularizing or demoralizing international law and law in general which reached its culmination in the sterile jurisprudence of the nineteenth century. No doubt the medieval view of the nature of law needs to be restated in new terms for us today, for law must be an independent discipline with its own standards and canons. But, unless law has its roots in some ethical creed, as medieval writers took for granted that it had, it is hardly possible to believe intelligently in the reality of legal obligation. It is because Vitoria never allows us for one moment to lose sight of this profound truth about the nature of law, more perhaps than for any other reason, that he deserves to be read today.”⁶ Vitoria was a disciple of St. Thomas Aquinas, who drew the great outlines of the medieval doctrine of natural law. “All were agreed,” says Gierke, “that there was “natural law which, on the one hand, radiated from a principle transcending earthly power, and on the other hand was true and perfectly binding law. Men supposed therefore that before the State existed the *lex naturalis* already prevailed as an obligatory statute, and that immediately or mediately from this flowed those rules of right to which the State owed even the possibility of its own rightful origin. And men also taught that the highest power on earth was subject to the rules of natural law. They stood above the Pope and above the Kaiser, above the Ruler and above the Sovereign People, nay, above the whole Community of Mortals. Neither statute nor act of government, neither resolution of the People nor custom could break the bounds that were thus set.”⁷ Elsewhere Gierke reminds us that the medieval philosophy of Right, ascribing an absolute and objective validity to the maxims of Divine and natural law, recognized the existence of the inborn and indestructible rights of the individual. “That every individual by virtue of his eternal destiny is at core somewhat holy and indestructible even in relation to the Highest Power: that the smallest part has a value of its own, and not merely because it is part of a whole: that Everyman is to be regarded by the community, never as a mere instrument but also as an end: all this is not merely suggested but is more or less clearly expressed.”⁸

⁶ *Dublin Review*, Spring, 1947, p. 17.

⁷ Gierke, *Political Theories of the Middle Age*, translated by Maitland, p. 75.

⁸ *ibid.*, pp. 81-82.

The reaffirmation of the traditional principles of natural law which, according to Sir Frederick Pollock, 'never ceased to be rationalist and progressive', helps accordingly to safeguard and secure the life and liberty of Everyman against the excessive or arbitrary power of the State. The classical or Christian concept of natural law has nothing but the name in common with the law of nature as conceived by Rousseau. It is a thing of reason, proper to man as man, as a reasonable being. It is the order, known by the light of reason, according to which Everyman is bound to fulfil his nature as man. It is not a written law, save in the sense that it is written in the hearts of men, "their conscience also bearing witness." Everyman knows naturally and infallibly that he must do good and avoid evil. "This," says M. Maritain, "is the preamble and principle of Natural Law." Natural Law is thus the sum in order of the rules of action that are proper to man as man, as a being of reason and of conscience: "*un ensemble des règles objectives, antérieure à la volonté de l'homme et s'imposant à elle, constatées et non créées par la raison.*" The rules of natural law impose duties and declare rights. "The King is under God and the law." He is subject, like Everyman, to the rules of natural law. "The medieval King," says Maitland, "was every inch a King, but just for this reason he was every inch a man, and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity or such powers as no mortal can wield. If you said he was Christ's Vicar you meant what you said, and you might add that he would become the servant of the devil if he declined towards tyranny. In all that I have read I have seen very little said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry." In his opening speech for the prosecution at Nuremberg, Justice Robert Jackson of the Supreme Court of the United States, declared that the Charter of the Tribunal showed a faith that 'even rulers' of totalitarian States were (in the language of Henry of Bracton) 'under God and the law.' Man does not belong to the State to the whole extent of his being or his possessions. "*Homo non ordinatur ad communitatem politicam secundum se totum et secundum omnia sua.*" Everyman is in a real sense an end in himself and is now also a member of the international community. "An International Bill of Rights is the concern not only of governments but of all men everywhere." "It is by defining human

rights and fundamental freedoms and placing them under the protection of international law and the guarantee of the United Nations that the dignity and worth of the human person will be best secured."

In the definition of human rights and fundamental freedoms, the British Draft Bill provides: "It shall be unlawful to deprive any person of his life save in the execution of the sentence of a Court following on his conviction of a crime for which this penalty is provided by law." "No form of slavery shall be permitted." "No person shall be deprived of his liberty save by an arrest which is effected for the purpose of bringing him before a Court on a reasonable suspicion of having committed a crime or which is reasonably considered to be immediately necessary to prevent his committing a crime or breach of the peace." Every person arrested and detained shall be brought without delay before a judge who shall either try the case or decide, after hearing evidence, whether there is sufficient case to justify that person's trial and if so whether his liberty shall be restored to him on bail." "Every person who is deprived of his liberty shall have an effective remedy in the nature of *Habeas Corpus*." "Every person who is not subject to any lawful deprivation of liberty . . . shall be free to leave any country, including his own." "Every person shall be free to hold any religious or other belief dictated by his conscience and to change his belief." "Every person shall be free to practise, either alone or in community with other persons of like mind, any form of religious worship and observance." "Every person of full age and sound mind shall be free to give and receive any form of religious teaching, and to endeavour to persuade other persons of full age and sound mind of the truth of his beliefs." "Every person shall be free to express and publish his ideas orally, in writing, in the form of art or otherwise." "Every person shall be free to receive and disseminate information of all kinds including both facts, critical comment and ideas by books, newspapers, or oral instruction" "All persons shall have the right to assemble peaceably for any lawful purpose." "All persons shall be free to constitute associations in whatever form may be appropriate under the law of the State, for the promotion and protection of their legitimate interests, and any other lawful object."

Behind all these provisions is a certain conception of man and a certain conception of law, of man as a reasonable being and of law as a reasonable rule. By virtue of his rational nature man is free : freedom has its root in reason. There is too in the nature of man a certain native worth and dignity and a certain native inclination to friendship with his fellow-man. "Non enim homini homo lupus est (ut ait Ovidius) sed homo."⁹ "Nature, or rather God," says Erasmus, "hath shaped this creature (that is, Man) not to war but to friendship, not to destruction but to health, not to wrong but to kindness and benevolence." This point touching human nature and the innate friendship of man for his fellow-man is of high importance for the whole theory of law and international relations. A leading anthropologist, Professor Elliot Smith, has subscribed to the view that "it is coming to be more and more realised that peace is the natural state of mankind." "If," he says, "warfare and all forms of strife and violence are due not to the innate impulse to be savage and malicious but to some artificial and avoidable interference with man's instinctive tendency to decent conduct, the preservation of peace by reason and consideration becomes a real possibility."¹⁰

The Preamble to the Draft International Bill of Human Rights recites that all men "are members of communities." The natural inclination of a rational being for friendship and communication with his fellow-man leads him to live as a member of a political community, and to recognize his membership of the wider international community. As Nicolas Politis has pointed out, Grotius and his predecessors were of opinion that international law ruled not only the relations of State with State, but also the relations of the State and individuals, and even the relations of citizens of different States. 'The principle of international law', said Suarez, 'is that notwithstanding its division into different kingdoms and peoples, mankind is a species of not only physical but also moral and political unity, as indicated by the natural precept of mutual love and charity, which extends to every nation and to all men without exception. Hence every sovereign State, be it commonwealth or be it kingdom, though in itself a perfect community, yet in relation to the human race, is in some measure a member of

⁹ Aquinas, *Contra Gentes*, III, cap. 117.

¹⁰ *The Times*, 13th Nov., 1938 ; 15th Nov., 1939 ;

that universal unity. For those single States are never so self-sufficient as not to stand in need of mutual aid and association and even, in a measure, of union with other communities, be it for their greater material welfare, or by reason of some moral necessity or need. And thus they require a common law which shall direct and order their relations in the way of international communication and social life'.¹¹ The modern concern of international law for the individual, which goes with the revival of natural law, is, it seems, not so much a novelty as the return to an old principle and habit of thought.

The right to leave one's country and to travel and to trade was for Grotius and Vitoria and their predecessors also a natural and a fundamental right. The tie of friendship that binds Everyman to Everyman finds its natural expression in hospitality and in the exchange of ideas and of goods and service.¹² One might also say that in the philosophy of Vitoria, the whole theory of international law proceeds from the right of Everyman to hold speech and intercourse with Everyman, and within the limits of justice to exchange goods with him. The reciprocal right of travel and of trade that he claimed for the Spaniards and the Indians in his time is recognized in the Income Tax Convention which lays down that the income of a foreigner is not to be charged to higher or other taxes than the income of nationals. A paper on *Double Taxation* given last year before the Grotius Society by the Chairman of Inland Revenue significantly stated that the old right of Everyman to trade with his fellow-man would not be effective "if trade were shackled by the imposition of taxes to such a degree as to leave the enterprise unprofitable, which could very well happen if the tax-gatherers of all countries were free to do as they pleased, to fill the coffers of their exchequer."¹³

¹¹ Suarez, *De Legibus*, II, II, cap. 19, n 19.

¹² Vitoria, *De Indis*, Washington, 1917, "Apud omnes nationes habetur inhumanum sine aliqua speciali causa hospites et peregrinos male accipere: e contrario autem humanum et officiosum se habere bene erga hospites" . . . "Item, omne animal diligit sibi simile. Ergo videtur quod amicitia inter homines sit de jure naturali: et contra naturam esse vitare consortium hominum innoxiorum. Item, quia si Hispanis non liceret peregrinari apud illos vel hoc esset jure naturali, aut divino aut humano. Naturali et divino certe licet. Si autem lex humana esset quae prohiberet sine aliqua causa a jure naturali et divino esset inhumana nec esset rationalabilis et per consequens non haberet vim legis."

¹³ Sir Cornelius Gregg, *Transactions of the Grotius Society*, vol. 33, p. 86.

The right to travel and to trade presupposes the right of Everyman to possess and to own property. The right to possess and to own springs directly from the rational character of man. "It is the mind or reason which is the predominant element in human creatures. It is this which renders a human being human and distinguishes him essentially from the brute. Man alone being endowed with reason, it must be within his right to possess things, not merely for temporary and momentary use, as other living things do, but to have and to hold them in stable and permanent possession."¹⁴ In answer to the Communist argument in the Utopia, Sir Thomas More speaks in his own name: "Me thinketh that men shal never live wealthele where all thinges be commen. For howe can there be abundance of goodes or of any thing, where every man withdraweth his hande from labour? Whome the reward of his own gaines driveth not to worke, but the hope that he hath in other men's travayles maketh him slowthfull. Then when they be pricked with povertie, and yet no man can by any lawe or right defend that for his owne, which he hath gotten with the labour of his own handes, shall not there of necessity be continual sedition and bloodshed? Specially, the authority and reverence of magistrates being taken away, which, what place it may have, with such men among whom there is no difference I cannot devise." "Ad reges enim potestas omnium pertinet; ad singulos proprietas: To kings belongs authority over all; to private persons, property." This maxim, according to Professor McIlwain, is the one which, on the whole, best comprises the living political conception of the later Middle Ages.¹⁵

The British Draft of an International Bill of Human Rights does not explicitly affirm the right of Everyman, by virtue of his rational nature, to possess and to administer private property. It is not surprising in the case of a Bill prepared at the instance of a Socialist government for submission by a Socialist minister to the Commission on Human Rights of the Economic and Social Council. It is more sur-

¹⁴ See the Encyclical, *Rerum Novarum*, of Pope Leo XIII (1891) Compare Aquinas, S.T., IIa, IIae, Q.66, A.I.: "Sic abet homo naturale dominium exteriorum rerum, quia, per rationem et voluntatem potest uti rebus exterioribus ad suam utilitatem, quasi propter se factis."

¹⁵ McIlwain, *op. cit.*, p. 394

prising that a jurist of the eminence of Professor Lauterpacht and one who has written so nobly in defence of the natural law, should have chosen in his Draft of an "International Bill of the Rights of Man," not to defend but deliberately to exclude the right of Everyman, as a rational being, to own and to administer property. Is the right to own property and the right of inheritance entirely excluded even in Soviet Russia? The law of succession and inheritance is, in the apt phrase of Professor Plucknett, "an attempt to express the family in terms of property." Modern political philosophy has been hostile to the idea and the institution of the family on which in some degree the institution of property is founded. It was Walter Bagehot, I fancy, who remarked that every treatise on political economy which he read in his youth began with the supposition of two or more men cast on an otherwise uninhabited island.¹⁶ The rights of the family in respect of property and inheritance and otherwise are not greatly regarded in these Draft Bills of Human Rights. Yet the family is the source of life and being of the community. Everyman is a member of the family before he is a citizen of the State or a member of the international community.

Everyman is something more than a member of a family and of the State and of the international community. The provisions of the British Draft which are designed to secure freedom of conscience and freedom of religious worship and observance underline the truth that man is not ordered to political society to the whole extent of his being and existence. The appetite of our mind and of our will for the Good and for the True takes us beyond ourselves and beyond the State and beyond the whole community of Mankind :

" And thus I know
 this earth is not my sphere
 For I cannot so narrow me
 but that I still exceed it."

It was a saying of the medieval schoolmen whose thought has now returned to fashion that true peace lies in the love of

¹⁶ In his Lloyd Roberts Lecture for 1948, Mr. Richard M. Titmuss protested that : " An area of contradiction and conflict stretches over much of our social and economic policy, not because we do not care about the family, but because we do not think about the family."

the supreme good : *Vera quidem pax non potest esse nisi circa appetitum veri boni* ; and that the common good of the whole world is to be found not in a material but in a spiritual principle : *Manifestum est autem quod Deus est bonum commune totius universi et partium ejus*.

V. R. IDELSON, K.C., Ph.D. : Mr. O'Sullivan has said all that one would wish to hear on the concern of international law for the individual, but there are one or two things which I hope you will allow me to say. It is quite true that since the beginning of the nineteenth century, there has been a revival of natural law in books and nobody here has alleged so far as I know, that all the law that there is is contained in the Statutory Rules and Orders, or similar enactments published in other States. The question is, however, what is natural law ? I have been trying myself to seek guidance on that subject and also to find what I would like to describe as the minimum on which international lawyers would agree. I venture to think that in human nature it is possible to find guidance. Natural law is something perhaps quite indefinable but still existing in our minds and here I come to a statement which I am afraid I cannot fully substantiate, but I am trying to study it further. When people talk about natural law, they do not seem to realise that natural law is a system of law, applicable to the judicial determination of a case, and also applicable to the administration of justice. There is always the underlying principle that "administration of justice" implies that the judgments of the Court conform always with the principles of natural justice and that proposition may be easy to substantiate.

May I now come to the question of the position of the individual in natural law ? I would like, if I may be permitted, to refer to what has happened, so far as I know, since 1944 when this Society was considering the problem of the individual and international law. The first thing which I should like to mention is that the idea that the individual enjoys rights under international law, as a subject of international law, has now become much more important than ever before. This idea has been spreading very widely in the United States of America, and in a recent book on international law by a Brazilian, he goes so far as to say that today the individual is a subject of international law not by favour but by right, or as some writers claim, he is a subject of international law in the full

meaning of the word. Then the work proceeds to a consideration of the provisions in the United Nations Charter which lay stress on the position of the individual in international law. But there is also a tendency, rather a violent tendency, to deny every legal status to the individual in international law, and that is the tendency which can be best illustrated by recent publications in Moscow. That is what I should like to say about literature—has nothing happened otherwise? Well, we have the Charter of the United Nations which deals with human rights and there remains, very forcibly, something on which I believe there was always common agreement amongst jurists that the beneficiary of international law is the individual. Only one question remains, is he so to speak, a distinct person enjoying definite rights, or is he under an obligation to his State, and must always go through this State to attain his rights? Here I would like to sound a warning based on what Sir Cecil Hurst told us at yesterday's dinner of the Society, viz., that international law must be in our hearts and in our homes and therefore we must be careful not to indulge too much in any abstract set of ideas originally created and not always for the purpose of studying international law.

You remember the controversy about the legal status of the League of Nations. It is quite true that the League was subject to international law, but it was only yesterday I read a contribution by an international lawyer saying it was not so. Now that the United Nations Organisation has come into being I must admit this is not a very easy question to answer. Can you have individuals and States as subjects of international law and can you have the United Nations Organisation as a subject, or will they all be on the basis of equality, or what would be the legal structure? I would prefer, in view of what has been happening recently, to approach the problem from a different angle; from the angle of the remedy to a great problem. You know that the International Court of Justice has a very limited jurisdiction. At present it is only States that can be parties before it. The question is, is nothing happening which would allow an individual, or a group of individuals, to appear before the Court? Could they have a better position and better remedies than they had before the events of the last year? This brings me to the question of the declaration of human rights. One should try and understand and seek the law as it is today. I venture to think that the Convention on

Human Rights affords a better protection than ever before in safeguarding the rights of the individual. It seems to me that Article 66 of the Statute of the International Court of Justice points to a very wonderful vista. Let us assume that someone who is entitled under the Charter approaches the International Court and says that in a particular country human rights have been badly infringed. Well then, one of the bodies to which the International Court could go for a written statement or information, I venture to think, would be U.N.O., and it could not be presumed that U.N.O. would not be in a position to give the information required. You would have this, that U.N.O. could not only be asked to give a statement in writing, but could also be heard. That is the provision of Article 66.

Before I sit down, I should like to say that I agree entirely with what Mr. O'Sullivan has said about the present idea of the omnipotent State. It is not talking politics; it is opening one's eyes to what is happening. It is quite clear that today the State has assumed a very great control of everything and much greater control perhaps than we ever thought. This has resulted in the elimination of individual will and individual creative power and I sometimes think when I try to read books on international law, that I really 'should read a little' more about the individual and the municipal laws of the respective countries of the world, and then when I have read about the omnipotent Registrars, I turn to the best book that was ever written and that is the Bible, and read there "Nations may know themselves to be made of humans."

DR. ERWIN H. LOEWENFELD : Mr. O'Sullivan has rightly emphasised in his admirable address that the reaffirmation of the respect for, and faith in, human rights and fundamental freedoms is a means of limiting the abuses of state sovereignty, vis-a-vis citizens, foreigners and stateless persons. Provisions in the Charter such as art. 1 (promoting and encouraging respect of human rights), art. 55 (providing for the United Nations to promote universal observance of human rights regardless of race, sex, religion), art. 56 (members of United Nations pledging themselves to take joint and separate action in co-operation with the organisation for the achievement of this purpose), can be regarded as sources of natural law and represent legal obligations as well for the United Nations as a whole as for their members. Although the Charter has not adopted any machinery for the enforcement of such obligations,

these provisions serve the purpose of checking the arbitrary power of the State in its domestic jurisdiction.

Art. 2 (7) must in future obtain a reasonable interpretation so as to subordinate this principle to the overriding purposes of Articles 1, 13, 55, 56 and 62 of the United Nations Charter wherever there has been a systematic or flagrant violation of human rights so as to affect international peace and security. But even if there has not been such a flagrant breach, the question of observance of these provisions must be a matter of international concern. This is proved by two precedents. In the dispute of India v. South-Africa (General Assembly, 1946), the memorandum of the Union Government on the treatment of Indians in the Union of South-Africa admitted at least that the provisions of the Charter extended to such human rights as are by international law accepted as being so fundamental that they are not merely of domestic importance, but are the concern of the society of nations, as e.g. protection of life and liberty, free exercise of religion, equality before the law regardless of nationality, language, race, religion or sex. In the same debate the delegate for Panama submitted that by the Charter of the United Nations, human rights have been taken out of the province of domestic jurisdiction and have been placed within the realm of international law (Journal U.N. 54, Suppl. P.V., 9th December, 1946, p. 368). Further in the so-called Spanish question before the Security Council, Dr. Evatt, representative of Australia, disassociated himself emphatically from the view that the application of measures contrary to the principles of the United Nations in Spain by the Spanish Government was a question exclusively within the domestic jurisdiction of Spain. "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. If the facts indicate that a régime by its nature, conduct and operations is likely to interfere with international peace and likely to be a menace to its neighbours then the existence of that régime is no longer a matter of essentially domestic concern."

These precedents plainly establish that in a possible conflict between the international concept of the principles of the United Nations based on natural law and the principles of Article 2 (7) of the Charter representing the principle of sovereign state power, it is never a matter of domestic jurisdiction if an international obligation exists and a question

arises whether a State has fulfilled its international obligations. This question must always be determined from the international point of view (Advisory Opinion of the Permanent Court of Justice, B.4., p. 24). The practice of the same Court contains also several principles of natural law. I need only remind you of the judgment (No. 7, p. 31) in the case concerning certain German interests in Polish Upper Silesia which upholds the respect of private rights. Further in the Judgment (No. 8, p. 31) in the Case concerning the factory of Chorzow, the principle was established that a person cannot plead his own wrong. (See also Advisory Opinion (B, No. 15, Jurisdiction of the Court re Pecuniary Claims of Danzig Railway Officials, p. 26).

In this respect it is above all the tendency of the Court to fill the gap in positive law by applying principles of equity which prove that even to-day the idea of natural law is still alive. See e.g. the Diversion of Water from the Meuse Case (Series A/B 70, p. 76) where Hudson J. emphasised that under Art. 28 of the Statute, if not independently of that Article, the Court enjoys freedom to consider principles of equity as part of the international law which it must apply. The present lawlessness in vast territories of Europe based on arbitrary state power cannot be considered a sufficient reason for regarding the general principles of natural law as irrelevant or obsolete.

MR. F. N. KEEN, LL.B. : I feel that this is an extremely difficult subject to speak upon, but perhaps I might make one or two contributions. I was pleased to hear Dr. Idelson looking at the question of human rights from what seemed to me a practical point of view,—that of the possibility of enforcing human rights. I recollect reading somewhere that our rights of freedom here, about which we think so much in England, have depended much less upon any declarations of rights than upon the introduction of *Habeas Corpus*, which was a practical remedy enabling a person to claim to be brought before a Court which would adjudicate upon his circumstances ; and it seems to me that the question of the practical methods of enforcing human rights is one of very great importance. I would go further than Dr. Idelson and venture to suggest that it is a mistake really to try to deal with the question from the point of view of human rights. You can look at the same set of relations from the point of view of the duties of the Governments from whom the human rights must be claimed, and it appears to me

a much more practical thing, if you want to secure the protection of individuals, that you should attempt to lay down the duties of Governments towards the individuals rather than that you should attempt to confer rights internationally upon the individuals as against their Governments. There are now reputed to be more than 2,000 million people in this world, and if you are going to give human rights to all these individuals, you have a very large number of plaintiffs to consider. You have the possibility of two thousand million plaintiffs against 70 defendants. If you approach the thing from the point of view of the duties of Governments, you have 70 possible plaintiffs, in the form of Governments, to enforce these rights against other Governments in the International Court, and the possibility, referred to by Dr. Idelson (which I should strongly recommend as being practical) that U.N.O. should have a right of approaching the International Court to enforce the duties of the Governments. There should be some minimum standard of good government laid down and you would then have only one plaintiff (U.N.O.) and 70 possible defendants to deal with. If you come to the point of enforcement, how is the individual going to enforce his rights against the Government in a case which depends upon the laying down of some principle of international law? It might hold out more certainty of success if you give U.N.O. the power of intervening. You would then have to have someone or somebody in the nature of the Attorney-General to take proceedings for enforcement of the duties, and some means of ensuring that the judgment of the International Court is carried out; but it seems to me a much more practical thing to tackle the subject from that point of view, than to confer rights on the individual against the State.

I would like to say a word with regard to another point raised in Mr. O'Sullivan's excellent address. He appeared to show a great preference for law being based upon principle rather than upon Statutes, and that seemed to me to extend not merely to the international sphere but also to the national sphere; but at the same time I assume that he would not wish to abolish our Statutes in this country. We have always regarded the passing of legislation as a very practical thing. In legislation you have, in the first place, a means of defining clearly the conduct to which the individual may have to conform, and in the second place you can cover all kinds of developing circumstances which are not satisfactorily met by

applying the principles that you have evolved as a matter of natural justice. In the third place, legislation serves to correct what has proved to be insufficient or unjust in your principles of natural justice. Surely Mr. O'Sullivan would recognise that in the sphere of state law, the common law is very much modified by statute, and I think the application of law has always needed to be modified by circumstances, so that the legislature in passing Statutes has been driven to lay down laws prescribing reasonable conduct and leave it to a Court, and particularly in this country, to the Magistrates' Courts to decide what is reasonable ; and thus you have, through state laws, the possibility of development and modification in these two respects. When you come to international law, are you not going to be faced by the same practical requirements ? You have the principles of natural justice defined in all manner of different ways by different personalities, and you will be driven to statutory international law in order that you may clarify the position for the guidance of the conduct of the individual nations. You will have also in exactly the same way, to establish a number of rules by the reasonable application of which you can meet the developing circumstances of the world.

MR. W. HARVEY MOORE, K.C. : I think that probably this meeting would be better for a little prophylactic dose of Communism, and therefore, as *advocatus diaboli*, I propose to offer it, not in any party sense, though some of you may think that to speak so is to show marks of politics.

Firstly then I urge that in using phrases like natural law and natural justice we should not limit our views as to what is natural and right by standards of the trading middle class. There is too much thinking in terms of what is the natural right of the little propertied individual. The natural right of a man to a house, furniture, tools and regular means whereby to maintain them is not the same as an alleged right of a Herr Krupp to his factories. Only yesterday I heard of a gentleman who by an expenditure of £50,000 had, in a very short time, by some clever international work on the exchanges, but quite lawfully amassed a fortune of £300,000. He has run into trouble with the revenue authorities, and he claims that natural law should protect him in his ownership of the £300,000!

Secondly, let us not forget the great desire of the ordinary man everywhere for security. Political security is a great good : and the independence of the judiciary in maintaining

it is essential. But economic security is also a prime need of man. Most of those who are present here today—do not know what it is to feel, as so many distinguished people in recent years have felt owing to the German troubles, insecure : not only as to their previous standard of life, but as to ordinary everyday health and food. The working class of the world have always suffered and still suffer, from insecurity. In the sphere of health when we have our new National Health Insurance, it will be for them a great burden lifted. Disraeli once proclaimed rightly that the maintenance of the “reasonable expectations of the individual” was a fundamental principle of politics. No doubt it is very good to have a “habeas corpus,” but it is also good to have a ‘corpus’ that you can keep together.

With those two comments, that we should not extend the doctrine of natural law too high, nor fail to let it include lowly needs, in terms of property, I rejoice in the opportunity of applauding the address of Richard O’Sullivan, full, as usual, of learning and wisdom.

MRS. A. PIERCY, M.A., LL.B., M.Sc. : It might be interesting to consider Mr. O’Sullivan’s theme, namely, that natural or universal law has always been a residual or even an overriding element in law for the benefit of the individual, in conjunction with Mr. Idelson’s statement—that international law is, at present, largely procedural in application. Maine’s familiar reminder that substantive law is often deposited in the interstices of procedure points in this direction.

Remembering that international customary law is derived from the law of nature and the *jus gentium* of olden times—generally regarded as idealistic and practical versions, respectively, of natural law based on reason—one can see in retrospect a growth of international law for the benefit of litigants by the process of municipal courts. Bynkershoek, deciding cases at The Hague in the seventeenth and early eighteenth centuries, considered argument and evidence of much customary, general, and foreign law, but often had to frame decisions on the reason of the thing.

Many general agreements between independent States—the equivalent of statutes in international law—have since accelerated the growth of international law through municipal courts. Foreign independent States have been enabled to sue, subject to special rules, in the courts of countries which

recognise them. With the institution of the International Court of Justice, it is possible for independent States, as legal personae with like rights, to litigate concerning the rights of their subjects either as plaintiffs or defendants, whenever jurisdiction is established. The international case law emerging from this source will more adequately protect individuals in all countries.

MR. WILLIAM LATEY : I should like to speak about the challenge laid down by my friend Mr. Keen, with regard to the question of imposing some limitation on Statute law. The law of Great Britain, up to the end of the nineteenth century, left a very large discretion in the hands of His Majesty's Judges. Since the early part of this century, the Judges' discretion has been progressively cut down, and may be so cut down further by statutory enactments that we may possibly have the Royal Courts of Justice in the future administering manifest injustice and that was in my mind when Mr. Keen was talking about the general operation of statutes and case law. Several of the numerous statutes recently passed in this country exclude the discretion of the High Court Judge to administer justice according to the principles of case law. It is a matter which needs serious consideration, because it causes great disturbance amongst those of us who have to consider the development of the administration of law in this country. I will give an illustration : the Stevenage case (1947) W.N.230, in which it was proposed to set up a new town in England and the Minister concerned was invested with an authority to make enquiries into the possibilities of establishing this new town in a certain part of the country. Having instituted this enquiry, he decided on the report of an Inspector in his Ministry, that the objections raised by local residents were not of any consequence and he decided that the scheme should go on, and made an order accordingly. The methods used in the enquiry were such that the plaintiffs in the matter decided to go to the Royal Courts of Justice, and the High Court Judge decided that the Minister had not fulfilled his duty to act judicially in considering the objections and quashed the Order. Therefore to my mind he vindicated a principal of natural law. However, it went to the Court of Appeal and the House of Lords, and they decided Parliament was omnipotent and reversed the decision.

That is an illustration of what I myself regard as so limiting the discretion of a High Court Judge that he may be called upon to inflict injustice instead of administering justice. I do say that the time may come when the omnipotence of Parliament to pass any Statute it likes may call for serious consideration in this country, and a possible change in the Constitution. Of course, in international matters one has to deal with different concerns and considerations. There is a French Administrative Tribunal where of course they have, side by side with the administration of justice, jurisdiction in many private matters which are supposed to be the interest of the State. I am not sufficiently familiar with the way in which that works, but I am told in regard to the questions of property with which the State is concerned, there again the State is very much a Judge in its own cause. If all Statutes and Orders in England were reduced to the equivalent of Hitler's system of edicts, we know the consequences. The system in Soviet Russia by which the State controls the Press and deprives its citizens of any right to express their free opinions has become common knowledge.

We have therefore to be very much on our guard regarding the Statutory systems of Acts of Parliament in this country. One might just as well sweep away the whole system of the independent judiciary which up to the present has been maintaining the principles of the common law with regard to individuals, if this rapidly growing habit of setting up departmental tribunals and ousting the jurisdiction of the Courts of Law is not checked in this country.

DR. SLUZEWSKI: Although the very valuable arguments on international law from a theoretical point of view give us a lot to think about, I feel, perhaps because I am a practising international lawyer, that one should realise that international law is first of all a system that is practised. I think the student of international law should not only occupy himself with theoretical problems and thoughts which could be developed in theory, but should look out for a practical approach to further the actual advancement of international law. Opportunities often occur for international lawyers and especially for organisations connected with international law like this Society, to do something on the spot. I think that is a point which should be considered by this Society too. To give a practical example, there is the question of the relationship of the individual to international law, which is the problem of

nationality; we experience that now. The new Nationality Bill is under consideration in Parliament, but I have not heard whether any of the Societies dealing with international law or any international lawyers have been asked to give their opinion on general or special questions in that respect. I think this country could set a practical example at the moment, namely in the matter of how to deal practically with the protection of the individual regarding nationality. I have recently had to deal with a case which had a very strange story behind it. A British-born woman married, before Hitler came to power, a German Jew and became German by marriage. The couple emigrated from Germany to Russia. In Russia the husband was naturalised but not the wife. In Russian law, the wife's nationality does not change by marriage and the wife was considered as of British Nationality. One day the husband was arrested in Russia and the wife applied for protection to the British Ambassador in Moscow and the Ambassador succeeded in bringing her back to this country during the war. She made an application to the Home Secretary with the view to regain her British nationality. The Home Secretary considered the case and said he was very sorry but the law on regaining British nationality only applied to the marriage of British-born women to enemy aliens, not to friendly aliens (the husband was a naturalised Russian), and he could not help her. Proceeding on these lines he decided in the end that the woman's nationality was "uncertain." It was legally impossible for this poor woman to apply to any Court of Law in this instance for a proper decision of her nationality. We have now under consideration the new provisions of the Nationality Bill. Should not the Grotius Society try to make suggestions that any cases of doubtful nationality arising within the British Commonwealth, should be submitted to a kind of Commonwealth Court which could be set up with jurisdiction over all the members of the Commonwealth? That would be an example of approach to a legal problem to be decided on an international basis within the nations belonging to the Commonwealth.—I think the functional and practical approach to international law is of the greatest importance because the most excellent thoughts in theory will not help if they have no practical effect. There is no time to wait. I think this policy should now occupy lawyers and Societies with practical thought in order to tackle the international legal problems of the day and thereby further the development of international law in practice.

SECOND SESSION

Saturday, 10th July, 1948, at 2-30 p.m.

In the Chair:—SIR CECIL J. B. HURST, Vice-President of the Society

LEGAL ASPECTS OF STATE SHIPPING

By SIR WILLIAM L. MCNAIR, K.C., LL.M.

1. As the title of this talk suggests, I do not propose in my remark this afternoon to consider at all the political or economic aspects of state shipping. This is not the time or the occasion for a discussion of these factors. Nor am I qualified to express any informed view upon them though I have during the war years seen from close quarters a highly centralised system of state shipping in operation. It is sufficient to say that those who seek to derive from the success of government control of shipping during the last two wars in which Great Britain has been engaged, arguments in favour of state shipping in peace time, are perhaps apt to forget how much of that success was due to the experience and zeal of men who had spent a lifetime in direction and managing shipping under the system of private enterprise and whose services were readily made available to the State in its emergency, and further how much of its success was due to decentralization of the work of day-to-day management and operation to the liner and tramp shipping Companies which would disappear under a system of complete nationalization. Even to-day I believe that the bulk of the Government tonnage is entrusted to private concerns for management, and is for all practical purposes, though not for finance, incorporated in the ordinary commercial fleets of the country.

2. Before considering in any detail the legal problems created by state shipping it may be as well to state what we mean by "state shipping" and to form some estimate of the proportion which state owned shipping under the chief maritime flags bears to the total of the useful mercantile tonnage afloat.

For the purpose of this paper I take "state shipping" to

mean merchant tonnage owned by the State itself or by organs of the State and do not include in the expression naval vessels or merchant tonnage owned by limited companies even though the State holds all or the majority of the shares of the owning company. (If the State uses the mechanism of the Limited Company in which to vest the ownership of the ships, I cannot see that the ships themselves can, at any rate in the view of English law, be considered as in any special category). On this basis there were in round figures on the United Kingdom register as at 31st December, 1947, over 200 state-owned merchant vessels of 1600 GRT and upwards totalling $1\frac{1}{4}$ million GRT as against 2,000 privately-owned vessels of 1600 GRT and upwards totaling some $13\frac{1}{4}$ million GRT; in other words state shipping represented one-tenth of the total. Of the total merchant fleet in the U.S.A. register at the same date totalling about 33 million GRT, about 18 million GRT were owned by the U.S.A. Government of which half were laid up in reserve. All Russian shipping is, I believe, state owned and though information about Russia is notoriously difficult to obtain, an informed estimate puts the figure at about $1\frac{1}{4}$ million GRT for vessels over 1500 T. It will be seen therefore that taking these three flags alone, the proportion of state-owned ships to the merchant fleets as a whole is substantial. In addition most, if not all, the European States within the Russian sphere of interest have adopted the policy of complete nationalization of their shipping though the volume of tonnage involved is not large.

3. From the point of view of the lawyer obviously the most important aspect of state shipping is its immunity from legal process. Most of my audience will be familiar with the leading case of *The Parlement Belge* (L.R.5.P.D.197) decided by the Court of Appeal in 1880 in which the judgment of Brett L. J. (later Lord Esher), contains the *locus classicus* on this subject. A collision having occurred between the Dover tug 'Doring' and the mail packet steamer 'Parlement Belge' owned by the Belgian State, a writ *in rem* was issued on behalf of the tug, and duly served on the steamer, and no appearance being entered, the Plaintiff applied for judgment and that a warrant might issue for the arrest of the steamer. Thereupon the Admiralty Advocate on behalf of the owner moved in opposition to the motion on the ground that the said packet vessel was the property of His Majesty the King of the Belgians and in his possession, control and employ as reigning sovereign

of his State of Belgium and was a public vessel of the Government and sovereign State of Belgium. In allowing the motion, Brett L. J., after reviewing the earlier decisions including the famous judgment of Marshall, C.J., in the Supreme Court of America in *The Exchange* (7 Cranch 116), said :—" The principle to be deduced from all these cases is that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdictions over the person of any sovereign, or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Though in this passage the learned Lord Justice confines the immunity to "public property of any State which is destined for public use", later in his judgment at p. 220 he states clearly that " in the opinion of the Court the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity." His arguments in support of this opinion would seem to me to justify the omission of the words " subordinately and partially" from his proposition.

Up to the first World War State shipping was but little engaged in general commerce and this immunity of state shipping from legal process, though inconvenient, created no large scale practical difficulties. Mainly as the result of that war and the social changes brought about by it, state shipping to an increasing extent invaded the ordinary fields of commerce and the continued immunity of state shipping from legal process, both in its own country and in foreign jurisdictions, has been felt to involve in many cases a real denial of justice. The first major attempt to deal with the problem on an international basis resulted in the "*Convention for the Unification of Certain Rules concerning the Immunity of State-Owned Ships*" adopted by the International Conference on Maritime Law at Brussels in 1926. This Convention (together with a further Convention of 1934 which attempted to resolve some of the ambiguities of the principal Convention was signed by some

nineteen States, including Great Britain, but not including the U.S.A., and has up to date only been ratified or adhered to by twelve States, viz.: Belgium, Brazil, Estonia, Germany, Hungary, Italy (which never granted immunity), Mexico, Netherlands, Poland, Portugal, Rumania and Sweden. In view of the complaints which have been made in certain quarters as to the non-ratification of this Convention by Great Britain, it may be useful to examine its terms to see whether it deals with the problem satisfactorily.

The Convention deals with both state shipping and cargoes owned by States and cargoes and passengers carried in them but here I shall confine myself to the provisions relating to shipping. *Article 1* states the general principle that sea-going vessels owned or operated by States shall be subject in respect of claims relating to the operation of such vessels to the same rules of liability and to the same obligations as those applicable to privately owned vessels, and *Article 2* provides that for the enforcement of such liabilities and obligations there shall be the same rules of jurisdiction, the same right of action and the same procedure as in the case of privately-owned vessels. These two Articles clearly involve a fundamental departure from the position hitherto adopted by the principal maritime countries of the world and in particular those which derive their system of jurisprudence from the English common law. The first Article established the principle of *liability* and thus abrogates within the field in which it operates the principle of the State's non-liability for the torts of its servants; the second Article establishes similarity in matters of jurisdiction and procedure between state shipping and privately-owned shipping. Accordingly, as between parties to the Convention, the owning State may be sued in respect of liabilities arising out of the state shipping either in its own country or in any country in which jurisdiction can be established either by arrest of the particular ship concerned or, presumably in countries like the U.S.A. in which jurisdiction can be established by the attachment of other property of the potential defendant, by attachment of any property of the State. Furthermore, in cases where, in accordance with recognised principles of private international law, jurisdiction can be established against private individuals by service of process out of the jurisdiction, jurisdiction could, it would seem, in like cases be established against the owning

State even though no ship or property was available for arrest within the jurisdiction.

It is no doubt because of the wide extension of both liability and jurisdiction involved in these two Articles that we find that they are in effect limited to state shipping engaged in ordinary commerce. For by Article 3 these general statements of principle are severely cut down by the exclusion from their application of "ships of war, state yachts, patrol vessels, hospital ships, fleet auxiliaries, supply and other vessels owned or operated by a State and being exclusively used at the time a cause of action arises on governmental and non-commercial service." Such excluded vessels are not subject to seizure, arrest or detention by any legal process or to proceedings *in rem*. But even in the case of these vessels in the proper Courts of the country owning or operating them claimants are given a right to take proceedings within a fairly wide field, viz: in respect of collision, salvage and general average and for repairs and goods supplied and other contracts relating to these vessels giving a right of action. Then in Article 5, if in any proceedings within this field there is in the opinion of the Court a doubt whether the vessel is "of a governmental and non-commercial character," which presumably means "is being exclusively used on governmental or non-commercial service," a certificate signed by the diplomatic representative of the owning or operating State is to be conclusive evidence of its character. In this last provision there may lurk the possibility of controversy or considerable divergence in practice:—(i) If the Court takes the view that there is no doubt that a ship is not so engaged, presumably no certificate by the owner or operating State that it is so engaged would avail them. (ii) If the Court is in doubt, the owner or operating State may give a conclusive certificate. But the phrase "governmental and non-commercial character" is obviously susceptible of differences in interpretation. For instance, is it clear that a vessel importing essential commodities on government account is of a non-commercial character? Does it make any difference that the goods are strategic materials imported by the Government for stock-piling purposes or are foodstuffs for the civilian community? Most lawyers whose experience embraces shipping matters are familiar with the difficulties which have arisen in connection with the standard English War Risk clause

of deciding what cargoes are included in the term "war stores" and what proportion of "war stores" is sufficient to constitute the vessel one engaged in the warlike operation of carrying war stores from one war base to another. As the result of judicial decisions following the last war, the ridiculous position had finally been reached that the question whether the marine or war underwriters were liable often depended on a minute examination of the vessel's cargo manifest though in no real sense did the nature of the cargo bear any relation to the cause of loss. These difficulties constituted the main reasons which lead to the modification of the standard war risk clause following upon the *Corvold* decision by the addition of certain qualifying words which, though inelegant in form, have achieved in practice the intended result of defining the dividing line between war and marine losses without reference to the nature of the cargo carried or the purpose for which it is being carried.

It may well be wished that a more precise criterion had been adopted in the Convention. Some discussion of the meaning of the phrase "governmental and non-commercial service," as used in the Convention, is to be found in the judgment of the Swedish Court in the *Rigmar* case decided during the last war. In this case H.M.G. successfully claimed immunity in the Swedish Courts in respect of a number of Norwegian vessels which had been requisitioned by the Norwegian Government whilst in Swedish waters and the possession in which had been transferred to H.M.G. by a demise charter designed for that purpose. The original Norwegian owners who remained in Norway, under the German occupation arrested the ships when it became apparent that attempts were being made to move them out of the Baltic. The ships were, however, finally released on the ground of the *de facto* possession of H.M.G. But in the course of its judgment the Supreme Court stated apparently on the authority of the *travaux préparatoires* leading up to the Convention—that the phrase above quoted "was chosen to make clear that a State cannot claim immunity if it engages in carriage with no idea of profit but still for a purpose such as the provision of supplies for the population which does not entail precisely state activity *per se*." It may, perhaps, be doubted whether this construction would be accepted by all parties to the Convention.

4. Again it is to be observed that the exclusion in Article 3 relates to vessels owned or operated by a State. Doubts soon

arose as to the content of the latter phrase and we find in the 1934 Convention the provision that "ships on charter to a State whether for time or voyage, while exclusively engaged on governmental and non-commercial service, shall not be subject to any arrest, seizure or detention whatsoever." Seeing that these forms of charter confer neither possession nor dominion or temporary ownership on the charterer, this provision confers a new right of immunity upon privately-owned ships on Government charter if their service is certified diplomatically to be of a "governmental and non-commercial character" at the time when steps are taken to arrest even in respect of liabilities incurred before the ship came on government charter. See Article 11 of the 1934 Convention. This may be considered to be a retrograde step. Though in *The Broadmayne* (1916) p. 64, a privately owned vessel requisitioned by H.M.G. on terms which amounted to a time charter, was granted freedom from arrest in respect of pre-requisition salvage claim, the ground of the immunity was the requisition not the Government charter. Finally it is worth noting that by Article 7 each Contracting State reserves the right in time of war to suspend the application of this Convention by a declaration notified to the other Contracting States to the extent that vessels owned or operated by the State shall not be subject to arrest, seizure or detention by any foreign Court of Justice, whatsoever service they may be engaged upon. When such a notice has been given, an injured party can only proceed in the Courts of the owning or operating country in respect of the particular causes of action referred to above under Article 3, i.e. collision, general average, salvage, necessities, etc. During the last war Great Britain "operated" within the meaning of the Conventions large blocks of foreign tonnage. On the literal wording of the Convention, it would seem that, if the Convention had been in force vis-à-vis Great Britain, she would, by giving the appropriate notice, have secured immunity from arrest in the Courts of other contracting parties for the whole of her foreign chartered tonnage on whatsoever service it was engaged—a satisfactory but scarcely intended result. Recent Parliamentary answers have also disclosed that even to-day large blocks of Scandinavian tonnage are still on charter to H.M.G. engaged in the importation of timber. It is difficult to believe that the draftsmen of the Convention intended that such vessels should be immune from arrest on the certificate of the chartering Govern-

ment that they are being used exclusively on governmental and non-commercial services. Yet the language of the Convention seems to lead to this result. Sufficient has perhaps been said as to these Conventions to shew that though they may mark a considerable step forward, it may be doubtful whether the solution proposed by them is wholly satisfactory.

5. Before parting with the Convention, it is well to bear in mind the comment of Lord Wright in the *Cristina* case, 1938 A.C. 485, that "even if the provisions of the Convention were made law here, it is not clear that it would affect the position in the present case" (namely a claim by a foreign sovereign to set aside the arrest in a possession action of a vessel in its possession) "because its effect is apparently limited to claims in respect of the operation of such ships or in respect of the carriage of cargoes in them. Thus it would affect claims *in rem* for collision damage such as the claim in the *Parlement Belge* or for salvage as in *The Broadmayne* and the *Porto Alexandre* or for cargo damage as in *The Pesaro*, but it may be not claims for possession such as those in the present case, in *The Gagara* or *The Jupiter*."

6. As stated above, Great Britain has not ratified the Conventions nor is the U.S.A. a party to them. It may, therefore, be useful to consider briefly the position in these countries apart from the Conventions. In Great Britain as the result of the Crown Proceedings Act 1947, the Crown is broadly speaking placed in the same position as regards litigation arising out of ships owned by the Crown in United Kingdom right as the private shipowner—with the comparable right of claiming the benefit of provisions of the Merchant Shipping Acts relating to limitation of liability. This change though revolutionary in form probably will not involve much, if any, change in practice since as a matter of grace the Crown invariably provided facilities for testing collision liability in the Courts of this country in the case of H.M. ships by nominating the navigating officer as the nominal defendant and agreeing to accept liability on his behalf up to the limit of liability which would have been applicable if the Merchant Shipping Act provisions as to the limitation of liability had applied to the Crown. In the same way the Crown invariably agreed as a matter of grace to accept liability to pay salvage awards assessed by arbitration for services rendered to H.M. ships and property. This Act has also abolished the cumbrous machinery of proceeding by way of

Petition of Right and has generally (except in the matter of discovery of documents reserved by the Crown) assimilated the method of enforcing claims against the Crown to that heretofore used in claims against individuals or companies. Proceedings under this Act may be brought in this country against the Crown not only by British subjects but by aliens or presumably foreign Governments both in respect of shipping matters and generally, and this without proof of reciprocity. So far as state shipping owned by His Majesty in United Kingdom right is concerned this Act has accordingly removed any difficulty in suing in the Courts of this Country. The Act, however, expressly prohibits proceedings *in rem* in respect of any claim against the Crown or the arrest detention or sale under judicial process of any state property. But the Act does not touch the question of judicial proceedings against state vessels owned by foreign countries or by His Majesty in right of a Dominion. (See S. 40 (2) (c)).

In the United States the position is not dissimilar. Under the Suits in Admiralty (Public Vessels) Act 1925, incorporating, so far as relevant, the Suits in Admiralty (Merchant Vessels) Act 1925, the United States may be sued *in personam* in respect of shipping claims arising out of its state-owned vessels, and, more recently, the assimilation has been carried one step further by the Federal Tort Claims Act 1947; but as I understand the position, none of this legislation affects the position in the U.S. Court of state vessels owned by other countries. (See article by Edwin Borchard in Vol. 26 of the *Canadian Bar Review*, p. 399).

8. As has been pointed out above, neither the Crown Proceedings Act, nor the United States Public Vessels Act of 1925, confer any right of suit against state-owned vessels other than those owned respectively by Great Britain and the United States. Great Britain though a party but not having ratified the Conventions and the United States not being a party to them, in these countries the right of an injured party to proceed in the Courts of these countries against a foreign state-owned vessel falls to be determined by the municipal law. So far as English law is concerned, it is I think clear that in all Courts up to and including the Court of Appeal, a foreign sovereign State could successfully claim immunity from judicial arrest for all its state shipping whatever the nature of the service on which at the time of the alleged cause of action or the issue of writ the

ship was engaged. In *The Porto Alexandre* (1920), P. 30, the Court of Appeal held itself bound by the earlier decision of the Court of Appeal in *The Parlement Belge* (1880) 5 P.D. 197, to set aside a writ *in rem* claiming salvage remuneration against a ship which had been requisitioned by the Portuguese Government and was being employed by them in the carriage for reward of ordinary commercial cargoes though Scrutton, L. J. used characteristically pungent language in doubting the propriety or expediency of such a claim for immunity. In the House of Lords however, the question whether a state-owned merchantman engaged in ordinary commerce is subject to arrest and if so within what limits, is still open since in *The Cristina* (1938), A.C. 485, Lord Thankerton, Lord MacMillan and Lord Maugham expressly reserved the question whether *The Porto Alexandre* was rightly decided. Anyone who to-day was asked to advise whether a journey to the House of Lords on this question was a reasonable commercial speculation would have to examine that decision with care though, having done so, he might still be in some doubt, as to the answer. Though the case is well-known it may be convenient at the outset to restate the facts before considering what it did and did not decide. The *Cristina*, a merchant vessel belonging to a Spanish Company and registered at the port of Bilbao, was lying in the port of Cardiff during the course of the Spanish Civil War. After she had left Spain, but before she reached Cardiff, a decree was made by the Spanish Government requisitioning all vessels registered at the port of Bilbao. On the arrival of the vessel at Cardiff, the Spanish Consul there, acting on instructions from the Spanish Government, went on board *The Cristina*, stated that she had been requisitioned, dismissed the Master and put a new Master in charge who thereafter held possession of the ship on behalf of the Spanish Government. The original owners thereupon instituted possession proceedings in Admiralty by the issue of a writ *in rem* against the ship claiming as sole owners of the vessel to have possession of the ship adjudged to them and calling upon the ship and all persons claiming an interest therein to cause appearance to be entered for them in the Probate Divorce and Admiralty Division. (The Plaintiffs were not seeking to enforce any claim against the ship arising out of her operations but were claiming possession.) The Spanish Government entered a conditional appearance and moved to set aside the writ and all subsequent proceedings (which in-

cluded her arrest) on four grounds :—(1) “ that the steamship was at all times the property of the Government of Spain, a recognised foreign independent State and that the said State declined to sanction the institution of these proceedings in the Court ; (2) “ that at the time of the issue of the writ in this action, the steamship was in the possession of the Spanish Government by its duly authorised agent ; (3) “ that at the time of the issue of the writ, the Spanish Government had a right to possession ; (4) “ that this action impleaded a foreign sovereign State.” The House (Lord Atkin, Lord Thankerton, Lord MacMillan, Lord Wright and Lord Maugham) were unanimous in affirming the decisions of the lower Courts in acceding to the motion to set aside the writ and the arrest of the ship though the reasons stated in the opinions shew considerable divergence of view. On the fourth ground stated in the notice of motion—namely that the action impleaded a foreign sovereign State—Lord Atkin, Lord Thankerton and Lord Wright without qualification accepted the contention of the Spanish Government, Lord Atkin stating as “ well established and beyond dispute ” the proposition of international law engrafted into our domestic law “ that the Courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.” The decision on this issue, in part at least, turned on the nature of the Admiralty writ *in rem* in a possession action as to which Lord Maugham seems, inferentially at least, to have taken the view that such a writ does not implead the persons against whom it is directed ; for at p. 515 he says “ My Lords, it is not in doubt that an action *in personam* against a foreign Government will not be entertained in our Courts unless that Government submits to the jurisdiction.” If in truth an Admiralty action *in rem* is merely a method of establishing jurisdiction *in personam*—and there is a formidable argument to be advanced on these lines—it may well be that this consideration alone would conclude the question. I think it is fair to say, however, that in view of the reservation by Lord Thankerton, Lord MacMillan and Lord Maugham as to state-owned vessels engaged in trade, it is probable that they at least did not intend by this decision to conclude the question on these lines.

On the remaining issues raised in the motion though in the result the decision was unanimous, the reasoning in the five opinions in support varied. Lord Atkin at p. 490 states the proposition in the widest terms, viz: that the Courts "will not by their process, whether the sovereign is a part to the proceedings or not, seize or detain property which is his or of which he is in possession or control" and says that, "though there has been some difference in the practice of nations as to possible limitations of this principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property, in this country it is in my opinion well settled that it applies to both." At p. 492 he describes the case as "one of actual possession for public purposes" in which presumably he includes trading purposes on governmental account. Similarly Lord Wright at p. 505 says "the crucial fact is simply that *de facto* possession was enjoyed by the Spanish Government" and at p. 510 after holding that *The Cristina* was requisitioned for public use, cited with apparent approval the judgment of the Supreme Court of the United States in *Berizzi Brothers v. S.S. Pesaro* (1925) 271 U.S. 562. In that case the Court said "We think the principles of immunity are applicable alike to all ships held or used by a Government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a Government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in times of peace as any less a public purpose than the maintenance and training of a naval force." He concludes as follows:—"In view of what I regard as the nature and purpose of the possession held by the respondent of *The Cristina*, it is not necessary to express a final opinion on the question; but as at present advised I am of opinion that these decisions of the U.S. Supreme Court and of the Court of Appeal" (which include *The Porto Alexandre*) "correctly state the English law on this point." As against these views, Lord Macmillan hesitated "to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason *merely* of the fact that it is owned by a foreign State; for such a principle must be an importation from international law and

there is no proved consensus of international opinion or practice to this effect." "It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity considered in one set of circumstances should be enjoyed in totally different circumstances." Lord Thankerton too taking the same view of the facts held that *The Cristina* was dedicated to public use and expressly reserves the correctness of the decision in *The Porto Alexandre*. Lord Maugham clearly took the view that *The Porto Alexandre* was wrongly decided. At p. 519 he says: "The judgments in *The Porto Alexandre* seem to me to have omitted any consideration of what I deem to be the vital point—namely the fact that other countries, while they admit the immunity as regards ships of war and other public ships, have not been at all agreed that the same immunity might be granted to ships and cargoes engaged in ordinary trading voyages." In view of Lord Wright's reliance upon the decision of the Supreme Court of the United States in *Berizzi Brothers v. s.s. Pesaro* it is of interest to note that in a case decided by the same Court in 1945 (*The Republic of Mexico v. s.s. Bajor California* (American Maritime Cases, 1945, p. 277) the Supreme Court doubted the correctness of its decision in *Berizzi's case* and apparently declined to follow it on proof that *The Bajor California* though owned by the American Government was in the possession of and being traded by a privately owned Mexican Corporation between which and the Government there was a profit-sharing agreement. The United States Supreme Court, unlike the House of Lords, is not, I believe, bound by its previous decisions and this later decision may indicate a recognition by that Court of the change in international practice since 1925.

9. On this state of the authorities it is impossible with any degree of confidence to state what views the House of Lords would take if it became necessary to decide whether a state-owned vessel engaged in ordinary commerce could claim immunity. I am inclined to think that, subject to some doubt as to the effect of the writ itself, the claim would fail since whatever may have been the position in 1880 at the time of the decision of *The Parlement Belge*, it is reasonably clear that there is to-day no settled or established principle of international law in favour of such immunity. A possible alter-

native is that the case would fall to be determined on the basis of *reciprocity*. For instance, if the ship under arrest in this country was owned by the State of Ruritania and engaged in ordinary trade, a motion to set aside the arrest might well be determined by whether or not British state-owned vessels similarly engaged would be granted immunity in the Courts of Ruritania. There are indications in support of this view in the speech of Lord Maugham in *The Cristina* (*supra*), but a decision on these lines would place an intolerable burden upon the legal advisers of shipowners who would, before advising on an arrest, have to satisfy themselves as to the law administered in the Courts of the owning State. A further difficulty created by the present state of uncertainty is that of discriminating between a ship "destined for public purposes" and a "ship engaged in ordinary commerce." Is there under modern conditions of totalitarianism and state trading any valid distinction between the two? Is feeding the civilian population or importing essential raw materials any less a public purpose than the carriage of mails or the transport of troops? Furthermore, should it make any difference from the point of view of immunity that a part of the cargo on board the state vessel is carried at a commercial freight for private individuals and, if so, what proportion of private cargo should involve a forfeiture of immunity? I myself do not feel that our law affords any clear answer to these questions.

Without expressing any view as to whether the present Conventions should be ratified I have probably sufficiently indicated that the present position is unsatisfactory.

10. Certain further aspects of state shipping arising in time of war require consideration; for instance (1) Does the right of visit and search extend to merchant vessels owned by a neutral State? (2) Is a vessel owned by a neutral State which (a) knowingly carries contraband or (b) attempts to break a blockade or (c) is chartered to a belligerent State, subject to condemnation as lawful prize? (3) In the cases referred to in (2) would the neutral State commit any breach of neutrality?

11. Does the right of visit and search extend to merchant vessels owned by a neutral State? Dr. Colombos states in his *Treatise on the Law of Prize* (2nd Ed. p. 257), that the right of visiting and searching during war all *private* vessels met at sea has been constantly recognised by belligerents. The same

author also states that "neutral *vessels of war* are not subject to visit though the question was one of some controversy in the early part of the nineteenth century." I do not profess to express an expert view on the question but, though so far as I know the question has never been determined by any Prize Court, I hazard the guess that no Prize Court sitting in the country of a belligerent would deny to its own naval forces the right to visit and search neutral state shipping at any rate for the purpose of establishing the identity of the ship. Great Britain at least has never recognised that neutral vessels proceeding under the convoy of warships of their own country are exempt from visit and search although such visit and search involves some derogation from the sovereignty of the neutral. In *The Maria* (1800) I.C. Rob. 341, Lord Stowell after emphasizing that his duty as a Judge of a national Prize Court is "not to deliver occasional and shifting opinions to serve present purposes of particular national interests but to administer with indifference that justice which the law of nations holds out without distinction to belligerent States, some happening to be neutral, some to be belligerent," states categorically "that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestible right of the lawfully commissioned cruiser of a belligerent nation and that the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent owner.

It is true that Article 61 of the Declaration of London exempted neutral vessels under *national* convoy from search, but there is I understand no reason to believe that this Article embodied any settled international customary law. If then the presence of neutral convoying warships does not protect private neutral vessels from search, it would seem to follow that the state character of the neutral state vessel would not afford the necessary protection from visit and search. Prof. Lauterpacht in his latest edition of Oppenheim (Vol. II, in a note at p. 519) states that when in October, 1939, Soviet Russia protested against certain measures of the British Government in the matter of contraband and search, she declared that her merchant vessels were State property and for that reason not subject to the ordinary measures of compulsion applied to privately-owned merchant vessels. But it does not appear

from this reference how the matter was resolved. The cynic may perhaps say that the rule that a public vessel, such as a mail ship, commanded by a commissioned officer of the Navy is exempt from visit and search if that officer declares on his honour that the mail ship is not carrying contraband, is of doubtful validity to-day in view of the general deterioration in standards of international conduct.

11. Is a neutral state vessel which (a) knowingly carries contraband or (b) attempts to break a blockade or (c) is chartered to a belligerent liable to condemnation as lawful prize?¹⁷ In each of these cases a private neutral vessel would certainly be subject to condemnation. Does the fact that the vessel is state-owned make any difference? I cannot see in principle why it should, though obviously the condemnation of a state vessel involves an extreme violation of the sovereignty of the owning State. Nevertheless, once it is admitted that a belligerent is entitled to go to the extreme length of condemning a privately-owned vessel which assists the enemy, I feel that it must follow that state ownership imposes no restriction on that right. Otherwise it would be a simple matter for the neutral State desiring to protect its maritime commerce in time of war to nationalize its shipping and thus evade the legitimate rights of belligerents. Similar considerations would I think, apply to the transfer during war-time of privately owned ships under an enemy flag to neutral state ownership.

In the Great War of 1914-1918, the United States before their entry into the war on the side of the Allies, passed legislation enabling vessels registered under the German flag and interned in U.S. ports, but owned by Companies in which American capital was substantially interested, to transfer to the American Register. H.M.G. though formally claiming to

¹⁷ Prof. Lauterpacht (*op. cit.* §296) states categorically though without citing authority that "vessels (other than men-of-war) and cargoes of such States (i.e. countries engaging upon activities of an economic character) are subject to the ordinary incidents of the laws of blockade and contraband or other belligerent rights. This is for the reason that it is impossible to maintain one set of rules for countries organised on the basis of private enterprise, and another for countries where the production and trade in certain articles is in the hands of the State. In this statement, if it is not disrespectful to say so, some may detect a *petitio principii*."

insist upon their strict rights under Article 56 of the Declaration of London, finally agreed with U.S. in view of the general tonnage shortage not to interfere with such vessels provided they satisfied certain stringent restrictions on their trading. If this legislation had enabled transfer to be made to the U.S. Government itself the problem at present under discussion would have arisen in an acute form. I understand that the Chilean Government did pass legislation of this character, but in view of the attitude of H.M.G. did not put the question to the issue by attempting to trade any vessel so transferred.

12. The final question is whether in the cases mentioned in the last question, the owning State would itself commit any breach of neutrality. Here it is possible that a distinction might legitimately be made between carriage of contraband and breach of blockade by neutral state vessels on the one hand and the chartering of neutral state vessels to a belligerent on the other hand. In the case of an individual, no breach of the laws of neutrality is, according to the better view, involved in the carriage of contraband or attempted breach of a blockade though in either case the penalty may be condemnation. On the other hand, it is well recognized that there are certain things which a State may permit its nationals to do, without infringing its obligation of neutrality, which it could not do itself. The safer view probably, is that a neutral State would commit a breach of neutrality if it employed its ships to carry contraband or run a blockade and so render unneutral service to the enemy. The care of state ships on time charter to a private individual performing such service is not so strong. There can be little doubt that for a neutral State to charter its own state vessels to a belligerent Government necessarily involves such a degree of identification with the belligerent cause as to amount to a breach of neutrality.

As stated above, I do not profess to express any informed view on these matters and it may well be that the experts among my audience may be able to tell us that my speculative answers are completely beside the mark. But I raise these points in the hope that they may evoke discussion.

MR. CÝRIL MILLER : I am very sensible of the honour that has been asked of me to address this learned Society, and consequently to follow my learned friend Sir William McNair, and equally sensible of the great difficulty of that task. He has, as one would expect, so thoroughly and successfully examined this

difficult subject, that I feel all I can usefully do is to discuss for you some of the very important and urgent, and I use that word advisably, practical difficulties which arise out of the principle of State immunity of vessels. May I preface what I am going to say by a personal explanation, merely in order to give you some idea of how this principle arose. We in the shipping industry of Great Britain, particularly those of us who are concerned with the insurance of vessels, and more particularly with the insurance of third-party liability, must naturally have some unity in the laws of maritime countries. Therefore any disparity in the law operates against the interests of maritime commerce, a thing we have found to be true by practical experience. There is a body as you probably know, the Comité Maritime International, which is composed of experts ; in fact the majority of whom are actively engaged to bring about uniformity in the commercial maritime law. The second reason why to us in Great Britain these principles are of great practical importance is that, having regard to the drop in value of money all over the world, the cost of insurance has risen enormously. To give you an illustration : The classic type of merchant vessel is a 10,000 ton cargo vessel. The cost of insurance of such a vessel is £7,500 to £8,000 per annum, but in addition to that, there is the cost of insuring third-party liability, which is an addition as to 99% of the vessels in Great Britain. This would amount to the sum of £4,000, or a little more, viz : a total cost of say £13,000 a ship. In these days it does not sound very much, but it is so heavy a proportion of the cost of shipping that one has to be particularly careful to take every step to keep costs down. One of the major items in the cost of third-party insurance is legal costs. I am happy to be able to say that in this country they are about as low as in any other country in the world. In the United States they are certainly much higher.

May I now just explain to you, in amplification of what Sir William McNair has told you, that the Brussels Convention of 1926 is considered by all those who have anything to do with it, and who are still examining it, to be by no means completely satisfactory. Sir William has dealt with all points involved so carefully that I need not go into further details. At the last meeting of the Comité Maritime in Antwerp, last September, it was unanimously resolved that all steps be taken now to put this Convention into effect, although admittedly,

as I say, it contains many imperfections. What we really all felt was that the necessary diplomatic steps should be taken through the Belgian Government to bring to the various Governments the desirability of uniform rules upon this topic.

The Brussels Convention, as you will have ascertained from Sir William, distinguishes between the liability of a State to be sued by persons not within the jurisdiction. Another important distinction is the right of arrest. These distinctions are emphasised because of the desirability of obtaining an agreement between countries whose laws differ on these points. In the law of the Netherlands, for instance, there is no distinction between an action *in personam* and an action *in rem*, and these sharp distinctions in the Anglo-Saxon jurisprudence are unknown to the Netherlands and some other countries.

Regarding the Convention itself, there are these two important questions: First of all as regards state-owned or operated commercial vessels which can be arrested and whose government owners could be sued. That is the first step. The second step relates to state-owned or operated non-commercial vessels which cannot be arrested at all nor can a Government be sued except in its own jurisdiction—a matter of great practical importance. Thirdly, in time of war, under Article 7, to which Sir William has already referred (and war there does not mean a state of emergency such as most of us find ourselves in at present, not amounting to war), a State can be induced to suspend the right of arrest of its non-commercial vessels in foreign jurisdiction, but government owners of commercial vessels cannot be sued in foreign jurisdiction. It is important to bear this in mind. At the present time it is only by English and American law, as amended by the Crown Procedure Act and the American Federal Law Tort Claims Act of 1947, which affect the liability of the Government of Great Britain or the United States, as the case may be, to be sued in its own Courts.

There are three developments of marine commerce that raise questions frequently of great practical importance. The first development is the actual ownership by the Government of trading vessels. By that I mean the Government is entered in the national register as the owner. You have heard that the British Government is still in the register as owning nearly 200 ships. The actual figure is 230. Individual ship-owners operate on behalf of the Government concerned—the Ministry of Transport—these vessels in the same manner as they operate

their own vessels. Further the operation of the British mercantile fleet is now in the hands of the industry itself. In other words, the Government has, I think very properly, considered it to be in the general interest that the control of British ships should be in the hands of the shipping industry, and it has arranged for a body presided over by naval civil servants, all other members of which are shipowners and officials of the Chamber of Shipping. There is another consideration to be borne in mind and that is one of the most profitable and most important activities of the British Merchant Fleet to-day, dealing with the importation to, or exportation from, the United Kingdom of cargoes. It is what is known as cross-voyages in which the British vessel is carrying cargoes from one foreign country to another. A prominent example is trading between the United States, the Western ports and South Africa. That trade will not be very large until the bulk of foreign currency and H.M. Government ships are fully engaged. However, these ships are now covered for third-party liability insurance by the "Shipowners Mutual Insurance Association." They pay premiums in the same way as the individual shipowner, and any claim made against one of H.M. Government commercial ships is paid by the Mutual Association in the same way as any individual claim is paid. This gives rise to considerable problems. For example the frequent case of personal injury or death of a stevedore working in a British ship in an American port. If the injury or death is due to the shipowner, the stevedore has a perfectly good claim against the British Government-owned ship. How does he enforce it? This is a trading vessel and there is nothing governmental about it, apart from the fact that it is registered as H.M. Government vessel, and one of the problems we all try to avoid is the problem of such vessel either being arrested or sued in the United States Courts. So far the problem has been avoided by inducing the plaintiff to accept as a nominal defendant the ship's agent, the agent getting complete indemnity from H.M. Government or the underwriters. There are cases in which the plaintiff has refused to do that. So far none have mattered but some will undoubtedly arise. I am expressing a personal opinion; it would be very difficult in politics under present conditions for H.M. Government to take the defence of the claim that it is entitled to immunity. The principle of operating National Boards could be applied to our industry in the

same way as it is to others and the same may happen in other countries. No such question arises in this country, especially having regard that Ministers of the Crown refuse to accept responsibility for such Boards, and that no immunity could be claimed in respect of such vessels. It is interesting to note that this point did arise in the United States in the early twenties. The United States Government in 1917 created a separately corporate Shipping Board to run U.S. Government ships and in 1919 the Supreme Court of the United States held these ships liable to arrest and the U.S. Government hastily passed through Congress a Public Vessels Act, 1920. Immunity of arrest was given, but you could sue by libel. The second development which is causing difficulty is the Government tonnage scheme whereby the British and American Governments are getting rid of surplus tonnage to private ship owners of any nationality. The U.S. Government, having more surplus tonnage, is disposing of its vessels to French and Italian owners. 110 Italian owners have taken over American vessels which are dealt with in this way. The vessel is chartered to the individual owner on a Charter under which the true owner operates with possession and control of the ship, and the State still remains the nominal owner. Sometimes this is done by a chain of Charters, the first being the Government (French or Italian). In such a case I think there is no freedom from arrest, but having regard to that factor, an American Government body insisted that in the case of third-party liability insurance, the underwriters should undertake to pay any policies in which the mortgage debt was outstanding because to enter into a mortgage debt with a Government is a liability. If the Convention were in operation there would be no justification for that particular demand by the disposing Government at all, because Governments and individual owners would then all be on an equal footing with regard to arrest. It is also important to note that the Convention makes no attempt to unify laws relating to arrests of vessels or to actions *in rem* or *in personam*, nor are there any rules with regard to Governments and their jurisdiction. It is because it is felt that these topics cover such a wide field that they must be dealt with in a separate Convention. Many of you know the distinction of *in rem* and *in personam*. Continental law is entirely different from English law and gives rise to practical inconveniences. The fact that the Convention makes no

attempt to regulate the method in which actions against Governments should be brought is a matter which causes concern. We have just been advised in negotiations with the French Government that the French law takes a very different view with regard to an act of state than do we in England. I am now going to make a statement ; we are told that in all probability, although it is not definitely decided, the French Government during a state of emergency may either charter the vessel of an individual owner or charter one of its own vessels to some other body, and thus perform an act of state. If that is right, any dispute, however commercial in nature, which might arise out of the charter, will be justifiable in the State Courts. From the point of view of a private individual, he would much rather go before the ordinary Civil Tribunals. That is a distinction quite unknown to an English lawyer, and difficult for English business men to appreciate in its full value.

May I conclude by expressing what I must make clear is my own opinion, although I understand that the same opinion is held by a number of people who are engaged in the administration or operation of the shipping industry, and who have considered this question very carefully, both practical men and lawyers. My view is that it is very desirable that some Convention like this should be passed by the western maritime nations. In other countries, I believe, the State will continue to run ships as government-owned ships for many years. It may be that our own Government will not entirely dispose of its very big fleet, although I think it will reduce it. If we are going to maintain what is the essence of western jurisprudence, namely that the rights of the individual as against the State must be maintained except in cases of the most urgent necessity, it seems to me that the various Governments must, to some extent, sink part of their sovereignty and be prepared to be placed in exactly the same position as the individual shipowners. It is no good their using government authority when they are doing exactly the same thing and for the same profit as the private individual. Something like this Convention must be passed otherwise we shall continue to encounter the same difficulties as we are having now with totalitarian States. We should say to them that when they are trading in our goods they ought to be subject to the jurisdiction of our Courts, and to the Courts of any of the western group of nations, as we are ourselves. This is bound to prove in future

a highly important factor. For these reasons I feel that for all its imperfections, something like this Convention is preferable, and as Sir William suggested, ought to be passed in the near future.

SIR W. ERIC BECKETT, K.C. : Sir William McNair has been describing with great clarity the effect of state immunity in removing from the jurisdiction of the ordinary courts disputes in which state-owned or operated ships are engaged. He has also set forth the essence of the proposals which are in existence for remedying the situation, and indicated that, in my opinion, quite truly, some of the principles of these proposals are much simpler to state as principles than to apply in practice. Now, if I may compare small things with great, and of course ships are great things, I would mention another case of immunity, having the effect of removing cases from the jurisdiction of the courts and the solution which has been adopted and which, I think, settles that particular difficulty satisfactorily. Diplomats in this country, of course, have immunity but they also own and drive motor cars and may have accidents as well as other people and their cases should come before the courts. Now, it has been arranged that they will always insure against third party risks, and when a dispute arises there would be a formal waiver of immunity in order to allow the dispute to be dealt with in the ordinary way because it then becomes in fact, though not in form, a dispute to which an insurance company is a party rather than a diplomat and where very possibly the other party is an insurance company too.

Now, I do not know much about ships, but even in my state of ignorance I can realise that it is not so easy to apply this solution to the case of state-owned or operated ships. Nevertheless, I ask whether it is not worth while seeing if more can be done on these lines. If in the first place you can exclude any possibility of the state owned or operated ships ever being held up, and make sure, by conventional arrangements, that there is always an insurance company which will fight the action if necessary, is it possible to endeavour to solve the question by a simple waiver of immunity ? Perhaps not, but I only mention it because Sir William has illustrated so clearly the difficulties of applying the criterion in the existing proposals which distinguish between different classes of state ownerships on the basis of whether they are being used for the purposes of state ownership or otherwise.

DR. ROMAN K. KURATOWSKI (Poland) : The problem of the immunity from local jurisdiction of ships owned or controlled by a State and employed in commercial trading—one of many controversial problems of international law—is differently solved in different countries. Such immunity is refused in some countries like France, Belgium, Italy, Switzerland, Holland (see Higgins and Colombos, *The International Law of the Sea*, 1945 p. 168 ; M. Wolff, *Private International Law*, 1945, p. 57). In England, as Sir William McNair told us, as well as in the U.S.A., such immunity is granted. On the eve of our meeting, on July 9th, 1948, the U.S. District Court in the *Baja California*¹⁸ allowed the claim of immunity ; in that case libels *in rem* and *in personam* for fuel and crew's wages were filed against a Mexican Government-owned merchant vessel anchored at Balboa, Canal Zone, which had been repossessed by the Mexican Government through its Navy Department from a Mexican Corporation to which the vessel had been chartered and which had abandoned the charter while the vessel was in a Cuban port. However, Sir William has himself expressed some doubts whether the immunity would be upheld if the question happens to be decided by the House of Lords. Lord MacMillan in the leading *Cristina* case said : " I confess that I should hesitate to lay down that it is part of the Law of England that an ordinary foreign trading vessel is immune from civil process within the realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect " [(1938) A.C. p. 498]. In Ireland, in the High Court, Judge Hanna held in *Zarine v. Owners of s.s. Remava* " that the immunity for state vessels under public international law does not apply to those vessels which are used for private trading purposes but only to such vessels as are *publicis usibus destinata*" (Irish Reports, 1942, p. 171) : however, Judge Meredith of the Supreme Court of Ireland found that this proposition was " misleadingly " stated and that " the suggestion that a sovereign State forfeits its rights to object to being indirectly impleaded in an action *in rem* if it engages in trading operations is not supported by authority " (*ibid* p. 175).

With the present prevailing trend in some countries of

¹⁸ (1948) A.M.C. 1560.

nationalisation, socialisation, communisation, etc. of the merchant shipping, new problems have arisen concerning the question of the immunity of State shipping. Separate legal entities, in law distinct from the State, are created in some countries for the purposes of owning and of managing shipping. Sometimes these entities are created in the form of limited companies which do not differ from other limited companies of which the capital belongs to private persons. I agree with Sir William when he says that if the State uses the mechanism of the limited company in which to vest the ownership of the ships, he cannot see that the ships themselves can be considered in any special category. There is a great variety of other types of such separate legal entities, like the *collectivités publiques étrangères* which are recognised as separate legal persons (see Niboyet, *Droit International privé*, 1938, T. II., p. 320), municipalities, legal entities, which in law are separate moral or judicial persons but in fact are organs of a State, etc. According to Prof. Martin Wolff (*Private International Law*, p. 56) these corporations, such as the Postmaster General and several companies under State control, and in which the State is the owner of all, or practically all, the shares of the company, do not benefit from the immunity of the State. In U.S.A. it was held that a suit against a corporation is not a suit against a Government merely because the corporation has been incorporated by direction of the Government and is sued as a governmental agent and its stock is owned by the Government; such corporation does not share the immunity of the sovereign (*United States v. Deutsches Kalisyndikat Ges.* D.C. 31 F. 2d. 199, Ann. Dig. 1929-1930, Case No. 71, approved by the Supreme Court of New York in *Ulen and Co. v. Polish National Economic Bank*, S.C. of N.Y., Ap. Div., Ann. Dig. 1938-1940, Case No. 74).

It is, I think, very difficult to foresee whether the immunity of the State will be applied to the ships belonging to these different types of legal entities. Each case—when such a legal entity claims immunity in foreign courts—would require a detailed examination of the rules governing that entity at its home; new and interesting rules of international law will undoubtedly be, with respect to this problem, laid down by the Courts. (A recent example of such a case—*Re Krajina v. Tass Agency* where Lord Justice Cohen said that even if it had been established that the Tass Agency was a separate legal entity

he would not be prepared, without further argument, to accept the view that it necessarily followed that it was deprived by incorporation of the right to assert its sovereign immunity in foreign courts (*Weekly Notes*, 1949, p. 310).

DR. ERWIN H. LOEWENFELD. In the rather confusing position of state shipping, as Sir William McNair has told us in his impressive address, we may distinguish various stages. There is the old traditional principle of *The Parlement Belge*, where it is emphasised that as a consequence of absolute independence of every sovereign authority and of international comity, each State declines to exercise any territorial jurisdiction over public property of any State which is destined to its public use. The movement in favour of immunity was checked in the *Cristina Case*, where four law lords (although they upheld the immunity of state shipping) admitted that the decision might have been different if *The Cristina* had been employed for purely commercial purposes. Lord Maugham noted that other countries did not agree to immunity in case of ordinary trading voyages. There exists in fact a school of thought accepting the idea that sovereign States should be treated as private persons in so far as they pursue ordinary trading purposes. However there is no agreement at present on this point, and although, particularly in France, jurisprudence has waived, one cannot say that the principle of absolute immunity has been abandoned on the Continent. This was the view of the Swiss Federal Tribunal in the *Saloniki Monastir Railway Case*. In future exception to immunity should be limited to cases where a State has voluntarily subjected itself to the jurisdiction of another State as in the case of the United States Lines and Russian commercial ships. To create such an exception to the principle of state immunity would be in conformity with the view of Lord Justice Scrutton in the *Porto Alexandre Case* (1920) P. 30) where he held that the fashion of nationalisation is in the air and that many States are trading with ships belonging to themselves and if these national ships wander about without liabilities, many trading affairs will become difficult. But he made it quite clear that these are matters which fall to be dealt with by negotiation between governments and not by governments exercising their power to interfere with the property of other States contrary to the principles of international courtesy which governs the relations between independent and sovereign States.

Another point which I should like to raise is, what is the present position regarding maritime liens? Can they be imposed upon state vessels, when damage has been occasioned by collision or should the view taken by Lord Justice Scrutton in the *Tervaete Case* (1922) P. 259 be preferred? He refused to impose a maritime lien upon a public collier, since such lien would have diminished the value of the property by lowering the price which a private purchaser would have given for it. Such lien would therefore, in his view, have constituted an indirect enforcement of rights against a foreign sovereign and should therefore be regarded as inadmissible.

There is even in this country an increasing tendency to withhold jurisdictional immunity from state owned ships engaged in commerce. The *Cristina Case* has indicated the road which public policy ought to follow in future in the case of state vessels employed for purely commercial purposes. In view of this tendency of future jurisdiction there does not appear to be any urgent need to ratify the existing Conventions on the subject.

DR. M. WILENKIN (U.S.S.R.): I hope I will be permitted to speak to bring to the attention of the meeting something which is bound to play a great part in unifying the rules of international shipping. It relates to the United Nations Maritime Conference which met at Geneva from February 19th to March 6th of this year and which was attended by both Great Britain and the United States and the great majority of the other principal maritime countries. For the benefit of this meeting, may I say that the Conference has set up another Inter-Governmental Organisation as a specialised agency of the United Nations. In the first instance this Organisation is to be strictly limited to the technical field and its functions are advisory. It is intended to consider any unfair restrictive practices by shipping concerns; to provide machinery for co-operation regarding the technical construction of ships and their standards of maritime safety, and to deal with any shipping problems of an international character, and the exchange of information. An important aim of this new Organisation is to centralise the various functions in maritime matters which under numerous Conventions are entrusted to so many individual Governments at present.

I do not want to take up your time unnecessarily, but this Organisation is sure to have a lasting effect on the waiving of

actions by Governments in the field of international shipping. It is proposed that the headquarters of the Organisation should be established in London.

Unfortunately the Soviet Union is not amongst those who have signed this Convention. I think we have heard a great deal about the Brussels Convention, and I hope this Geneva Convention, which is the most up-to-date, will make all the difference.

SIR CECIL J. B. HURST : Before I ask Sir William McNair to give his concluding observations on the discussion this afternoon, I venture to add a word or two of my own. I think really that the upshot of the two addresses which we were so fortunate as to hear in the earlier part of the discussion is to show that it will be to the benefit of our own shipping industry, and I expect to that of all the world, that the Belgian Convention should be brought into force, not as the final word of wisdom on the subject, but as a stepping stone to something else which should be better and fuller than the provisions which the existing text contains. Apart from the matters that can be put right by that Convention, even in an amended form, I think there is a wider question of policy beyond it, and it is to that that these remarks are directed, namely, that it must be to the general advantage that this immunity from the jurisdiction of the Courts of trading ships which are state owned, should be discontinued. May I tell you a little personal experience of my own, founded on a case of which, I admit, details are a little vague in my head, because I am speaking of personal recollections of what happened 30 years ago. It was a case which illustrates to my mind the hardships and shortcomings of the existing situation. It was a case that arose in the Far East, somewhere I think off Hong Kong, where a vessel belonging to one of our great steam navigation Companies was in collision with a Government-owned American vessel, not a ship of war. The American Government in its wisdom proceeded to waive its right to jurisdiction and to bring an action against the English shipowners in the Courts of Hong Kong. When the suit was instituted against the British shipowners by the American Government, the owners endeavoured to enter a counter-claim, but the American Government adopted the attitude of saying we are going to sue you, but we are not going to allow you to sue us. That seemed very unfair, but it succeeded for the time being. What was the result ? There

was a dispute remaining open between the two Governments, because the British Government took up the case of its national as international law entitled it to do : that claim could not be brought to the decision of a Court of Justice, and it dragged on for a long time as one of that class of inter-governmental pecuniary claims between the United Kingdom and the United States which were outstanding between the two Governments. There it remained until such time as a clearing-up of such claims between the two countries was arranged and then it came before the International Tribunal which was set up. To many people it might appear that it did not matter whether the British shipowners vindicated their claims before an International Tribunal or whether they did so before a municipal Court, but I venture to think it does matter ; and that the wise policy to aim at should be an amendment of the jurisdiction of the Courts, not that of setting up as the deciding authority some International Tribunal composed of individuals who are appointed to arbitrate international claims. Such individuals are not Admiralty Judges but a tribunal whose task is to decide matters on the basis of international law, not that of Admiralty law. They are not trained admiralty lawyers and they are handicapped by a procedure which has not been designed as Admiralty procedure. Even if you can substitute for the courts some sort of international forum, you are going to get a much less satisfactory tribunal to decide the issues between the parties.

One other point which emerges from what Mr. Miller told us is that it is clear that the shipping industry is faced by grave divergencies between the law in this country and the law in other countries. Take one matter he mentioned : the distinction we draw between remedies *in personam* and those *in rem*. The rules that obtain in some foreign countries are different from those in this country. Is this not one of the cases where some recommendation should be made that the whole subject should be studied with a view to the ultimate establishment of harmony by means of a uniform Convention ? These are the suggestions I have to make towards the solution of some of the very acute difficulties mentioned in our two principal addresses this afternoon.

I am now going to ask Sir William McNair to make his concluding observations in answer to some of the points put to him.

SIR WILLIAM MCNAIR : I have always regarded as a satisfactory feature of this Society's procedure that you do not at the end of a discussion proceed to pass any resolution or to try and commit the Society to take any views. Discussions are primarily for the purpose of seeing different points of view and setting the main work upon them. We do not have to commit ourselves at the end of this meeting to any definite solution and I think it would be difficult after the discussion we had this afternoon to formulate any really final conclusion. Mr. Miller has indicated from the commercial point of view the desirability of putting forward this Convention with all its difficulties. Sir Eric Beckett has suggested that possibly there may be some way of getting over the difficulties without waiting for a Convention, such as reaching agreement not by way of Convention but that the State should agree in practice to submit voluntarily to the Courts of the other country, especially in cases where this liability is insured. That I have no doubt would be a solution entirely satisfactory to commerce, but its adoption would necessitate a good deal of education. My experience has been that there has been considerable reluctance by States to submit to the jurisdiction of the Courts in suits against them. Whichever of these solutions may work in future, one is left at present with the existing position. Mr. Miller indicated in two cases his views, emphasising on certain points the difficulties of the present solution. He quoted the position of a ship being arrested or sued in the United States Courts. He expressed views on immunity ; I would at the moment express a different view on both points, because Mr. Miller and I have, throughout our professional career, always been arguing different views.

I hesitate to express any view on the new Maritime Convention signed at Geneva last March—a point raised by one of the speakers. But I hope this discussion has been sufficient to raise points of interest and that it will be felt that it has served a useful purpose.

SIR CECIL HURST : Before this part of our session this afternoon comes to a close, I am sure I shall be voicing the opinions and wishes of you all in thanking very cordially Sir William McNair for his paper ; also Mr. Cecil Miller for his contribution to the discussion this afternoon in commenting on his unique experience of the shipping industry. It is a great pleasure and an opportunity to the Grotius Society to

have a really useful discussion, when it can hear opinions from such skilled practitioners, and I feel sure you will all endorse my request to them to accept our very cordial thanks for their contribution this afternoon. That concludes the discussion of the subject for which the President of the Society invited me to preside.

The International Law Conference was preceded by a dinner given by the Grotius Society in Gray's Inn Hall, London (by kind permission of the Treasurer and Masters of the Bench of the Honourable Society of Gray's Inn) on Friday, 9th July, 1948, at which over one hundred members and guests of the Society were present.

The Principal speakers of the evening were Lord Schuster, G.C.B., C.V.O., K.C., and the Rt. Hon. Lord du Parcq., P.C.

LORD SCHUSTER said :—Let us look back before the 1914–1918 war to the consciousness which the ordinary British subject had of Europe and the World as compared with the consciousness which he now has. I remember sitting at lunch with a friend of mine in the summer before the outbreak of that war and saying that I thought our civilisation was going to crack from top to bottom. He replied calmly, “I cannot see why there should be a war.” I do not think, until the middle of the summer of 1914, that anyone realised the significance of the position occupied by these Islands in the World. That is not the case now—we are all acutely conscious of our position. There has come this change. Then we had no idea of what war meant. Now we are anxiously, desperately conscious of the effect of war. Those consciousnesses must awaken us to the realisation that International Law is the thing that really matters.

We have the British Commonwealth of Nations. Such a union is not a concept to which our people have purposely been driven. It was brought about we do not know how—bound together not only by common allegiance, but because we all think together on the same lines. We are privileged to have a powerful friend making a great sacrifice for the cause of peace—for the peace of other nations :—the great Republic beyond the seas which is in fact giving to Europe help with a consciousness that its fate is linked with ours and ours with Central and South-Eastern Europe.

This Society is concerned in essence with the family of nations obeying the rule of law. We may take a great comfort for the future, but the things to discomfort us are heavy and grievous. Think of what we have endured during the last few years. International Law was tossed on one side—solemn treaty obligations were disregarded. I have noticed how much all the gatherings of nations, which preceded and followed the conclusion of the war, were marked by lack of precision. Many

of our troubles arose from the fact that, meeting in the agony of war, people have been signing what the other fellows have signed without ensuring that they both meant the same thing. In Lord Hartingdon's words, "I do not know what these things mean, but I do know he does not mean what I mean." Had we kept these words in mind at Yalta and Potsdam, we should not have entered into these agreements. It is no use entering into agreements by pretending to believe what in fact we do not believe. In future do let us make certain that the other nations mean the same thing that we do.

We have now got to address ourselves to this new method of looking at things which hitherto have seemed so obvious as to be beyond discussion. The Grotius Society can be of enormous use in this connection. There lies the hope for the future. What are we aiming at? We are building something which is imperishable.

THE RT. HON. LORD DU PARCQ said :—I have drunk with enthusiasm the toast to the Grotius Society to which I am privileged to reply. I am replying to an eloquent and moving address by Lord Schuster. He might have flattered and cheered us by light-hearted words, but this is a learned Society and there are many here who know the capabilities and limitations of International Law. I am glad to think that Lord Schuster gave a serious talk because I am convinced that it is no use writing elaborate papers about what might or could be done in an ideal world without looking at practical issues. You cannot get justice without law, but you can get law without justice. We must satisfy the peoples of the world that international law is full of justice. Justice is the influence of the stronger—nothing else. The State is stronger and tells the individual what to do. The international lawyer must bear in mind that each State is inclined to think of itself first. The statesman cannot be blamed if he thinks first of his own country. Then the next step is that he says, "I want my country to be strong." Then great Powers, when settling rules of International Law, will tend to say, "The rules which we want are the rules which will let us do what we want to do." Then you get rules which appear to little nations to favour the strong nations. International lawyers must remember this tendency towards sovereignty and the remedies which ought to be applied in future to mitigate this extreme conception of

sovereign rights in the interests of peace and human progress.

You have a Court at The Hague—perhaps not as occupied as might be wished—where Judges are conscious that they are international Judges and not merely subjects of their particular nations. I feel sure that our distinguished President who is the British member of the Court would not allow his British outlook to colour his decisions. Thus although the Court has far to go, I believe we can look to The Hague as one of the hopes for the future. It is for this reason that I am glad there are such bodies as the Grotius Society.

While Vice-President of the Society, I saw some of the great work done for the Society by Sir Cecil Hurst. For eight years he was almost always there as President. He breathed new life into the Society.

It is very difficult to reply on behalf of International Law. My duty was primarily to receive the bouquets handed to me by Lord Schuster—some were a little mournful. I must express thanks on behalf of International Law.

SIR CECIL HURST in moving the toast to “our guests,” said how much he regretted that post-war conditions obliged the Society to restrict the size of its dinners and the numbers of its guests. It was, however, most encouraging when illustrious lawyers came to our dinners. We had listened to a moving speech from Lord Schuster and to a touching speech from Lord du Parcq. But when we saw among us High Court Judges, men holding high positions, men whose business was not only to foster national but also International Law, it was most encouraging. The law by which the world must be ruled was International Law. It used to be the custom for some University Professors to speak with something like contempt for International Law because they said it was not law at all. But that was disproved by recent events and the growing importance which civilized nations attached to that law. What is really necessary is some sovereign authority to enforce international law. At present we only have the public opinion of the Democracies of the world. We must realise how great is the importance of a good healthy public opinion behind International Law.

Sir Cecil Hurst continued :—“ I venture to enlarge the toast. Let us drink not only to the guests of the Grotius Society but also to your guests—the ladies who have been kind

enough to come with you to grace our dinner. It shows that the ladies are not only interested to know what their husbands are doing but are also interested in International Law. It is in our homes and in our hearts that public opinion originates and it is the ladies who hold sway in the home. I am most grateful for the generous and kind tributes paid to me to-night. But do not think that my work and that of my fellow-officers has made this great difference to the reputation and prestige of the Grotius Society. That is the effect of the recent developments which have driven home to all the necessity for International Law."

"I should now like to turn to our Host—Gray's Inn. It has always given us a welcome. We as a Society owe a deep debt of gratitude to the Inns of Court for the help and hospitality they have given us."

PART II

**PAPERS READ BEFORE THE SOCIETY
IN THE YEAR 1948**

THE GROTIUS SOCIETY

HUMAN RIGHTS

Discussion opened by Mr. W. ERIC BECKETT, C.M.G., K.C.

4th February, 1948.

SIR CECIL HURST, *President of the Society, in the Chair.*

SIR CECIL HURST: The large audience here today, which I am glad to welcome, is a tribute to the topic under discussion. Some of you may have taken notice of my plea at the Grotius International Law Conference of last July, that the question of human rights is of tremendous importance to all of us. I urged you all to get copies of the British Draft of the Preamble to the International "Bill on Human Rights". I am sure that you will all be glad that Mr. Beckett is here to talk to us on this subject today.

MR. BECKETT: I am not reading a paper today. I am merely laying information before you and for this purpose I want to distribute copies of certain information. These are—

- (1) The Foreign Office Draft on Human Rights ;
- (2) The draft Declaration ; and
- (3) The draft text of the International Covenant on Human Rights which was drawn up at the last session of the Commission on Human Rights of the United Nations.

The first document may be held to express the official British view on the question of human rights but I want to make it clear that, apart from the views contained in them, what I am going to say now is my own opinion and should not be taken as an expression of official policy.

I wish to take two texts on which to base my remarks. The first is that I think human rights and freedoms are one of the few ideals for which the people of this country would fight, and for which it is worth fighting. The second is contained in a

paper presented by Judge Charles de Visscher to the Institute of International Law last August in which he stated that "respect for human personality is a great restraining influence on the executive and prevents the executive at home developing into tyranny and abroad into a machine of destruction." The Fascist or Nazi State may be defined as a State which would not recognise human rights.

The Charter of the United Nations, however, refers to human rights in about six places and refers to them as rights and freedoms regardless of colour, sex, race, religion or nationality. But the Charter does not define human rights, and the United Nations have set up a Commission to explore the fundamental rights and freedoms by States. Three other Committees or Sub-Committees have been set up, however,—one to examine the question of minorities, the second to consider the freedom of the press and the third to report on the status of women—and it has been questioned whether it was wise to set up at the same time these four Commissions covering such a wide field of inquiry. There is perhaps a justification for the Committee on the status of women because its activities go beyond the scope of the fundamental freedoms, but the Committee on minorities and the Human Rights Committee may be apt to get into each others' way. Moreover, the setting up of four bodies simultaneously imposes a great strain on countries regarding representation.

The Human Rights Committee uses the awful word "implementation," the meaning of which involves both "execution" and "enforcement." Execution means that States must take all steps necessary—by legislation or otherwise—to ensure that human rights are protected in their territory as required by their international obligations. Enforcement means the action to be taken against States to investigate allegations of violations and to prevent the violation of human rights in those States.

The Human Rights Committee adopted a text called a *Declaration* and a Text called a *Covenant*. Both are included in the International Bill of Rights. The Declaration is really a statement of ideals :—all men are born free, endowed with freedom of conscience ; everyone has the right to liberty of person, social security, asylum and so on. It may be said in favour of the Declaration that declarations such as the United States Declaration of Independence and the Declaration of the

French after the Revolution have acted as beacon lights. Moreover, States might agree on aims so simply stated while they would not accept more involved statements. Thus, States so fundamentally opposed in all their ideas as the United States and the U.S.S.R., may agree on such simple statements of ideals.

Since the Declaration is confined to statements of ideals there would be no question of enforcement. This is important because the U.S.S.R. for one would strongly object to enforcement. But there is a danger in the very simplicity of the Declaration. States will accept the simple statements, but they may not mean the same thing to different States—we all know that the United States and the U.S.S.R. have widely different views as to the meanings of “democracy” and “freedom of the press,” though they both profess devotion to these ideals. Procedure by declaration, therefore, means the adoption of statements which might be interpreted completely differently by different States. Nevertheless, the United States favour the Declaration because they fear that a more detailed legally expressed and legally binding instrument would be difficult to get accepted by Congress in view of their constitution.

The United Kingdom, on the other hand, do not consider that the Declaration will bring great progress. In fact, they think that it would merely be a battleground for different views of the terms contained in the Declaration. The United Kingdom realised that ideals like the right to work, social security and so on could not be included in a legally binding instrument, but thought that these could be dealt with by the specialised agencies and special conventions. The United Kingdom official philosophy is indicated in the draft resolution in Appendix 2 of the Geneva draft—in other words, if there was a binding Covenant we would be prepared to agree to the Declaration as well. The Declaration obviously could not create a legal obligation but the Covenant would.

There are difficulties about the Covenant, however, in particular, with regard to enforcement. We have to consider the most that States would be likely to accept in the way of control. The United Nations is not a calm judicial body: Emotions run high, and, though there is always a middle group who do go on the merits of the argument, a large number

of votes may be predicted on purely political grounds. This leads me to suggest that the more far-reaching provisions for enforcement which have been suggested do not take into account the realities of international life.

The objects of the Geneva meetings were to adopt a Declaration of ideals and to find a Covenant which would be legally binding. These proposals are not final, however, and some of the texts submitted show provisions in the Declaration which ought to be in the Covenant and provisions in the Covenant which ought to be in the Declaration ; while other texts, though interesting, are perhaps not very practical. They represent first tentative efforts.

I have tried to put all the information before the meeting in order that this question of human rights may be considered.

PROFESSOR NORMAN BENTWICH : I rise in support not of the word "implementation" but of the substance of the word which was dealt with in the Geneva Conference. I was in a working Committee on implementation dealing with the two meanings of the word. The Conference did not adopt the findings of the Committee but merely referred them. The Committee found that the two meanings of the word could only apply to a legally binding Covenant. The Committee said that there must be some independent body to deal with questions of human rights coming from groups or countries. There should be a permanent Committee to deal with such petitions involving serious violations of human rights and it should be on the lines of the Permanent Mandatory Commission. It would not have any power of sanction but it should have the right to bring serious questions to the United Nations. The other proposal was that the United Nations should set up a new International Court of Human Rights. This is a pet theory of the Australians—it was first raised in 1946 at an international meeting. It was very strongly opposed by the Soviet member. It was recognised however that use should be made of the International Court of Justice on these matters. France suggested the appointment of an Attorney-General at the International Court whose function would be to represent the group complaining of the breach of human rights. It was maintained

that it would not be fair to expect individuals to plead their own cases. You must not run the risk of allowing a State which has not adopted the Convention to take advantage of it. Enforcement would only be applied to protect the interest of those States who had adopted the Convention and who were themselves bound by it.

DR. F. R. BIENENFELD : The Secretariat of the United Nations wished to have a Convention concluded earlier or later. But the United States were afraid that, if the question of a Convention was brought up, Russia would insist upon enforcing questions such as equality of race or the colour bar. Great Britain, Australia, Canada, New Zealand, France and probably all the South American countries would adopt the Convention, but this would be of little use, if you cannot get the required two-thirds majority. It may take a long time to get it. With regard to the Declaration, this would be much less important than the Charter. You have already a sort of legislation in the Charter. So why have the Declaration as well ? In its present form, the Declaration is not in any shape or form suitable for international legislation. I was very much impressed by Mr. Beckett's statement that the provisions of the Charter provide for progress, but do not impose legal obligations. But I see various provisions which do. The only organ which can carry sanctions into effect is the Security Council. Thus we would be wise not to talk about sanctions in connection with the word implementation.

MR. L. C. GREEN : Mr. Beckett said that in the Declaration human beings are to be guaranteed asylum. But surely if the document intends to remove the necessity for asylum why weakly admit the possibility of defeat by providing for asylum ? In the draft Covenant, Article 18 on the right of assembly gives the police far too many rights. As regards declarations, the Soviet Constitution contained a declaration of rights which is probably more far-reaching than many ; but we all know what it means. We ought to have a document agreed to by all States with a *consensus ad idem* of human rights but unfortunately one of the States with most power does not possess the *consensus ad idem* required. Articles such as 2 and 4 which practically nullify each other will cut from top to bottom the value of the Covenant.

DR. EMIL ZASLAWSKI : I wish to speak in favour of the Declaration although I fear that it will meet with great opposition. You must have a list of human rights which are considered to be fundamental and you must define the minimum of human rights to be protected. If you have such a document and a procedure for dealing with petitions, you can uphold human rights without a Covenant. A Declaration could be agreed to by a two-thirds vote of the Assembly, but a Convention must be agreed to by every Nation. Thus there are almost insurmountable obstacles in getting a universal acceptance of the Convention.

DR. E. H. LOEWENFELD : My contribution is purely academic. I agree with all Mr. Beckett has said, but it is clear that we are up against retrograde opinions in the drafts. One of these opinions must be ascribed to the United States. It is impossible in any International Convention not to include rules of international law to which all members and their nationals must submit. Otherwise the enforcement of human rights would only be effective against foreigners. We have to consider three methods of approach :—(a) What are the individual rights to be dealt with ; (b) whether they are comparative and (c) whether they are political. We are not interested in declarations of right, for example the French Declaration of 1789, or the Declaration of the Pilgrim Fathers. The enforcement is the important point. With regard to individual rights, there is no question of enforcement. Here I might disagree with Mr. Beckett. The enforcement of individual rights is a matter for individual States not international bodies.

PROFESSOR H. LAUTERPACHT : I am glad to hear that it is the British Government's intention not to become a party to the Declaration unless the Covenant is also drawn up. I should like the British Government to say that they will not sign the Covenant unless there is to be sufficient enforcement. It has been suggested that the Declaration will have no legal standing ; so how can it be used as an instrument of interpretation of legal words ? There are no definitions in the Declaration, which is rather roughly concocted. The Covenant is a legally binding document. That is a great advance. It is not internationally enforceable. It is laid down that with regard to Federal States, their obligations shall be fulfilled merely by drawing the attention of their component States to parts of the

Covenant. It is significant that the most powerful Nations consist now of Federal States. From the point of view of international enforcement, the Covenant puts the burden on the General Assembly. It is lacking of the necessary force. There are, of course, difficulties in the way of enforcement. The United States and the U.S.S.R. are opposed to an effective right of Petition. There is a nucleus—composed of perhaps the majority of States—in the Human Rights Commission who are in favour of the enforceable protection of human rights. This has been the case of the United Kingdom from the very beginning. I suggest therefore that we concentrate on the essential requirements of a Bill of Rights worthy of that name and get all the States in favour of such a Bill to act together. The provisions of the Charter constitute a solid legal binding obligation and it is unfortunate that the Commission did not take action.

MR. BECKETT (in reply) : I think there is a general—or at least a big majority of opinion—that the right course is to have a legally binding Covenant and that will necessarily mean that you will not get all the world in at once. Professor Lauterpacht criticised the draft Covenant drawn up by the United Nations and criticised the lack of enforcement. But the enforcement provisions were purposely left out so that the Governments of the different countries could be consulted. With regard to definitions, the short Declaration does not help because such phrases as “freedom of the press” can mean quite different things in different countries. On the question of petitions, we must remember that there is no international law against champerty and maintenance. Many petitions might be sponsored by money supplied with no interest at all in human rights.

SIR CECIL HURST : Anyone reading a note of the speeches made today might be very despondent, but I am old enough to see how interest in the progress of international law topics has grown. Public opinion is making itself felt. Do not imagine that no progress is being made. This description of the difficulties that are being encountered is addressed to you as members of the Grotius Society because you can help.

THE TREATMENT OF ENEMY PROPERTY UNDER THE PEACE TREATIES OF 1947.

By DR. ANDREW MARTIN, Ph.D.

(Read before the Society on March 4, 1948)¹

In the Chair: SIR CECIL HURST, *President of the Society.*

1. This paper is not concerned with the highly controversial issue whether it is right or wrong that private property should be expropriated in partial satisfaction of a defeated State's duty to pay reparations. The politics, morals, and economics of the Peace Treaties will not, therefore, be criticized in the following pages. Considerations of space impose a further limitation; they do not allow the subject to be treated on a comparative basis, however tempting it may be to review in some detail the practice of Allied Courts and public authorities outside the United Kingdom. The ground to be covered is thus limited to the discussion of the nature and purpose of the expropriation of private enemy property; the examination of the relevant substantive provisions in the Peace Treaties and of their application in the United Kingdom; and the consideration of the remedies available to the expropriated owners.

2. The Peace Treaties under consideration are those concluded on February 10, 1947 with Italy, Rumania, Bulgaria, and Hungary.² The Peace Treaty concluded with Finland on the same day need not be considered since the Allied and Associated Powers have undertaken to restore all such Finnish property, rights, and interests as were subjected to control in Allied territory on account of Finland's participation in the war.³ All these Treaties came into force on September 15,

¹ The text has been brought up to date of publication.

² The following abbreviations will be used: I.T., Peace Treaty with Italy; R.T., Peace Treaty with Rumania; B.T., Peace Treaty with Bulgaria; H.T., Peace Treaty with Hungary; F.T. Peace Treaty with Finland; T.V., Peace Treaty of Versailles, 1919.

³ Art. 27.; F.T.

1947. Insofar as they relate to Italian, Rumanian, Bulgarian, and Hungarian property situate in the United Kingdom, they have become part of the law of England under the Treaty of Peace (Italy, Rumania, Bulgaria, Hungary, and Finland) Act, 1947⁴ and by Orders in Council made thereunder.⁵ The four Treaties provide uniformly that each of the Allied and Associated Powers shall have the right to seize, retain, liquidate, or take any other action with respect to all property, rights, and interests which, on the coming into force of the Treaty, are within its territory and belong to the enemy State or its nationals.⁶ In each Treaty these provisions appear under the general heading "Property, Rights, and Interests" and not in the chapters dealing with reparations. This arrangement is somewhat confusing; it creates the impression as though private property, rights, and interests were not directly involved in reparations. In reality, the right to expropriate enemy property is part of the reparations exacted; indeed, it is the only form of general reparations exacted by the Allied and Associated Powers other than the Soviet Union and the immediate neighbours of the enemy States.⁷ This is clear from the *travaux préparatoires*⁸; from an express provision of the Italian Treaty⁹; and from the rule common to all four Treaties

⁴ 10 & 11 Geo. 6.c.23.

⁵ Treaty of Peace (Italy) Order, 1948, Statutory Instruments 1948, No. 117. (Rumania) Order, 1948, Statutory Instruments 1948, No. 118. (Bulgaria) Order, 1948, Statutory Instruments 1948, No. 114. (Hungary) Order, 1948, Statutory Instruments 1948, No. 116.

⁶ Art. 79. I.T.; Art. 27. R.T.; Art. 25. B.T.; Art. 29. H.T. For the sake of brevity the right to "seize, retain, liquidate or to take any other action" will henceforth in this paper be referred to as "expropriation."

⁷ The category of neighbours entitled to reparations includes, in the case of Italy: Albania, Ethiopia, Greece, and Yugoslavia; in the case of Hungary: Czechoslovakia and Yugoslavia; in the case of Bulgaria: Yugoslavia and Greece.

⁸ Proceedings of the Conference of 21 Nations held in Paris, July 29–October 15, 1946; as yet unpublished, but available in the Foreign Office Library.

⁹ Art. 74. (D) (1) I.T.: "Claims of the other Allied and Associated Powers shall be satisfied out of the Italian assets subject to their respective jurisdiction under Article 29. of the present Treaty." There is no similar express statement in the other Treaties, but all of them include provisions identical with Art. 79. I.T.

that each Allied and Associated Power may apply the expropriated property or the proceeds thereof to such purposes as it may desire within the limits of its claims and those of its nationals against the enemy State or its nationals.¹⁰

3. In reserving the right to expropriate private enemy property by way of general reparations, the Allies have made a noteworthy departure from the precedent of the Peace Treaties of 1919. Under the Treaty of Versailles, the expropriation of enemy property in Allied territory was additional to, and not part of, reparations; the Treaty expressly excluded¹¹ the application of the provisions relating to reparations to enemy property, rights, and interests which were subject to expropriation in Allied territory; the only link with reparations was the rule that any surplus remaining after the satisfaction of the specific claims chargeable to private enemy assets was to be credited to Germany's reparation account. Whereas under the 1947 settlement the range of claims chargeable to such assets is unlimited,¹² under the Treaty of Versailles such claims were confined, in the first place, to compensation for damage to Allied property, rights, and interests in enemy territory, debts owing to Allied nationals from enemy nationals, and compensation for acts committed by enemy authorities between July 31, 1914, and the effective opening of hostilities; and in the second place, to compensation for unsatisfied claims arising from interference with Allied property, rights, and interests in the territory of Germany's allies.¹³

4. Whereas each Treaty specifies the amount of reparations due to the Soviet Union and to the group of Allied States above referred to as "neighbours",¹⁴ the claims of the remaining

¹⁰ Such claims also include debts, but do not include claims fully satisfied under the special provisions of the Treaties providing for the restitution of looted property and the restoration of, or compensation for, Allied property sequestered, confiscated, or destroyed in the enemy country during the war.

¹¹ Art. 242. T.V.

¹² Except for the claims referred to in note 10 *supra*.

¹³ It is interesting to note that the Versailles precedent for the proposition that enemy private property may be seized in satisfaction not only of claims against the owner's State, but also of claims against an ally of the owner's State has not been followed in the present settlement.

¹⁴ See note (7) *supra*.

Allied and Associated Powers (including the United Kingdom) are not specified. The right of these Powers to claim general reparations has never been expressly abandoned ; on the other hand, it has not so far been proceeded with. The fact that the terms of reference of the Inter-Allied Reparation Agency¹⁵ have been confined to reparations from Germany¹⁶ tends to show that it is not intended to resort to inter-Allied machinery in the establishment of such claims for reparations as may yet be made under the Paris Treaties ; the matter hangs fire pending bilateral arrangements, if any, between the Allied and Associated Powers and the ex-enemy States concerned. In the United Kingdom, the Treaty of Peace Orders¹⁷ by which a statutory charge has been created on all enemy property liable to expropriation, have reserved the full, and virtually unlimited, range of claims outlined in the Treaties. There are, however, two pointers in the direction that the claims ultimately to be charged against these assets will be confined to the category of debts. One of these is the Financial Agreement with the Italian Government of April 17, 1947¹⁸ in which the United Kingdom expressed its willingness¹⁹ to relinquish all claims against Italian property in the United Kingdom other than " the debts due from Italy to persons in the United Kingdom." The other instrument is the Distribution of German Enemy Property Act, 1949²⁰ under which German enemy property in the United Kingdom is earmarked for distribution "to persons who establish claims in respect of German enemy debts."²¹ Neither of these two instruments is conclusive evidence of any intention to relinquish all claims other than

¹⁵ This agency was set up under an " Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold" made in Paris on January 14, 1946 ; Treaty Series No. 56 (1947) ; Cmd. 7173.

¹⁶ Art. 2. of the Paris Agreement.

¹⁷ See note (5) *supra*.

¹⁸ Treaty Series No. 31 (1947) ; Cmd. 7118 ; Agreement No. III.

¹⁹ The provisions of this Agreement do not appear to have become part of the law of England. *Republic of Italy v. Hambros Bank, Limited and Another* (1950) 66 T.L.R. 468 and ff.

²⁰ 12, 13 & 14 Geo. 6. c. 85.

²¹ s.1. (1) ; for the definition of " German enemy debt " see s.8 (1).

debts in respect of Rumanian, Bulgarian, and Hungarian private property ; as, however, the value of such property (less the costs of liquidation and the value of property to be released *ex gratia*)²² is reputed to fall short of the debts due to persons and corporations in the United Kingdom, the question may well be of academic interest only.

5. Enemy assets or the proceeds thereof which are in excess of the amount of claims chargeable to them must, under a provision common to all four Treaties, be returned.²³ This is a noteworthy departure from the 1919 settlement which provided that the excess value of enemy assets must be credited to the reparations account of the enemy State concerned.²⁴ The Treaties do not say to whom excess assets, if any, shall be returned, but it would seem that they are returnable direct to the owners and not to the owners' State. There is nothing in the text of the Treaties to support the view that a compulsory assignment, if only for the limited purpose of collection, was intended for the benefit of the enemy States. Likewise, there is nothing in the texts to suggest that the enemy States are entitled to notice identifying the owners of such assets as may be returned.²⁵ Indeed, it is arguable that, in the case of excess property as distinct from property released *ex gratia*, no Allied or Associated Power is entitled to hand over the assets to the owner's State, or even to disclose to this latter the identity of the owner. Admittedly, the Treaties uniformly provide that the owner shall have no rights with respect to his property in Allied territory except those which may be given him by the *lex situs* ; but that provision appears in the context of the "liquidation and disposition" of enemy property and cannot be extended to property which, being "excess" property, is not subject to such liquidation and disposition.²⁶

²² See § 14 *infra*.

²³ This rule is incorporated in the Articles referred to in note (6) *supra*.

²⁴ The departure is logical ; under the 1947 Treaties, the expropriation of private enemy assets serves to satisfy, in addition to debts, also claims in the nature of general reparations.

²⁵ For a fuller treatment of this question see the present writer's article on "Private Property, Rights and Interests in the Paris Peace Treaties" in 24 B.Y.I.L., pp. 291-292.

²⁶ In the Financial Agreement with Italy of April 17, 1947 (cf. note (18) *supra*), the British Government undertook not to return Italian

6. Under the Treaty of Versailles²⁷ industrial property rights were to be re-established or restored, reciprocally by all belligerents, in favour of the persons entitled to the benefit of them on the commencement of the state of war. The present Treaties say the opposite: they exclude any obligation to return such property even if it were "excess" property, or indeed, to include industrial property in determining the amount of returnable "excess" property. In the United Kingdom, the Peace Treaty Orders have since made it clear that it is not intended to expropriate industrial property but only to impose such limitations, conditions, and restrictions as may be necessary in the national interest; and to do so with effect retrospective to the date when the enemy State concerned first became subject to the Trading with the Enemy Act, 1939. Power has also been taken to continue in force certain sections of the Patents, Designs, Copyright, and Trade Marks (Emergency) Act, 1939 and to refuse or revoke the grant of patents for any invention relating to the war materials specified in the Annexes to the Peace Treaties.²⁸ In relation to Italy, the position has been further simplified by the general exemption, on February 5, 1949, from the charge imposed by the Peace Treaty (Italy) Order, 1948 of all industrial property rights (including applications pending) belonging to Italy and Italian nationals.²⁹ Rumanian, Hungarian, and Bulgarian industrial

assets to the original owners except in cases approved by the Italian Government; and to supply the latter with lists identifying the owners. Since this Agreement has not been judicially recognized as part of the law of England, the right of the British Government to hand over the assets to the Italian State and to disclose the names of the owners is open to some doubt. The moment the British Government relinquished all claims against Italian property in the United Kingdom other than debts, all assets surplus to the amount of such debts became "excess" assets in the meaning of Art. 79 (1) I.T. and as such returnable direct to the owners. The practical importance of this issue would appear to be confined to Italian nationals living outside Italian jurisdiction and therefore not subject to foreign exchange regulations obtaining in Italy.

²⁷ Art. 306. T.V.

²⁸ The power to refuse or revoke patents has also been reserved in relation to Finland, although Finnish industrial property is not otherwise subject to any charge; Treaty of Peace (Finland) Order, 1948; s.4.

²⁹ Trading with the Enemy and Peace Treaty Legislation in Force in the United Kingdom on September 1, 1949; H.M.S.O., 1949; p. 86.

property is still subject to the charge imposed by the Peace Treaty Orders.

7. The Treaties enumerate certain categories of property which, although the assets are *prima facie* "enemy" and situated in Allied territory, are not liable to expropriation. These are as follows :—(a) Property of the enemy Government used for consular or diplomatic purposes ; (b) Property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes ;³⁰ (c) Property of natural persons who, although they are enemy nationals, are "permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory" ; other than property which, at any time during the war, was subject to measures not generally applicable to the property of persons of the same enemy nationality resident in the same territory.

The application of the first part of the rule presents comparatively little difficulty. The date to which the term "permitted to reside" refers can be no other than the date when the Treaties came into force, i.e. September 15, 1947. Actual residence is not required ; permission to reside is sufficient. What is meant by "permission to reside" must be determined by reference to the aliens' regulations obtaining in the country concerned. According to the practice of the British Home Office, this would seem to include (i) all aliens permitted to accept employment and (ii) all aliens not classified as "temporary visitors." The second part of the rule, owing to its ambiguous terminology, bristles with difficulties. Firstly, what is meant by "measures not generally applicable" to the property of enemy subjects of the same nationality ? If it had been intended to exclude from the exemption property which was "subject to control by reason of a state of war",³¹ there was no reason why that term employed in a similar context in the same article of the Treaties should not have been used. It would seem to follow logically that "measures not generally

³⁰ The criteria applied to these terms by English law are by no means universally accepted outside the United Kingdom. Dr. F. A. Mann in "Enemy Property and the Paris Peace Treaties," L.Q.R., October, 1948, p. 499, rightly warns against any tendency to assign to these terms the special meaning which they bear in England.

³¹ Cf. § 12.. *infra*.

applicable" mean special measures directed against individual enemy subjects wherever they may have been resident during the war. In the United Kingdom, such special measures include a direction by the Board of Trade that any person specified in the order, wherever resident, shall be deemed to be an enemy for the purpose of the Trading with the Enemy Act, 1939; and the subjection to control measures of the property of enemy nationals resident in the United Kingdom or elsewhere outside enemy territory.³² The second difficulty arises from the uncertainty whether the phrase "in the same territory" refers to the country where the enemy national was permitted to reside or to the country where the property was located. It is submitted that the first interpretation should be preferred.³³ The reason for the exemption is what may be termed "a presumption of loyalty" in favour of enemy nationals who, during the war, resided in United Nations territory; and the host State was in a better position to judge the sufficiency of that loyalty than a State which had no other point of contact with the person concerned than the location of his property. It follows that the property in the United Kingdom of an enemy national who was resident in some other United Nations territory must go free unless the property of the same person located in the country of his residence was subjected to special measures. Since the entry into force of the Peace Treaties, the scope of the exemption considered in the present paragraph has been widened in the United Kingdom, to that extent that the Administrators of Enemy Property have released from the charge the property of Italian, Rumanian, Bulgarian, and Hungarian nationals who were, on February 2, 1948, the date when the Treaty of Peace Orders came into force, resident in territory which has at no time been enemy territory as defined by the Trading With the Enemy Act, 1939. This further exemption does not cover property which has at any time been subject to measures of control under s.7 of the Act; the effect being that the charge will not normally³⁴ attach to the property

³² ss. 2 (2); 3 (A); 7 (8) of the Trading with the Enemy Act, 1939.

³³ For the opposite view see *Mann, l. cit.* p. 509.

³⁴ Such property may still be caught in the net if, during the war, it was vested in a British Custodian, e.g. because the owner's name appeared in a Schedule to one of the numerous Trading with the Enemy (Specified Persons) Orders.

of enemy nationals who, during the war, resided in neutral territory; (d) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and the enemy State concerned or arising out of transactions between the Government of any Allied or Associated Power and the enemy State since the conclusion of an armistice. In view of the somewhat ambiguous formulation of the first part of this rule, it should be stressed that the exemption covers only property rights arising from new (i.e. post-armistice) transactions; it does not, for instance, extend to such instalments of a pre-war debt or such income of a pre-war investment as may have fallen due since the resumption of trade and financial relations; (e) Literary and artistic property rights.³⁵ In the United Kingdom, the Treaty of Peace Orders have added two further categories to the list of exemptions, viz. property rights or interests acquired under any authority given under the Trading with the Enemy Act, 1939; and property rights or interests which would be forfeited or determined if they became charged. This second category is of particular importance to beneficiaries under wills, trusts, pension schemes and the like which contain a forfeiture clause for the event that the property should become vested in, or charged in favour of, some other person than the beneficiary.^{35a}

8. Subject to the exemptions considered in the preceding paragraph, the Treaties operate with a combination of three tests to be applied to the question whether any particular asset constitutes enemy private property liable to expropriation. These are, first, the nationality of the owner; secondly, the location of the property; thirdly, the relationship between an enemy national and the property. These tests are supplemented by a presumption to the effect that enemy property which has been subject to control by reason of a state of war existing between an enemy State and the Allied or Associated

³⁵ In the case of Italy there are additional exemptions covering the property in ceded territories of Italian nationals and the property of natural persons residing, and corporations or associations having *siège social*, in ceded territories or in the Free Territory of Trieste; see sub-clauses (f) — (g) of Art. 79 (6) I.T.

^{35a} *Re Gourju's Will Trusts* (1943) Ch. 24; *Fraenkel v. Whitty* (1947) 63 T.L.R. 580; *Wigham, Bradbury v. Cambridge University* (1947) 2 All E.R. 647.

Power having jurisdiction over the property, is deemed to be property liable to expropriation.³⁶ These three tests and the presumption will be examined in the next following paragraphs.

9. No property is liable to expropriation unless on September 15, 1947, it belonged to an enemy State or to an enemy national. In the case of natural persons, nationality must be determined by reference to the municipal law³⁷ of the enemy State concerned. In the case of property which has been subject to control, the onus of proving that the owner was not an enemy subject at that date will, at any rate in practice, rest on the person claiming for release; in the case of property which had not been subject to such control prior to the entry into force of the Peace Treaties, the onus of proving the owner's enemy nationality must rest on the Government claiming the right to expropriate. Residence in an enemy State at any time during the war or on the entry into force of the Peace Treaty raises no presumption of enemy nationality.³⁸ Persons, who on September 15, 1947 were stateless, cannot be treated as enemy nationals, not even if during the war they were resident in enemy territory and prior to their deprivation of nationality were nationals of an enemy State. The Treaties contain no special rules concerning the nationality of corporations. In the United Kingdom, the Treaty of Peace Orders uniformly

³⁶ *Mann, op. cit.* p. 501 takes the view that enemy property which has been subject to control is a type of property which the Allies are entitled to liquidate as a matter of course. In the view of the present writer the special reference to such property in the Peace Treaties does no more than raise a presumption, which can be rebutted on proof that, for instance, the property did not on the entry into force of the treaties belong to an enemy national; or that it belonged to an enemy national other than the person who was believed to be the owner when the property became subject to control. For further observations on this subject, see § 12. *infra*.

³⁷ *Stoeck v. Public Trustee* (1921) 2 Ch. 67, 82. *Re Chamberlain's Settlement* (1921) 2 Ch. 533, 544. The same principle of international law has been asserted by The Hague Convention on Conflict of Nationality Laws of April 12, 1930, which is not however in force in the United Kingdom.

³⁸ Such a presumption is now enacted in s. 8 (2) of the Distribution of German Property Act, 1949. This enactment is not, however, applicable, not even *per analogiam*, to Italian, Rumanian, Hungarian or Bulgarian property.

provide that the expression "nationals" shall in relation to any State include "any body of persons constituted or incorporated according to the laws of that State." The tests of *siège social* and control have been wholly abandoned.³⁹ This leads to the iniquitous result that, for instance, the property in the United Kingdom of the Rumanian subsidiary of an English company is liable to expropriation. There are two ways out of this situation: the one is remedial legislation, introducing the test of ultimate beneficial ownership;⁴⁰ the other would be the liberal use by the Board of Trade of its unlimited power granted by the Peace Treaty Orders to direct the release of any "enemy" property from the charge imposed by the Order.⁴¹

10. Property, rights and interests which on September 15, 1947 were not within the territory of an Allied or Associated Power are not liable to expropriation. The Treaties do not say whether "territory" also includes colonial and other territories in which an Allied or Associated Power exercises territorial jurisdiction. As, however, all four Treaties operate with the presumption⁴² that property which has been subject to control by reason of a state of war existing between the enemy State and the Allied or Associated Power "having jurisdiction over the property", the missing colonial clause may be implied. In the United Kingdom, the Treaty of Peace Orders have removed all possible doubt by expressly covering all enemy property, rights and interests within His Majesty's Dominions

³⁹ Except in the case of corporations or associations having *siège social* in ceded territories or in the Free Territory of Trieste; Art. 79 (5) (g) I.T.

⁴⁰ Under s.1 (7) of the Distribution of German Enemy Property Act, 1949, if it appears to the Board of Trade that on September 3, 1939 a German company was controlled, directly or indirectly, by a United Kingdom company, the Board may treat the property of such German company, to such extent as the Board think fit having regard to the extent of such controlling interest, as property to which, but for the operation of the Trading with the Enemy Act, the United Kingdom company would have been entitled. As a result, British concerns which had subsidiaries in Italy, Rumania, Hungary or Bulgaria are at a definite disadvantage in comparison with British companies having had German subsidiaries.

⁴¹ s.1. (2) of the Treaty of Peace Orders.

⁴² See § 12. *infra*.

and Protected Territories, excepting the self-governing Dominions, but including territories which have been under a League mandate or are being administered under the trusteeship system of the United Nations⁴³. The question whether the legal *situs* of any given property, right or interest is within the territory of an Allied or Associated Power must, in case of dispute, be determined by reference to the appropriate conflict rule.⁴⁴ We know from the disputes which revolved around the Peace Treaties of 1919 that difficulties are most likely to arise in relation to shares, debts, and other choses in action.⁴⁵ In the United Kingdom, the determination of the *situs* of shares should present comparatively little difficulty. Shares in an English limited company are situate in England.⁴⁶ Shares (other than bearer certificates) are deemed to be situate at the place where the register of the shareholders is kept; and only if there is any choice between several registers at which a particular certificate can be transferred, will the location of the certificate itself determine the issue.⁴⁷ Bearer shares are normally⁴⁸ susceptible to treatment as corporeal things⁴⁹ and their *situs* is determined by the location of the certificates. As regards debts, the general rule is that they are located in the

⁴³ S. 1 (3) of, and the Second Schedule to, the Treaty of Peace Orders. For a different drafting technique leading to substantially the same result, see s.4. of the Distribution of German Property Act, 1949.

⁴⁴ See *Rabel*, "Situs Problems in Enemy Property Measures"; in *Law and Contemporary Problems*, Duke University, Vol. XI.

⁴⁵ Under the Treaty of Versailles (Part VIII, Section I, Annex III.), additional difficulties arose from the provision whereby Germany purported to cede, by way of reparations, all merchant ships in excess of 1600 tons gross not only if such ships were owned by German nationals, but also if they did, or were entitled to, fly the German flag. The Treaties of 1947 operate exclusively with the test of the nationality of the owner. See McNair, "Legal Effects of War", Cambridge University Press, 1948, pp. 394-395 and pp. 433 and ff.

⁴⁶ *Baelz v. Public Trustee* (1926) Ch. 863.

⁴⁷ *R. v. Williams* (1942) A.C. (P.C.) 541, 549.

⁴⁸ The rule is subject to such qualifications as the company's articles of association or the law under which the company was formed may impose.

⁴⁹ *Wolff*, *Private International Law*, p. 557.

place where the debt is "properly recoverable."^{49a} This is normally, but not necessarily, the place where the debtor resides.⁵⁰

11. Assets which, on September 15, 1947, did not, in the language of the Treaties, "belong to" an enemy State or an enemy national cannot be expropriated. In the United Kingdom, the Treaty of Peace Orders also purport to charge property which on that date was "held or managed on behalf of" an enemy State or its nationals. If this addition were intended to cover more than property held by an agent of whatever nationality of an enemy Government or subject, it would have to be treated as *ultra vires*.⁵¹ The term "belong" creates considerable difficulty since it does not indicate whether it refers to legal or beneficial interest.⁵² In the context of the present Treaties, this difficulty has not yet been judicially resolved, but it is submitted that the second interpretation should be preferred. The first interpretation would lead to the result that where, for instance, under a trust administered in Rumania, the Rumanian trustee had invested trust funds in the United Kingdom, such funds would be liable to expropriation even if all the beneficiaries were British and Swedish nationals; conversely, in the case where under a trust administered in Switzerland, the Swiss trustee invested trust funds in the United Kingdom, such funds would go free even if all the beneficiaries were Rumanian nationals.⁵³ These highly unsatisfactory results cannot be justified by the argument⁵⁴ that what an

^{49a} *Swiss Bank Corporation v. Bohmische Industrial Bank* (1923), 1 K.B. 673, 678.

⁵⁰ If, for instance, an English company having its registered office in the United Kingdom owes a sum of money under a pre-war contract between its branch office in the Argentine and an Italian national, it will depend on the terms of the contract whether the debt was payable in the Argentine or in the United Kingdom; in the former case, the debt would not be "situate" in the United Kingdom.

⁵¹ *Mann, l. cit.* p. 512.

⁵² The same difficulty did not arise in any comparable measure under the Treaties of 1919. See *Mann, l. cit.* p. 513.

⁵³ The situation would, of course, be different under a trust administered in the United Kingdom because, as *Mann, l. cit.* p. 512. rightly points out, the beneficial interest of enemies in the trust would constitute a right or interest subject to the charge.

⁵⁴ See *Mann, l. cit.* p. 513.

Allied Power (in the example given : the United Kingdom) might lose by the escape from the net of enemy property may well be compensated by Allied or neutral property being caught in it. The issue turns not on financial probabilities, but on a question of principle. Reparations are to be exacted from enemies and not from neutrals, let alone from Allied nationals. Moreover, if property beneficially owned by either neutral or Allied nationals could be expropriated, they would be placed in a worse position than expropriated enemy owners ; for under a uniform provision of the Treaties, each enemy State is under an obligation to give compensation for private property expropriated in the territory of an Allied or Associated Power, but such compensation is due only to the nationals of the enemy State concerned. Equally unconvincing is the technical argument that it is always easier to ascertain the legal rather than the beneficial owner. The answer to that is that, since the presumption that all assets subjected to control during the war are assets liable to expropriation, the onus of proving that such assets were beneficially owned by non-enemies will rest upon the claimants and not upon the authorities of the Allied or Associated Power concerned. The adoption of the test of beneficial ownership will not, of course, cure the injustices which arise from the Treaties applying a strict nationality principle to companies incorporated under the laws of enemy States ; but these injustices would not be cured by the adoption of the test of legal ownership either.⁵⁵

12. The four Treaties uniformly provide that where, by reason of a state of war existing between the Allied and Associated Power having jurisdiction over the property and the enemy State concerned, property of that State or its national has been subject to control, such property "shall be deemed" to be property liable to expropriation. In the United Kingdom, the Treaty of Peace Orders use stronger language. They provide that the enemy property, rights, or interests subject to the charge "shall include" (i) any such property, rights or interests in the possession of a Custodian ; and (ii) property, rights or interests which have been subject to control by reason of a state of war with the enemy State concerned. These provisions are open to two objections. Firstly, by using the

⁵⁵ See § 9. *supra*.

phrase "shall include" the Orders purport finally to determine the character and fate of property in regard to which the Treaties have only raised a presumption ("shall be deemed to include"); moreover, in the rule under (ii) they purport to catch all property which has been subject to control without making it clear (as rule (i) does by the use of the words "any such") that only enemy property is affected. It is submitted that both of these departures from the language of the Treaties are *ultra vires* and that the Orders should be construed in strict reliance on the text of the Treaties. The effect of the presumption raised by the Treaties is no more than that it reverses the burden of proof. In the case of property which has been subject to control under Allied legislation on trading with the enemy, it is not for the Allied or Associated Power concerned to prove that the property belongs to an enemy national or that it is situate within the territory of the expropriating State. It is for the person claiming release to prove that he was not on September 15, 1947 an enemy national; or that the property was not, on that date, located (in the legal sense of the term⁵⁶) within the territory of the expropriating State. If this burden of proof is discharged, the property must be released. To attribute any stronger effect than the one just indicated to Allied legislation on trading with the enemy would be tantamount to breaking up the uniform regulation intended by the Treaties for there were as many different legislations on the control of enemy property during the war as there were Allied and Associated Powers. In the United Kingdom, the lack of finality of such legislation is evident from the language of s.7. of the Trading with the Enemy Act, 1939, which makes it clear that all powers conferred upon the Board of Trade, and the Custodians acting under its authority, in the matter of the collection of enemy debts and the custody of enemy property were given solely "with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace."

Whether the phrase "subject to control," as used in the Treaties should, as regards property located in the United Kingdom, be interpreted as meaning exclusively control under

⁵⁶ See § 10.

s.7. of the Trading with the Enemy Act 1939 ;⁵⁷ or should be taken to cover also sections 3, 4, and 5. of the same Act and any Orders and Regulations made under the Emergency Powers (Defence) Acts, 1939-40, appears to be immaterial. The crucial fact is that no part of the United Kingdom legislation on trading with the enemy has had the effect of either so petrifying or so changing the character and incidents of any property, rights or interests as to preclude a claimant from proving that property which has been subject to control was not, on the entry into force of the Treaties, enemy property liable to expropriation. In cases where "control" was confined to precluding the possibility of property, rights and interests being dealt with without the consent of the Board of Trade, it could affect neither the legal nor the beneficial title. In cases where "control" took the form of vesting the property, or the right to transfer the property, in a custodian, the vesting order was "of the like purport and effect as a vesting order as respects property of the same description made by the High Court under the Trustee Act, 1925"⁵⁸ i.e., it did change the incidents of legal ownership, but left the beneficial interest in abeyance. To sum up : a vesting order or, even without such an order, the provisions of s.4. of the principal Act and s.4. of the Trading with the Enemy (Custodian) Order, 1939 prevented an enemy owner from effecting a valid voluntary transfer of property located in the United Kingdom ; they did not, however, prevent the transmission of property as a result of the owner's death.⁵⁹ If therefore the property passed *mortis causa*, to a non-enemy national or to an enemy national entitled to exemption, prior to the entry into force of the Treaties or, indeed prior to the effective date of the charge created by the Treaty of Peace Orders,⁶⁰ the property should be released. The

⁵⁷ Some colour is lent to this view by sub-clause (c) (ii) of the definition of German enemy property in s.8 (i) of the Distribution of German Property Act, 1949.

⁵⁸ s.2 (iii) of the Trading with the Enemy (Custodian) Order, 1939 and ss. 44-49 of the Trustee Act, 1925.

⁵⁹ In the same sense *Mann, l. cit.* p. 511.

⁶⁰ The Treaty of Peace Orders came into force on February 2, 1948. Prior to that date, the provisions of the Peace Treaties were not part of the law of England ; the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary, and Finland) Act, 1947 which came into force on April 29,

same applies if, before that date, the original owner of the property subjected to control lost his enemy nationality.⁶¹

13. In providing procedural remedies against the expropriation of enemy property, the present Treaties differ substantially from the Treaties of 1919. Under the previous settlement, such disputes were referred to Mixed Arbitral Tribunals to which both Governments and private owners had access; these Tribunals were also invested with power to review the decision of any municipal court on any matter covered by their jurisdiction and to give redress where such a decision was inconsistent with the provisions of the Peace Treaties.⁶² Under the Treaties of 1947, the mixed arbitral tribunals, now re-named Conciliation Commissions, have no jurisdiction in cases concerning the expropriation of enemy property;⁶³ such cases are reserved for a procedure which was designed, primarily, for the settlement of inter-state controversies relating to

1947 was an enabling act; it did not by itself bring the Treaties into effect in the United Kingdom. Since the Treaty of Peace Orders do not purport to claim retrospective effect, it may well be argued that the charge created by them affects only the property of persons who, on February 2, 1948, were enemy subjects. If they were, the property is charged by express provision of s.1 (2) of the Orders, with the amounts due from the enemy State concerned on September 15, 1947.

⁶¹ The observations of Roxburgh, J. in *Fraenkel v. Whitty* (1947) 63 T.L.R. 580, to the effect that, once money has become payable to the Custodian under the Trading with the Enemy (Custodian) Order 1939, its character is fixed and it must be paid to the Custodian, whatever may be the subsequent history of the person to whom the money was payable in the first place cannot, it is submitted, be taken to mean more than that a change of residence during the war cannot affect the Custodian's right to claim further payments. The Custodian's conservatory powers with which alone the decision was concerned, were given, in the language of s.7 of the Trading With the Enemy Act, 1939, "in contemplation of arrangements to be made at the conclusion of peace" and were without prejudice to such arrangements.

⁶² For a fuller discussion of this subject see *Martin, l. cit.* pp. 298-300.

⁶³ Their jurisdiction is confined to those provisions of the Treaties relating to the restitution and restoration of United Nations property, contracts, industrial, literary and artistic property, insurance, negotiable instruments, periods of prescription, war-time judgments of courts in enemy States, and, in the case of Italy, the economic and financial provisions relating to ceded territories.

political and economic questions. Under this procedure the settlement of disputes, including those relating to expropriation, is in the first instance, the function of the Heads of the Diplomatic Missions of the Principal Allied Powers in the ex-enemy capitals ; and, in the second instance, the function of a set of commissions which have a semi-administrative, semi-judicial character. The character of the procedure is diplomatic ; it is not easily adaptable to the settlement of individual claims and it is most unlikely that private claimants will ever gain direct access to this machinery. The only direct remedy available to private claimants is therefore their undoubted right of access to the municipal Courts of the expropriating country ; and, in such cases where the *situs* of an asset is outside the expropriating country, such protection as may be available under the *lex situs*.⁶⁴

14. Apart from legal remedies proper such as an action for the recovery of property which was expropriated contrary to the provisions of the Peace Treaties, there is available a subsidiary remedy in the form of an application to the proper Allied authority (in this country : the Administration of Enemy Property Department of the Treasury and Board of Trade) for the release of the property *ex gratia*. In the United Kingdom, the Treaty of Peace Orders contain a uniform provision⁶⁵ whereby any property, rights or interests subject to the charge, or the proceeds thereof, may be released by the Administrator concerned on the direction of the Board of Trade. This power vested in the Board of Trade is discretionary and unfettered by any international obligations in relation to the other Allied and Associated Powers. In May, 1948, the Board of Trade formulated and made public a set of rules⁶⁶ which had the character of an authoritative statement of the policy by which, in the exercise of its discretion, the Board would thenceforth be guided. With some additions concerning the estates of deceased victims of persecution, these rules are identical with those set out in Article 6(F) of the " Rules of

⁶⁴ E.g. where an Administrator of enemy property in the United Kingdom must try to enforce outside the United Kingdom a vesting order purporting to transfer to him a share in a foreign company.

⁶⁵ s. 1(2).

⁶⁶ Circular Letter, Reference No. T/E 51/P.

Accounting for German External Assets" approved by the Assembly of the Inter-Allied Reparation Agency on November 21, 1947.⁶⁷

Under these rules, the Board of Trade requires to be satisfied : I. *in the case of living enemy nationals* : that the applicant (i) was deprived of liberty pursuant to any law decree or regulation which discriminated against religious or racial groups or other organizations, *and* (ii) did not enjoy full rights of citizenship of the enemy country of his residence at any time between 1st September, 1939 and the abrogation of such law, decree or regulation, *and* (iii) has left that country, or intends to leave there within a reasonable time, to establish his permanent residence outside enemy or ex-enemy territory, *and* (iv) was not disloyal to the Allied cause during the war, *and* (v) has a case which merits favourable consideration. II. *in cases where heirs or legatees claim the estates of deceased victims of persecution* : that (a) the deceased himself satisfied the conditions of (i) and (ii) of I above regarding deprivation of liberty and loss of full civil rights, *and* (b) his death occurred before the end of active hostilities in the enemy country of his residence, *and* (c) the heirs or legatees are resident, or intend to reside, outside an enemy (or former enemy) country.

It will be noted that in both cases I and II the conditions are cumulative⁶⁸ and that, under I, when all other conditions have

⁶⁷ In the context of German external assets, Art. 6 (F) of the Rules of Accounting had the effect that German enemy property released under the article was not chargeable against the share in German reparations of the signatory State concerned. It is worthy of note that several signatory Powers, including the United States, have continued to follow a far more liberal *ex gratia* policy than the one set out in the Rules of Accounting.

⁶⁸ In the United States, it is sufficient to show *either*, that the claimant (or his predecessor in title) was deprived of life or substantially deprived of liberty ; *or* that he has at no time between December 7, 1941 and the abrogation of the discriminating laws, enjoyed full rights of citizenship. Moreover while the British rules take no notice of political persecution, the American rules also afford protection to the victims of political discrimination ; see s.32 (a) (2) ; sub-divisions (C) and (D), of the (U.S.) Trading with the Enemy Act, as amended by Public Law No. 671.

been satisfied, the Board still reserves a discretion to find that the case does not merit favourable consideration.⁶⁹

The virtually unlimited discretionary powers conferred upon the Board of Trade by the Treaty of Peace Orders have been widely and, it is submitted, justly criticized on the ground that they are not subject to appeal, not even by an administrative tribunal. Where private rights are made the subject of such powers, and particularly where the exercise of the powers involves adjudication on complicated sets of facts and even more complicated legal rules made and enforced in foreign countries, the case for an impartial tribunal is, on constitutional grounds, exceptionally strong. Admittedly, the discretion of the Board is not immune from judicial review by orders of prohibition and *certiorari* in cases where the claimant is able to show that an infringement of the principles of natural justice has occurred;⁷⁰ and it would seem that the ordinary Courts can also be invoked for the determination of facts which are not themselves subject to discretionary evaluation by the Board, but must be established before the machinery of the *ex gratia* policy can be set into motion.⁷¹ As, however, only exiles from their own

⁶⁹ These features of the policy were subjected to a considerable amount of criticism during the debate in the House of Commons on the Distribution of German Enemy Property Bill. *Hansard*, Vol. 469, No. 185 (November 15, 1949) and Vol. 470, No. 193 (November 25, 1949) *passim*.

⁷⁰ "The power of obtaining an order of *certiorari* is not limited to judicial acts or orders in a strict sense, that is to say acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties." *Local Government Board v. Arlidge* (1915) A.C., 120 at p. 140.

⁷¹ E.g. where A, a person *prima facie* entitled to the benefits of the *ex gratia* policy claims that he is owner of property held by the Custodian in the name of B, a person not so entitled. Such cases are most likely to occur in connection with the rules relating to the estates of deceased victims of persecution. The Board takes the view that where the testator died after the end of hostilities, nobody is entitled to claim for an *ex gratia* release, not even an heir or legatee who, in his own person, is able to satisfy the requirements of the *ex gratia* policy. It is submitted that, where the death occurred prior to the entry into force of the Treaty of Peace Orders, and under the law of the domicile the

countries are eligible for the benefits of the *ex gratia* policy, it is most likely that very few of them will be able to afford the costs involved in litigation.⁷²

property devolved *ipso facto* at the moment of death to a person who is able to satisfy the requirements of Case I., the fact that on the entry into force of the Treaty of Peace Orders the property "belonged" to the legatee, i.e. a "living enemy national," can and should be determined by the Courts in order to compel the Board to exercise its discretion on the merits of the legatee's claim.

⁷² In the course of the debate in the House of Commons referred to in note⁶⁹ *supra*, the administration of the *ex gratia* policy was criticised mainly on two grounds. Firstly, it was pointed out that the Board insisted on documentary evidence of a kind which, in view of conditions existing in Eastern Europe during and since the war, was not readily (if at all) accessible to the claimants. Secondly, examples were quoted to show that, in its interpretation of the term "deprivation of liberty," the Board refused to be guided by the meaning of that term in ordinary English usage and particularly by the meaning judicially attributed to it in cases of false arrest and malicious prosecution. In practice, the Board required evidence of incarceration in a prison or in a concentration camp for a prolonged period; and even in such cases required strict proof that such deprivation of liberty was inflicted by the then lawful authority in the enemy State concerned and that it was suffered by the victim in his capacity as a member of a persecuted religious or racial group. *Hansard, l. cit.*, particularly No. 185, pp. 1896-1897; and No. 193, pp. 671-674.

CONFLICTS OF LAW IN DIVORCE AND NULLITY

By WILLIAM LATEY, M.B.E., Barrister-at-Law.

Read before the Society on April 14, 1948.

SIR ARNOLD D. MCNAIR, *President of the Society, in the Chair.*

In a paper which I read before this learned Society in November, 1931, certain anomalies in the international operation of existing national laws were discussed, but in this paper I propose to touch also upon a few of the differences which exist in the field of divorce and nullity in various States.

There have been recently some cases in the English Divorce Court which make it clear that in that Court as well as in the Privy Council, Judges are not prepared to apply rigidly and without exception the principle that a potentially polygamous marriage is not a valid marriage. Thus, where a Hindu married a Hindu woman in India and, that wife still living, he went through a form of marriage in England with an English-woman, it was held by the Court of Appeal (affirming the decision of Barnard, J., in which he has followed his own decision in *Srine Vasan v. Srine Vasan*)¹ on the second wife's petition for nullity, that the first marriage was valid though polygamous, and the second consequently void : *Baindail v. Baindail*.² Lord Greene, M.R., in dismissing the appeal in this case, said of the well-known definition of marriage in *Hyde v. Hyde and Woodmansee*³ i.e. the voluntary union for life of one man and one woman to the exclusion of all others : " Lord Penzance quite clearly saw how undesirable it would be to attempt to lay down any comprehensive rule as to the manner in which a polygamous marriage ought to be regarded by the Courts of this country for purposes different from that with which he was immediately concerned. I do not feel myself

¹ (1946), P. 67.

² (1946), P. 122. Cf. *Mehta otherwise Kohn v. Mehta* : 174 L.T. 63.

³ (1866), L.R., P. & D. 130, 133.

bound by anything said in *Hyde v. Hyde* . . . to hold that, for the purposes of the present petition, the Court is bound, or ought to disregard, the existence of the Hindu marriage." The Court of Appeal also approved the observation of Lord Maughan, L.C., in the case of *Baron Sinha of Raipur*⁴: "It cannot be doubted now (notwithstanding some earlier dicta by eminent Judges) that a Hindu marriage between persons domiciled in India is recognised in our Courts (and) that the issue are regarded as legitimate."⁵ It is to be observed, however, that in each of these cases, the Indian husband was domiciled in India at the time of the marriage, and we must bear in mind the general principle that a marriage is valid in English law when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other, and if the marriage is celebrated in accordance with the local form (Dicey : 5th edition, p. 732).

Divorced Wife's Sister. On several occasions I have been called on to advise in cases where there was a divorce and the husband wanted to marry the sister of his former wife. In English law this is expressly forbidden. Though in recent statutes a number of exceptions to the law of affinity—as set out in the prohibited degrees in the Book of Common Prayer, exceptions covering relatives by marriage—this is not one of them, and a man may not marry the sister or half-sister of the wife whom he has divorced or who has divorced him during the wife's lifetime, or the former wife of his brother or half-brother whose marriage has been judicially dissolved during the brother's lifetime,⁶ and the same prohibition applies where a marriage is judicially dissolved to the other relations specified in the Marriage (Prohibited Degrees of Relationship) Act, 1931. I have heard that there are some countries in Europe where the law permits the marriage of a man with his divorced wife's sister during the ex-wife's lifetime.⁷

⁴ Committee of Privileges : July 25, 1939. House of Lords Journals 171, p. 350.

⁵ See Latey on *Divorce*, 13th edition, pp. 10-11, 1947, Supplement p. 1.

⁶ Judicature Act, 1925, s. 184. (1).

⁷ Since this paper was read, Mr. A. Weinreb has written to me that in Rumania the Head of the State can grant a dispensation from this Rule

Penal Disabilities in Marriage. A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or either of the parties, is of a kind to which the English Court refuses recognition.⁸ Thus the English Court would probably not recognise the divorce by a Massachusetts Court merely on the ground of the State colour bar of a negro domiciled in that State from an Englishwoman whom he married in England. Again, a disability imposed by some foreign laws against the remarriage of a divorced person is regarded here as penal and not operative outside the jurisdiction of the Court directing such penalty.⁹

Nazi Penal Divorces. This brings me to the obnoxious divorce laws introduced in the Hitler regime in Germany, where the mere fact that one spouse was of Jewish blood enabled the other to obtain a divorce, and anti-Nazi expressions of opinion formed another ground of divorce. The other day I conducted a case in which a British officer, captured at Calais and then a prisoner of war, was divorced by his German wife during the war without even receiving notice of the proceedings. The only substantial wrong alleged and found was that before the war began and the parties were living in England, the officer spoke contemptuously of the Führer when he was broadcasting. The German divorce of course was invalid in English law as the husband was always domiciled in England and so she had to bring a divorce suit here. (*Pope v. Pope*, Feb. 10, 1948). Although Law. No. 16 of the Control Council for Germany dated the 1st March, 1946, concerning marriage and divorce, makes some reference to these iniquitous laws, there is some doubt in my mind whether they repeal retrospectively the effect of judgments granted thereunder, or wipe out divorces granted on

for grave reasons. See also Dr. Martin Wolff's reference (*Private International Law*, 1945, p. 341) to Denmark in this connection. It is also understood that under the new Polish Code of 1946 this impediment disappears.

⁸ Dicey, 5th edition, p. 757 and notes.

⁹ *Scott v. Attorney-General* (1886). 11 P.D. 128. But Cf. *Warter v. Warter* (1890) 15 P.D. 152 : *Le Mesurier v. Le Mesurier* (1929) 46 T.L.R. 203 (where the penalty was temporary and procedural as in the case of the former six months interval after decree *nisi* in England).

such immoral grounds. See section 77, of which paragraph 4 reads: "No claim for restoration of a marriage which has been declared void or has been annulled or dissolved through divorce can be made."

Grounds of Divorce. Turning to the subject of divorce, I do not propose to give a catalogue of the various grounds in the various professedly Christian States. Speaking generally, the outstanding difference between the Anglo-Scottish law and the Continental system is that divorce by consent is barred in the former and more or less general in the latter. In the Courts in Europe which follow the Code Napoleon and laws engrafted thereon, divorce is allowed on the basis of more or less long periods of separation, and refusal before the Court to be reconciled. As I pointed out in evidence before the Denning Committee on Divorce procedure, this reconciliation procedure has become an empty form in France and in most other European States where it is employed. In Switzerland, Germany, Holland, Sweden and other countries divorces can be arranged with the greatest ease, and what is regarded in England as collusion—a fatal bar to divorce in England—is common form in those countries. Questions sometimes arise whether divorces granted in foreign States on a collusive basis will be recognised by the English Courts. The answer is that if the English Court is satisfied with the competence of the foreign Tribunal and the husband is domiciled, according to the English conception, in the State where the divorce is granted, it will accept the foreign judgment, providing that the respondent spouse has had due notice of the proceedings (*Rudd v. Rudd* (1924) P. 72.)

While I was at Prague for the International Law Conference last September—before the iron curtain fell—I took the opportunity of attending a divorce trial, and thanks to the courtesy of an eminent Judge, was allowed to follow it understandingly through all its stages. It was interesting to observe the usual Continental procedure. The Judge summarized the case from the pleadings and proceeded to question the parties and the witnesses, the substance of whose answers were taken down on an almost inaudible typewriter, thus constituting a *procès-verbal* to which reference could be made as the trial went on, if necessary. The lawyers for both sides were allowed to raise any particular points in examination or

cross-examination which the Judge permitted. In Czechoslovakian law the grounds of divorce are adultery, sentence of three years' imprisonment or less in regard to certain crimes, desertion for upwards of 6 months, attempt on life or health of spouse, repeated wrongs by one spouse against another (this includes cruelty, neglect, etc.), dissolute mode of life, insanity for three years and mental degeneration for two years including chronic alcoholism, and what is called the general case, i.e. derangement of the marriage so profound that it would be unjust to require the parties to remain married. Under this last mentioned ground, I was told, a large proportion of divorces were granted.

Jurisdiction in Nullity. If one looks at the laws as to nullity of marriage the world over, one is struck by the fact that there is a strange confusion in some States as to nullity as distinguished from divorce. One has to bear in mind that a nullity suit involves a judicial inquiry into whether there has been a marriage or not. That is why the Ecclesiastical Courts in England up to the year 1858, when judicial divorce was first instituted, always heard the complaint of a putative spouse suing for nullity whatever his or her nationality or domicile providing that he or she was resident in the diocese whatever might be the domicile or place of residence of the other spouse. Latterly there has been a disposition by the English Courts to assert the principle in jurisdiction of domicile as applied to divorce since the case of *Le Mesurier* (1895) A.C.517, to what are styled "voidable" marriages as distinguished from "void" marriages. Personally I have never been able to understand the distinction. If a marriage is declared void on any ground known to the law there never was a marriage, and yet the English Court, though bound by the principles and practice of the Ecclesiastical Courts, may refuse to exercise jurisdiction because a marriage is treated as still continuing, unless declared void. That is what was decided by the Court of Appeal in the recent case of *De Reneville v. De Reneville*.¹⁰ In this case an Englishwoman, before her marriage, was resident and domiciled in England. She married a Frenchman in France, where he was and remained domiciled, and they lived together in France and French possessions. After some years she left him, returned to England, and petitioned for nullity on the ground of

¹⁰ (1948) P. 100.

his incapacity or wilful refusal to consummate the marriage. On an issue as to jurisdiction, the Court refused to exercise it mainly on the ground that it was a valid marriage until declared void and as the respondent was not resident in England, the Court had no jurisdiction.¹¹

In the many States where the old canon law of Rome still exists, there is no divorce as such, but there are grounds of nullity far more numerous than in the present English law of nullity. Lord Salvesen, the Scottish Judge, in a lecture a good many years ago, said they numbered no less than fifteen. They do not include, however, the new English statutory ground of nullity—wilful refusal to consummate—because quite obviously something that happens after a marriage ceremony cannot logically be said to invalidate the marriage. But because the Royal Commission on Divorce in its 1912 Report said that it ought to be a ground of nullity instead of divorce, Parliament meekly adopted what is undoubtedly a legal anomaly. (In the State of New York, U.S.A., the law as to divorce is limited and strict, but yet it allows nullity of marriage often on the slightest pretext, as in a case where a British sailor was said to have promised his American wife not to sign on for a further period of service in the Navy, but because he did so she obtained an annulment of the marriage. This is only one illustration of grounds of nullity which are to be found in certain States and appear to be extraordinary).

To bring these varying laws into something like a reasonable shape would be the work of a juridical Hercules, and all that practical lawyers can hope to do in their lifetime is to effect some co-ordination in the field of jurisdiction and mutual recognition of decrees of divorce and nullity.

The Draft Prague Convention. An attempt was made to achieve this purpose by the Draft Prague Convention, adopted by the International Law Association at its Conference in 1947. As I explained to that Conference, it was sought to try and move as many Governments as was considered expedient to

¹¹ If the Law Reform (Divorce, etc.) Bill which in November 1949 is expected to become Law had then been in operation, the wife would have been entitled to have her case heard in England because she had been resident in England for three years next preceding the date of her petition.

agree to mutual recognition of divorce decrees so that the hardship of a person legally divorced in one State, being treated as still married in another might be avoided. Legislation always lags behind public needs in social problems of such importance as this. Marriage is the solid basis of any nation's existence. No one would wish to weaken that foundation but where marriages are broken beyond repair, divorce becomes the means of escape and gives the chance of a happier and more regular life for suffering spouses. This is by no means a new problem. In my paper to this Society in 1931 (vol. 17, "Transactions" at p. 131) I pointed out that a Committee of the I.L.A. of which I was the Convener (Mr. R. F. Bayford, K.C., leader of the Probate and Divorce Bar, being the Chairman) had been considering the subject. Our Report to the Oxford Conference of 1932 was adopted, together with a Draft Convention which was deemed a workable scheme by the several practising lawyers with expert knowledge of the subject who were members of the Committee. As so often happens with these projects, neither the British Government or any other Government took any step even to inquire into its merits or demerits, and it was pigeon-holed until after the end of the 1939-1945 war, I persuaded the I.L.A. to take it up again. A new Committee then presented the Draft Convention to the Cambridge Conference in slightly amended form, and the late Mr. Dehn drafted two additional articles dealing with the vexed questions of mutual recognition of orders for custody of children and variation of settlements after decrees of divorce or nullity. So many complications must necessarily arise on these thorny subjects that we decided to limit the Prague project to decrees dissolving or annulling marriage.¹²

The scheme may be summarised as follows:—Where the basis of jurisdiction in divorce is either (i) the domicile of either spouse at the time when the action is commenced; or (ii) the residence of either spouse in the State in which the action is brought for the space of at least one year during the eighteen months preceding the action; or (iii) one or other of the spouses is a national of the State where the action is brought according to the *lex fori*, it is proposed that the decree of a competent Court shall be recognised and registered in any other State

¹² For text see Report of the I.L.A. Conference at Prague, 1947.

which adopts a bilateral convention for this purpose, and a declaration by a recognised Court of the other State will give effect therein to the decree. In the Oxford draft Convention there was a fourth alternative jurisdiction, the Court of the place where the marriage was celebrated. But this was rejected by the Cambridge Conference, because the place of marriage often has nothing to do with the parties' real home or principal place of residence.

To gain a practical result we must proceed little by little. Let me emphasise that it is not proposed at present to make any change in the varying grounds for divorce. In England there are five grounds—adultery, cruelty, desertion for at least three years, incurable insanity for at least five years, and certain perverse practices.

Test of Domicile. Subject to certain statutory exceptions, the sole test of jurisdiction in divorce in England is the domicile of the husband when the action is commenced. In English law domicile means residence in a State coupled with the present intention to continue living there for an unlimited period, but in non-British States the definition of domicile is not so narrow. In some European States, the test of jurisdiction is either nationality or habitual residence. It was recognised at the Cambridge and Prague Conferences of the I.L.A. that nothing must be done to encourage the creation of Courts like Reno in the State of Nevada and, before the late war, in Latvia, which made a business of easy divorces. The safeguard there will be (1) not to agree to the Prague Convention with any such State, and (2) to schedule only those Courts which show a proper sense of responsibility.

The Prague draft Convention raises a distinction between the domicile of the wife and that of the husband (Art. 2. (b).) Already New Zealand, some Canadian Provinces, and most of the States of U.S.A. allow a wife a separate domicile, and not necessarily her domicile of origin, for the purpose of petitioning for a divorce. The strict rule in England that a wife takes her husband's domicile has in recent years been mitigated in a very limited manner, but if this Convention were adopted by England and another State where the *lex fori* of the other State allows the wife a separate domicile for the purpose of divorce,

England would recognise a decree.¹³

Difficulty often arises over (a) the almost universal acceptance of the principle that a wife takes the nationality of her husband, and (b) in British law, the domicile of her husband. *Qua* nationality this does not cause a wife any hardship if she can sue on the basis of residence, but it is otherwise if the only test is nationality.

Some Illustrations. Take the case of a Czech woman who marries an Italian national. There is no divorce in Italy, which applies the national law of the husband. He deserts his wife and she returns to live in Czechoslovakia. There she could obtain a divorce on the basis of residence, but would the marriage be dissolved according to the law of Italy? I understand that Italian Courts have actually recognised divorces of Italian nationals granted in other States, but unless Italy and Czechoslovakia mutually ratified this or a similar Convention, the position would be uncertain. There is also no divorce *a vinculo* in Eire, Newfoundland, Portugal, Quebec, Spain and most of the South American Republics. If however a husband who is a national or citizen of any of these States changes his domicile to a State where divorce is allowed, English law accepts the validity of a judgment or decree of divorce by the Court of the new domicile, though the decree may still be invalid in the State of which the husband is a national. The Draft Convention goes somewhat further and provides that if the test of jurisdiction in State A is residence and the petitioner has lived an aggregate of one year during the 18 months preceding his suit in State A, or has become a national of State A, then if Great Britain and State A ratifies the Convention mutually, the decree will be recognised in England and Scotland and when it is duly recorded will have legal effect in those countries.

Take a case of State B, where the test of jurisdiction is

¹³ Since this paper was read a Bill, which is expected to become law shortly, has been going through the British Parliament which will give the Courts in England and Scotland jurisdiction in a wife's petition for divorce and nullity notwithstanding that the husband is not domiciled in either country, provided that the wife has been ordinarily resident there for a period of three years next preceding the suit. This should render the adoption of the Prague Convention by the British Government in relation to one or more other States easier.

habitual residence, and a foreigner may sue for divorce. A British national domiciled in England according to English law has been, let us say, habitually resident in State B for some years. The English Court claims sole jurisdiction in divorce in his case, but in fact he sues for divorce in State B and is granted a decree. He then returns to England where in law he is still married to his first wife. If Great Britain and State B adopted this Convention, he could apply to the English Court for a declaration and registration of the decree, and such declaration would give that decree the force of law in England. Conversely, if a national of Hungary,¹⁴ which State alone can in Hungarian law dissolve that marriage, becomes domiciled in England according to English law and obtains a divorce here, then if England and Hungary were to adopt the Convention, Hungary will recognise the decree by its recording Court.

The Prague Convention requires proper service of process (by advertisement if there is no better way) on the respondent spouse as a *sine qua non*, and it does not permit a party to submit to the judgment of a Court which in fact has no jurisdiction over that party.

With regard to nullity of marriage, where the real issue is always: "Was there a marriage or not?" the problem is not so acute inasmuch as English as well as other laws in general recognise residence as the test of jurisdiction in nullity. But it has been deemed prudent to lay down some period of residence for nullity suits as well as divorce (Art. 2. (b) and proviso).

Time for Action. Professor Gutteridge in a most informative address to the "Institut de Droit International" at Lausanne in 1947 on the subject of the anomalies of jurisdiction, indicated how The Hague Convention of 1902 had failed in its purpose. He pointed out the Stockholm Convention of 1931 between the Scandinavian countries as a valuable model for an international convention between States which have similar matrimonial laws, and dwelled on the undue vagueness and rigidity of the English test of domicile. Similarly Professor Cheshire has urged a departure from the rigid test of domicile, and his suggestions in his inaugural lecture as Vinerian Professor of

¹⁴ This address was given before Hungary had become (only temporarily, it is to be hoped) to all intents and purposes a State controlled by Soviet Russia.

English Law at Oxford University¹⁵ were adopted in the final report of the Committee on Procedure in Matrimonial Causes.¹⁶

Is it then too much to hope that, having regard to this trend of the most expert legal opinion, the British Government can be persuaded at least to consider the draft Prague Convention as a scheme to adopt or adapt and to open negotiations with other suitable States which are already favourably disposed to discuss the matter, of which Sweden is one.

¹⁵ Reproduced in *Law Quarterly Review*, p. 352.

¹⁶ February 1947 [Cmd. 7024.]

SOME LEGAL ASPECTS OF THE IMMUNITY OF STATE PROPERTY

Read before the Society by DR. ERWIN LOEWENFELD, LL.B.
on May 5, 1948.

(SIR CECIL HURST, G.C.M.G., Vice-President of the Society,
in the Chair.)

The question has recently arisen in international relations whether immovable property which belongs to a foreign State is immune from compulsory (executive or judicial) jurisdiction in the territory of the State in which such property is situate. There appears to be a certain agreement that the *lex situs* is the governing law for questions of jurisdiction arising with regard to immovable property of a foreign State situate in another State. But there is no unanimity in the practice of the Courts of most countries as to the limits or, rather, limitations within which the *lex situs* can be applied. In particular, there is no common practice whether submission to the *lex situs* is limited to judicial ascertainment of liability or whether it comprises also measures of seizure and execution and, if so, whether measures of execution are only admissible with regard to claims and actions of a private law nature, as e.g. relating to title, seisin, possession, encumbrances ; or whether measures of execution are admissible also in every other case and, in particular, in the case of expropriation.

As early as 1891, the Institute of International Law, on the proposal of von Bar, adopted what was called a draft Regulation of Governments dealing with the competence of foreign States, sovereigns and heads of States.¹ According to this draft, the Institute regarded as immune from seizure claims brought as a result of acts of sovereignty or resulting from contracts concluded by plaintiffs in their capacity as state officials or actions concerning debts of a foreign State contracted by way of public subscription. On the other hand, the

¹ *Annuaire*, 1889-92, pp. 411, 436.

Institute declared the following actions as exempted from immunity and therefore admissible : (1) actions *in rem* against property located in the territory ; (2) actions against a foreign State in its capacity as heir or legatee to property situate in the local State ; (3) actions connected with commercial or industrial activities of a State (commonly called *jure negotii*) ; (4) actions in which the foreign State had expressly or impliedly recognised the competence of the Court ; (5) actions arising out of contracts concluded by a foreign State within the territory of the local State, if full performance in that territory could be demanded as a result of an express clause or by reasons of the nature of the transaction itself ; and finally (6) actions for damages for torts committed in the territory of the local State.

It is mainly immunity of land of a foreign State situate in another State with which I propose to deal today and this in view of the shortness of the time at my disposal.

I

1. In *Solon v. Gouvernement Egyptien*, a French decision of April 16, 1847, (Dalloz, 1849, I, 7, note), the Tribunal Civil de la Seine, ruled that the Courts of France had no jurisdiction over foreign Governments, save where the action related to real property in France owned by the Government in its *individual and private capacity* which would imply subjection to the territorial jurisdiction and to the execution of the judgment. However, the latter proviso was only *obiter* since the Court had to deal with an administrative and governmental act of an official to whom an official mission had been confided. It was an act *jure imperii* and not an act "ayant pour cause un intérêt privé." And it was for this reason that the Court refused to admit the plea.

2. The same court in *Etat Suède v. Petrochino* (decision of October 30, 1929, (Dalloz, 1930, I, p. 15) assumed jurisdiction in applying French rent restriction legislation to premises in which the Swedish Embassy was housed and regarded the applicability of this legislation to these premises as "simples actes de gestion pour lesquels elle agit comme un simple particulier et soumis par suite à l'application des lois françaises et à l'appréciation des tribunaux."

3. In *Riccio v. Little*, decision of the Italian Court of Cassation (Giur. It. 1934, I, p. 976 of June 16, 1934, Ann.

Digest, 1933-1934, case No. 68.), the Court following the *Solon* case already referred to, ruled that Italian Courts had no jurisdiction to ascertain an action as to certain property utilised by Great Britain as a cemetery for her nationals. This is a typical case of "non-private ends", the cemetery being maintained by Great Britain *jure imperii* for the benefit of her nationals as such, and not for them as individuals.

4. In *Perruechetti v. Puig y Cassanro* (decision of the Court of Rome of June 6, 1928, Ann. Dig. 1927-28, case No. 247), we find a distinction between *jus imperii* and *jus gestionis* similarly as in the *Solon* case and in the *Petrochino* case. The facts are as follows: Monsieur Puig, acting as Ambassador of Mexico and in the name of his Government, purchased from Perruechetti certain property to be used as Embassy buildings. A dispute arose as to the interpretation and application of the contract. In the subsequent law-suit, Puig pleaded non-jurisdiction of the Court for the reason that he was a representative of a foreign State. The Court assumed jurisdiction. "Jurisdictional immunity", it said, "aims at securing for diplomatic agents fullest possible freedom in the exercise of their functions. But privileges cannot be claimed by foreign States in so far as the same are considered as foreign juridical corporations (*persone giuridiche*) and this in view of the manifold and various activities which they display in the territory of other States and which are unconnected and foreign to political relations with foreign Governments."

5. The same Court said in *Storelli v. Government of French Republic* (decision of February 13, 1924 (Giur. It. 1924, I, 206, Corte d'Appello, and *Rivista di diritto internazionale*, 1925, p. 236) that there was an implied waiver in cases where "litigation related to immovables possessed by a State in another country and where the foreign State had instituted in the territory of a local State complexes of relationships giving rise to ordinary business intercourse through an agency firmly established by its own representatives."

We find a similar distinction between acts *jure imperii* and *jure negotii* in the practice of the Egyptian Mixed Tribunals. e.g. in the decision of the Court of Cairo of December 8, 1886 (Clunet, 1887, vol. 14., p. 364, *Avad Sayed v. Abdel Chahid Mikahil*).

II

In contrast to this line of mainly French and Italian decisions, is the practice of countries which do not distinguish between acts *jure imperii* and *jure negotii* and either assert or deny jurisdiction.

1. England and the United States in general take the view that ordinary jurisdiction as to actions *in rem* concerning immovables is governed by the *lex situs* (Cheshire, 2nd edition, p. 536).

2. The former German practice is illustrated in a leading case of the Reichsgericht, vol. 62, p. 165, 167 :—In March, 1902, the defendant, the Belgian State, concluded an agreement with the plaintiff for delivery of some railway material. It resulted in a divergency as to proper delivery. Plaintiff sued defendant for payment. Defendant denied jurisdiction. The Lower Courts ruled that there was no jurisdiction. This was confirmed by the Reichsgericht in the following words : “ A foreign State cannot be sued before municipal Courts of another country not even in connection with purely private claims.” Then it proceeds, *obiter* :—“ This principle of international law is subject to certain limitations. Thus the recognition of the principle of immunity was frequently refused in the case of a plea concerning real property situate in the local State. The reason is that the immovable is an inseparable part of the territory of a local State and as such subjected to its jurisdiction.”

3. In Reichsgericht, vol. 103, p. 274, 277 (case of *Iceking v. United States Shipping Board*) the same view appears more guarded, but still only *obiter*. The facts were as follows : In 1919, a steamer of the plaintiff collided in Nieuwe Waterweg with *The Iceking*, an American steamer. Plaintiff sued the United States Government for damages caused by negligence of defendant's agents in charge of *The Iceking*. The United States Government denied jurisdiction. The Reichsgericht refused to “ admit the plea because of lack of jurisdiction.” The decision contained the following *dictum* as to immovables (p. 277) “ landed property forms an inseparable part of the territory of the *lex situs* and is therefore subjected to the latter sovereignty.” From this the Supreme Court affirmed the exclusive jurisdiction of the Court of the *lex situs*. This jurisdiction in case of immovables is not affected by provisions dealing

with immunity and extritoriality. But the German Supreme Court in this connection only referred to actions relating to title, encumbrances, boundary, partition and possession claims to immovables (for which, according to sect. 24, Z.P.O., the Court of the *lex situs* is exclusively competent). The Court justified this on the ground that a foreign State when acquiring realty in a local State must take this situation into consideration. It appears from these German decisions that the non-applicability of principles of immunity from suit within the limits of the said section (24 Z.P.O.), is based on a tacit waiver of immunity on behalf of the foreign State.

4. In *von Hellfeld v. Russian Government*, the Prussian Court for the determination of Jurisdictional Conflicts (published and commented on by Edwin M. Borchard in *American Journal of International Law*, vol. V. 1911, p. 490), the Court relied on the decisions of the Reichsgericht referred to and affirmed that a sovereign State was immune from suit and from execution in a foreign Court save where real property was concerned. But again this was only *obiter*, since the case concerned a plea of the Russian Government against von Hellfeld alleging that defendant had unlawfully retained possession of a ship and her cargo. Russia succeeded in having vacated the order of the Court which had decreed the garnishment of Russian claims against third parties.

5. This decision was followed by a decision of the same Court (Prussian Court for the determination of Jurisdictional Conflicts) of March 10, 1928 (Ann. Dig., case No. 104, 1927-28, *Zeitschrift für Ausländisches öffentliches Recht*, 1930, p. 101, *Malig Ltd. v. Polish State*.) This case raised the question of the possession of real property in connection with the principle of independence and equality of sovereign States. The plaintiffs let certain offices to a firm in Stettin which sublet part of them to the Polish State for the accommodation of its vice-consul at Stettin. They had reserved a certain space on the right and left of the main entrance to the building for any signs or notices which tenants might wish to put up. Subsequently the Polish consul had a round plaque with the insignia of the Polish State put up above the entrance and he refused to comply with the request of the plaintiffs to remove the plaque and repair the damage to the wall. Before oral proceedings took place, the Prussian Prime Minister filed a declaration

questioning the Court's jurisdiction on the ground that the action was contrary to the recognised principles of international law, since it was inadmissible that property rights of a foreign State could be made subject to action or execution. The fact that the action could be construed as one of disturbance of possession (s. 862 of the German Civil Code) or of invasion of ownership (s. 1004 of the same Code) was regarded as immaterial by the Court. Even if such actions were regarded as relating to immovable property, a German Court could not have jurisdiction in cases like the present in which the plaintiffs asked for the removal of the insignia of sovereignty of the Polish State. The putting up of signs with the insignia of a foreign State was regarded by the Court as an act of sovereignty which could, in no case, be subject to the jurisdiction of the Courts.

6. In contrast to the decision of the German Reichsgericht referred to above, we find a line of decisions of the Austrian Supreme Court of January 3, 1878 (reported in *Clunet*, 1883, p. 67). In one of these cases, plaintiff had lodged a possessory claim before the Vienna District Court against the Reich and an architect charged with the construction of the Palace of the German Embassy in Vienna. Plaintiff alleged that building operations had disturbed him in the enjoyment of his neighbouring Palace. The defendants contested jurisdiction. The Lower Courts dismissed the plea and ruled that the dispute was not within their jurisdiction. The Austrian Supreme Court affirmed the dismissal declaring that a foreign State cannot be subjected to the jurisdiction of the Austrian Courts. Lyon Caen criticised the decision "*comme tout à fait exorbitante et nous n'hésitons pas à penser qu'elle est contraire aux principes généraux.*"

7. On the other hand, the Supreme Court of Justice of Czechoslovakia assumed competence in a decision of April 28, 1927 (Vaz., 8000, A.D. 1927-28, Case No. 94). Plaintiffs, Swiss subjects, had appealed against measures taken by subordinate Czech authorities and confirmed by the lower Courts in connection with the Czechoslovakian agrarian Reform of 1920. They based their claim to exemption from the operation of these reforms on the ground that according to international law, aliens were not liable to expropriation in the same way as nationals and that the expropriation was illegal except upon payment of

full compensation. The appeal failed and the expropriation was confirmed by the Czech Supreme Court on the following grounds: "Immovables situate inside the boundaries of a local State are portions of territory. Since territory is one of the vital constituents of a State, the State must wish to see it subjected exclusively to its own will and must not admit any disposition of a foreign State in respect of it for thus its own existence would be endangered." It appears that in this decision the *ratio decidendi* was based on the principle "*immobilia sunt obnoxia territorio*" and this principle which is normally only a principle of international private law was treated as being an element of international public law.

A review of the decisions already referred to proves that there seems to exist considerable agreement that real property rights are, as a rule, so intimately connected with the independence of the local State, that its Courts (of the *lex situs*) must be deemed to enjoy jurisdiction. A contrary view might lead to a denial of justice, considering that there might not be any jurisdiction whatsoever on immovable property except in the territory where the property is situate. But this does not decide the question which must be settled independently, whether the principle of the jurisdiction of the Courts of the *lex situs*, i.e. of the local State, applies also (a) to measures of execution of a judgment; (b) to legislation in the nature of expropriation and (c) to dispossession of an owner in pursuance of such legislation.

The principle that the Courts of the local State must have jurisdiction, since there would not be any jurisdiction elsewhere, does not actually apply to measures of enforcement and this for the following reasons:—(a) it cannot be assumed that a foreign State would refuse to carry out a judgment rendered against it; (b) a compulsory measure would be in violation of the dignity of a foreign State. It is obviously for this reason that the Harvard Draft Convention, dealing with the competence of the Courts of a local State in regard to foreign States laid down in 1932 (Am. J. of Int. Law, Suppl. 1932, p. 578, art. 9) that the effect of the principle of the *lex situs* is to permit an adjudication of rights leaving the question of enforcement to other methods.

III

Since there are no decisions directly in point dealing with the enforcement of claims against the local State in relation to immovables only of the foreign State, one has to refer to cases which do not necessarily relate or relate only to landed property, but in which the Courts considered quite generally, whether submission to local jurisdiction included submission to execution. This inference appears the more justified in view of the fact that local jurisdiction with regard to real property belonging to a foreign State has, as a rule, been treated as a tacit submission or as an analogous situation.

1. In the *Hellfeld* case referred to above, (p. 499) it was said that "execution proceedings are not affected by the question of jurisdictional conflict in, of or by itself" and further (p. 518): "the power to hear and determine and the power to award execution are not inseparably bound up together. And therefore the claim that in the submission to a complaint or to a counterclaim there is *ipso facto* contained the submission to execution is not justifiable."

2 In *Dexter and Carpenter v. Kunglig Järnvägstyrelsen* (United States, Circuit Court of Appeals, decision of July 14, 1930, Ann. Dig. Case No. 70, 1929-30 and Am. J. of Int. Law, 1931, p. 336), a clear distinction was drawn between measures of jurisdiction and those of execution and the first affirmed, the second denied. The case related to proceedings to enforce a judgment obtained by Dexter & Carpenter on their counterclaim against the Swedish Railways by writ of execution, and an order of attachment obtained against the funds of the Swedish Government in an American Bank and debts owed to the Swedish Government. Upon application of the Swedish Minister claiming immunity, the order of attachment and writ of execution were set aside and the decision was affirmed on appeal, *certiorari* being denied (282 U.S. 896). The Court held that the submission to jurisdiction would not justify the execution sought against the property of a foreign sovereign State. Delivering the opinion of the Court, Manton, J., said: "Consenting to be sued does not give consent to a seizure or attachment of the property of a sovereign Government. The clear weight of authority in this country as well as that in England and Continental Europe is against all seizures even though a valid judgment has been entered. To so hold is not depriving

our own Courts of any attribute of jurisdiction. It is but recognising the general international understanding recognised by civilised nations that a sovereign's person and property ought to be held free from seizure or molestation at all peaceful times and circumstances. When judgment has been rendered and the liability judicially ascertained, the power of the Courts ends and the sovereign is at liberty to determine for himself whether or not to satisfy the judgment. It is hoped that the judgment of our Courts will be respected and payment made by the Swedish Government." (l.c., p. 110 and 43 F. (2nd) 705). The Court cited with approval the case of *Hellfeld v. Imperial Russian Government* (*supra*).

3. A similar argument, namely, that consent to jurisdiction does not necessarily imply consent to execution was taken in an English appeal case, *Vavasseur v. Krupp*, 9 Ch. Div. p. 351. A foreign sovereign bought in Germany shells made there, but said to constitute infringements of an English patent. The goods were brought to this country in order to be put on board a warship belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign who thereupon applied to be made and was, in fact, made a defendant to the suit. An order was then passed by the Master of the Rolls and affirmed on appeal, that notwithstanding the injunction, the sovereign should be at liberty to remove the shells. The Court had indeed no jurisdiction to prevent the foreign sovereign from removing his property in this country since this would have had the effect of interfering with his, the sovereign's, property. Similarly, it was held in *Duff Development Co. v. Government of Kelantan* (1924 A.C. 797) that the Court had no jurisdiction as to execution. The facts in this case are well known. They related to a lease of mining rights granted by the Government of Kelantan to the plaintiffs. The lease contained an arbitration clause and an award was made by an arbitrator in favour of the plaintiffs. It was held that the contract by which the Kelantan Government had agreed to go to arbitration was not a submission to the jurisdiction of the High Court and execution could not be taken out on an arbitration award, although by statute that award had the effect of a judgment. Only one Law Lord dissented for the reason that the sovereign State by agreeing to the submission (which became an order of Court) had agreed to treat

the matter as one proceeding and thereby waived its privileges.

4. The decision of the French Court of Cassation in *Spanish Government v. Lambège and Puyot* (the claim relating to a bill of exchange clause) laid down that execution against a foreign State was inadmissible without the consent of that State (Dalloz, 1849, Part I, p. 5). This rule was subsequently followed in France with some uniformity as referred to in Annual Digest, 1938-39, p. 242 :—"Immunity from executions" where several decisions are cited. See *Caratier-Terrasson v. Chemins de fer d'Alsace-Lorraine*, decided by the Court of Cassation (Chambre Civile) (Dalloz, 1885, Part I, p. 341 ; Sirey, 1886, Part I, p. 353) ; *de Reilhac v. Comptoir d'Escompte de Paris* ; *Doucet v. Ottoman Government* (Revue de droit international privé, 7 (1911), p. 648) *Russian Government v. Simonnet Heslouin et Cie.*, decided by the Civil Tribunal of Brest (*ibid.*, (1911), p. 85), and by the Court of Appeal of Algiers (*ibid.*, 15 (1919), pp. 494, 496). *Spanish State and the Bank of Spain v. Banco de Bilbao* (Annual Digest, 1935-1937, Case No. 90) is cited as an example of the general principles of immunity of sovereign States from execution. The only exception is the decision of the Court of Cassation in *U.S.S.R. v. Association France Export* (Annual Digest, 1929-30, Case No. 7). The Court allowed a levy of execution against the Soviets in respect of acts of private commercial nature in which the Trade Delegation was engaged and to which the principle of state sovereignty in no way applied. The decision was commented by Niboyet in an article : " Les immunités des Etats étrangers en droit français." (Revue Générale de droit International Public, vol. 43 (1936) p. 542) where he says : " Mais voilà maintenant que dans l'affaire récente de l'U.S.S.R. et pour la première fois en France, 'une saisie-arrêt a par contre été nettement validée.' But he adds : " Il convient tout de même d'hésiter à l'égard de certains biens et de tenir compte évidemment de la nature de la créance. Il n'est certes pas choquant que l'Etat soit exproprié par un créancier hypothécaire antérieur à l'acquisition par lui d'un immeuble. Il doit en pareille matière suivre la loi commune. De même s'il succombe dans des actions possessoires ou pétitoires on est en général assez d'accord pour reconnaître que l'immunité ne s'étend pas . . . ne s'est pas étendu dans le passé aux actions immobilières en revendications, confessoires, négatoires, pos-

seusoires et hypothéquaires." This is to say that even Niboyet who ranks as one of the most far reaching authors who deny immunity, refers only to actions concerning immovables in order to establish title to recover property to enforce encumbrances or which are of a possessory nature (similarly R.G.E., vol. 103, p. 7). Nowhere does he mention claims of public nature and, in particular, interference with state property based on measures of expropriation. Since Niboyet emphasises in 1936 that execution on property of a foreign State had until then never formed the object of a decision of a French Court, it must be assumed that French Courts will not allow execution except in special cases as, e.g. in that of the *Union of Soviet Republics v. Association France* (l.c. Case No. 7). Since then, there have followed similar cases against Soviet trade delegations which were all dealt with on the basis of *jure negotii*, involving state-owned corporations in respect of acts of private law or of commercial nature as to which immunity was denied.

5. The principle of *jure negotii* seems also to have found recognition in a much commented American decision (*Georgia v. Chattanooga*, Supreme Court, (1923, 264 U.S. 472, 478-480) In 1837 the State of Georgia undertook the construction of a railway from Atlanta to Chattanooga, Tennessee. The legislation of Tennessee granted to Georgia the right of way and land for terminal facilities which then was in the outskirts of the city, but at the time of the decision, the terminal was found near the business centre, the town having grown to such an extent. There was a demand for extending one of the principal streets of the city of Chattanooga through Georgia's railroad yard. Georgia denied the power of the city to condemn her right of way in order to extend the street. She alleged she had never consented to be sued in the courts of Tennessee. The Supreme Court denied Georgia's claim to sovereign immunity. Its enterprises in Tennessee were regarded as private enterprises. The Court relied on the doctrine of "tacit submission" and it said :—" having divested itself of its sovereign character and having taken on the character of those engaged in the railroad business in Tennessee, this amounts to a consent that Georgia may be condemned as may like property of others." The decision is older than the leading case of *Dexter and Carpenter* referred to above. And since it relies on tacit consent, it does not necessarily deviate from the principle expressed in

the *Dexter* case. Nevertheless, it has been criticised by Hyde, *International Law*, II, p. 844, where he says : " a State never acts in a private capacity, even when the activity in which it participates is one commonly carried on by the private individual." Similarly Fenwick, *International Law*, 1934, p. 214, states that property of a State is immune from suit ; whether the property be personal or real makes no difference in respect to the immunity, nor is it of consequence whether the property is of governmental character, such as a consulate or of a non-governmental character, such as goods purchased by a foreign government or funds deposited in trust companies.

6. The position in English law still remains to be decided by the House of Lords. The House will have to consider the question whether the doctrine of immunity applies to a sovereign who engages in trade in respect of his trading activities or to government property used in commerce. The Lords may have an opportunity to consider this point in *Krajina v. Tass Agency* (1949, 2 A.E.R. 274). In that case the plaintiff claimed damages for an alleged libel contained in 'The Soviet Monitor' published by the defendants who claimed immunity on the ground that the "Monitor" was an organ of the Soviet State based on a certificate issued by the Soviet Ambassador to the effect that defendants enjoyed all the rights of a juridical person. The decision of the Court of Appeal held that the evidence did not show that the defendants were a separate legal entity and consequently service of the writ had to be set aside. The Court therefore was not able to decide whether the doctrine of immunity was applicable to an organisation that had a juristic entity of its own distinct from that of the State by virtue of whose sovereignty immunity was claimed. The decisions of the Court of Appeal in *Compania Mercantil Argentina v. United States Shipping Board* (1924) 93 L.J. K.B. 816 and in *The Porto Alexandre* (1920) P. 30 makes it for the time being impossible to contend in that Court that the nature of the activities of the department of a foreign State without separate legal existence can be such as to deprive it of sovereign immunity.

7. Switzerland has wavered between complete immunity and qualified admission of execution. In the case of *Walder v. Greek Republic* (Ann. Dig., 1929-30, Case No. 78, decision of the Swiss Federal Court), plaintiffs who were Swiss nationals

and owners of bonds which, though overdue, had not been redeemed nor drawn by lot, obtained in Zurich against the Greek Republic a writ of attachment in regard to securities deposited by the Greek Government with various Swiss Banks. The Greek Government asked that the attachment be raised on the ground that according to the jurisprudence of nearly all countries, foreign States were not subject to the jurisdiction of another State and still less to measures of execution. The lower Court of the Canton of Zurich refused to raise the attachment. But, on appeal, it was raised and the Supreme Court pointed out: "While the exemption of foreign States from national jurisdiction was well recognised in regard to actions arising out of acts performed *jure imperii*, there was no unanimity with regard to litigation arising out of acts of private law. Having regard to the opposition which has manifested itself in the jurisprudence of many countries against the limitation of the principle of exemption, the Swiss practice would be ill advised to commit itself to such limitation at the present moment." The Court gave a detailed survey of the recent practice of foreign Courts and distinguished the present decision from that given in the *Dreyfus* case in 1918, vol. 44., I, "Entscheidungen des Schweizer Bundesgerichtes," p. 49. This principle was reasonably qualified in *Sogerfin, S. A. v. State of Yugoslavia*, October 7, 1938, Ann. Dig. 1941-42, Case 61. In this case, the Federal Court (dealing with bonds of the Yugoslav Government which had been in default) regarded the failure of the said Government to appear in Court and to plead to jurisdiction as a tacit submission to Swiss jurisdiction and it confirmed a judgment *in contumaciam* against Yugoslavia.

8. The general principle was however upheld by a Geneva Court in a decision of February 6, 1925 (*Revue de droit international privé*, vol. 21 (1926), p. 103) where the Court refused to enforce a contractor's lien on property of the League of Nations, pointing out "that a judgment which against the will of the League would order the lien to be registered would violate the status of the League of Nations and be unenforceable. Therefore the Court would *ex officio* have to refuse to pronounce a judgment against the League, although the League voluntarily consented to be represented before the Court."

9. Austrian practice does not generally appear to have assumed jurisdiction and much less to have granted execution

in respect of land owned by a foreign State. *A. v. German Empire*. January 3, 1878, Clunet 1883, p. 67; *Y. v. Austrian Empire*, March 15, 1921, "Entscheidungen des österreichischen Obersten Gerichtshofs" in "Zivil und Justizverwaltungssachen," III (1921), p. 69, cited in A.J.I.L.¹ vol. 23 (1929), p. 593.

10. Czechoslovakia provides an exception to the general rule. In the case No. 111, Ann. Dig. 1927-28, decision of April 26, 1928 (dealing with the Czechoslovakian Land Reform applied against Swiss subjects), the practice of the Czech Supreme Court went further than that of the Courts referred to above. Plaintiff had obtained a judgment against the Hungarian State before the Czechoslovak-Hungarian Mixed Arbitral Tribunal and applied for execution by means of a compulsory sale of certain immovables, namely the building of the Hungarian Legation. The Supreme Court granted execution, but in pursuance of a protest of the Hungarian Government against this decision (emphasising that this was a gross breach of international law), the Czech Government temporarily suspended the execution of the judgment (A.J.I.L., vol. 23 (1929), p. 586). This led to a decree of the Czech Ministry of Justice of April 22, 1929, No. 14228, which provided that in future, executions by means of forced sale of premises of a foreign legation are not admissible. The principles of this decree were applied by the Supreme Court of Czechoslovakia in its decision of December 28, 1929 (Ann. Dig., 1927-28, Case No. 251, Vaz. 9491.) The decision contains the following authentic interpretation of Czech administrative practice :—"According to international law objects which directly or indirectly serve the purposes of the diplomatic service are exempt from the operation of municipal law. Consequently in so far as a building—as in the present case—is concerned, immunity extends not only to the building in which the diplomatic office is placed, but also to the dwellings of all diplomatic persons. On the other hand, when a diplomatic person possesses in the country a house or an agricultural estate or a factory for his own private purposes, such immovable property does not enjoy any exemption." This decision was based on a law of January 19, 1928, No. 23 of the Official Gazette of Czechoslovakia which amended prior statutes relating to civil procedure and judicial execution. The last paragraph of Article IV deals with execution against

diplomatic agents and their property stipulating that judicial execution against them and so-called extritorial property can be undertaken only within the limits set by international law. In doubtful cases the Court must request a declaration of the Ministry of Justice which shall give such declaration with the concurrence of the Minister of Foreign Affairs. Such declaration is binding on the Courts (A.J.I.L., l.c. p. 587).

The fact that the Czech Supreme Court used the words "for his own private purposes" in connection with property of a diplomatic person, seems to indicate that if the estate is dedicated to public purposes, immunity from execution may be accorded.

IV

In conclusion, when the various practices of the countries referred to are compared and considered, viz ; those of Great Britain, the United States, France, Italy, Switzerland, Germany, Austria and Czechoslovakia, the following views may be expressed :—

- (1) that real property of a foreign State is, as a rule, subject to the jurisdiction of the *lex situs*.
- (2) that this jurisdiction of the *lex situs* does not necessarily imply submission to measures of execution, garnishee orders or any other act of seizure, attachment or ejection in case of expropriation.
- (3) that in those countries which accept the principle of the unqualified immunity of foreign States, these measures of execution are not admitted, unless the foreign State has expressly renounced its immunity. The only exception is Czechoslovakia where executions can be carried out save with regard to objects dedicated directly or indirectly to diplomatic service. In case of doubt, a declaration of the Ministry of Justice is required.
- (4) that in those countries which accept the principle of qualified immunity, as for instance in France, in the case of claims against the Soviet Trade Delegation, Italy and the United States in the *Chattanooga Case* (but there is not yet a definite practice) execution appears to be admissible when property is held *jure*

gestionis, e.g. in the case of trade corporations engaged in private transactions or in commercial business.

- (5) that the submission by a foreign State to execution in respect of immovables whether by virtue of an express waiver or as result of acts *jure gestionis*, is restricted to claims relating to land, and to disputes concerning the title or possession, enforcement of encumbrances or of contracts relating to the land.
- (6) that levy of execution in other cases is not permitted and particularly, the compulsory dispossession of a foreign State from its immovable property except by virtue of a judgment of a Court deciding a dispute relating to claims of the nature referred to in paragraph 5.

THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE.¹

By DR. E. HAMBRO, Registrar of the International Court of Justice

Read before the Society, on June 2, 1948²

SIR ARNOLD D. MCNAIR, President of the Society, in the Chair.

(1) The jurisdiction of the Court is laid down both in the Charter of the United Nations and in the Statute of the Court, which is an integral part of the Charter.³ The present Court, as well as its predecessor, the Permanent Court of International Justice,⁴ has two main tasks to perform—the one to settle disputes between States and the other to give advisory opinions.

It is important to emphasise at once that the present Court, as well as the Permanent Court, can only entertain disputes between States.⁵ It should also be stated at the very outset that the Court has no jurisdiction in penal matters, but exclusively in civil cases between States.⁶

(2) When the Court's Statute was drafted at the San Francisco Conference, there was a considerable amount of discussion as to whether the jurisdiction of the Court should be

¹ This article is written by the author in his personal capacity, and has no official character. It does not in any way engage the responsibility of the Court.

² The text of this paper is printed as it was read on June 2, 1948, but subsequent developments have been included in the notes.

³ See Chapter III of the *First Yearbook of the Court*, 1946-1947.

⁴ The best book on the Permanent Court of International Justice is Manley O. Hudson : *The Permanent Court of International Justice*, 1920-1942, New York, 1943.

⁵ Individuals do, however, often write and ask for the intervention and protection of the Court. See for instance *Yearbook*, l.c., p. 116.

⁶ Those interested in penal jurisdiction in international law can consult the literature, i.e., books by Vespasian Pella and Donnedieu de Vabré.

compulsory or not.⁷ The majority of the delegates at that Conference considered that at the present day the institution of international jurisdiction had progressed so far that it would be a natural step to lay down the principle of compulsory jurisdiction. On the other hand, certain members of the minority stated clearly that they would be unable to adhere to the Court at all if such a principle were laid down. It was therefore decided to maintain the old system of optional jurisdiction. On the other hand, the so-called "Optional Clause" contained in Article 36, paragraph 2 of the Statute, was retained and a resolution passed by the Conference recommended the States to sign the Optional Clause.⁸

It was furthermore provided in Article 36, paragraph 5, of the Statute⁹ that those States which had accepted the compulsory jurisdiction under the Statute of the Permanent Court should also be bound under the new Statute, in so far as their declarations would still have retained their validity in regard to the old Court. There are to-day seventeen States bound by the Optional Clause in this way.¹⁰ Furthermore, thirteen States¹¹ have signed declarations accepting the compulsory

⁷ See my article : "Some observations on the compulsory jurisdiction of the International Court of Justice," XXV, *British Year Book of International Law*, 1948, pp. 133 *et seq.*

⁸ Printed documents of the San Francisco Conference, Vol. XIII, pp. 392 and 413.

⁹ "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

¹⁰ See list in *Yearbook*, 1946-1947, p. 217. A complete list of the States having accepted the obligatory jurisdiction of the Court is printed in every *Yearbook* of the Court. See, particularly, *Yearbook*, 1948-1949, pp. 138 *et seq.*

¹¹ At the date of submitting the final text, there are 17 States bound in this way. This means that the following 34 States are bound to-day : Australia, Belgium, Bolivia, Brazil, Canada, China, Colombia, Denmark, Dominican Republic, El Salvador, France, Guatemala, Haiti, Honduras, India, Iran, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Philippines, Sweden, Switzerland, Thailand, Turkey, Union of South Africa, United Kingdom, United States of America, Uruguay.

jurisdiction of the International Court of Justice since the Charter came into force.¹² Many of these States have signed with various reservations, the most serious of which is comprised in the following declaration signed by President Truman for the United States of America.¹³

" I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning :

" (a) the interpretation of a treaty ;

" (b) any question of international law ;

" (c) the existence of any fact which, if established, would constitute a breach of an international obligation.

" (d) the nature or extent of the reparation to be made for the breach of an international obligation ;

" *Provided*, that this declaration shall not apply to :

" (a) disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future ; or

" (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America ; or

" (c) disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction ; and

" *Provided further*, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

" Done at Washington this fourteenth day of August 1946."

A reservation concerning domestic matters can easily lead to abuses when given the wide form which figures in paragraph (b). Such a reservation can become serious when it is taken up by other Governments whose respect for international obligations

¹² See *Yearbook*, 1946-1947, pp. 109 *et seq.* and 1947-1948, l.c.

¹³ *ibid.*, l.c. pp. 217-218.

may be less strict. The exception of domestic jurisdiction in paragraph 7 of Article 2 of the Charter,¹⁴ which is more far-reaching and potentially more disturbing to the development of international jurisdiction than Article 15, paragraph 8, of the Covenant,¹⁵ is still more dangerous when the individual States reserve the exclusive right of interpretation. Even when it is admitted that Governments always act in good faith, it should not be overlooked that such a discretionary power of interpretation may easily lead to suspicion and engender a bad will that may prove as harmful to international relations as bad faith.¹⁶

(3) States can also accept the compulsory jurisdiction of the Court in other matters. They may make special bilateral or multilateral treaties accepting the jurisdiction of the Court;¹⁷ and they can insert jurisdictional clauses in multilateral treaties.¹⁸ Several such jurisdictional clauses, concluded in the years of the League of Nations, are still valid under Article 37.¹⁹ In this connection, however, a number of difficulties arise, for two reasons. The first is that the Peace Treaties with Germany, Austria and Japan have not yet been signed, and the second, that though the Peace Treaties with the satellite States have been signed and ratified, they all include a paragraph to the effect that the victorious Powers may notify the vanquished

¹⁴ Goodrich & Hambro, "Charter of the United Nations," 2nd edition, London, 1949, pp. 110 *et seq.* See also "Domestic Jurisdiction" Charles B. H. Fincham, Sijthoff, Leyden, 1948.

¹⁵ See article by Pollux in 16, *Acta Scandinavica Juris Gentium*, 1946-1947, pp. 13 *et seq.*

¹⁶ It has also been severely criticised in the United States. See, e.g., article by Laurence Preuss in XL, *American Journal*, 1946, pp. 720 *et seq.* See also paper by D. J. L. Davies in 32, *Grotius Society*, 1946, pp. 60 *et seq.*

¹⁷ One example is Article 7 of the Treaty between Spain and Portugal of 18 January, 1928. See P.C.I.J. Series D, No. 6, p. 261, and L. of N. Treaty Series, Vol. LXXVII, p. 119.

¹⁸ *Yearbook*, 1948-1949, pp. 150 *et seq.*

¹⁹ "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

Powers which multilateral treaties they wish to remain in force and which they do not.²⁰

(4) Article 36, paragraph 3, of the Charter of the United Nations has introduced an innovation in the matter of jurisdiction :

“ In making recommendations under this Article, the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court.”

The wording seems to indicate fairly clearly that it is only a question of a recommendation, and it is generally, although not unanimously agreed that recommendations are not binding.²¹ It is furthermore to be noted that the Council does not itself refer the matter to the Court, but recommends the parties to do so, in accordance with the Statute of the Court. It was therefore—it is submitted—agreed by most commentators that this paragraph did not introduce compulsory jurisdiction.

It became apparent, however, during the preliminary stages of the *Corfu Channel* case, that there were divergent views on this point. The British Government argued at some length before the International Court of Justice that this article actually did introduce compulsory jurisdiction, the main British argument being that even a “ recommendation ” under Article 36 was binding on the States and brought Article 25 of the Charter into play.²² This point was disputed by the Albanian Government, and the Court did not pronounce itself on this point, since it deemed that it was sufficient to base its

²⁰ A note on this is included in the *Yearbook*, 1947-1948, p. 195. Certain States have intimated to some ex-enemies which treaties they consider to be in force. See, for instance, Notes delivered by the Czech Government published in Vol. XXVI of the United Nations Treaty Series, pp. 103 *et seq.*

²¹ Goodrich & Hambro, “ Charter of the United Nations,” 1st edition, p. 134, 2nd edition, pp. 208-9. Cf. article by F. Blaine Sloane “ The Binding Force of a ‘ Recommendation ’ of the General Assembly of the United Nations,” XXV, *British Year Book of International Law*, 1948, p. 1.

²² See I. C. J. Pleadings, Oral Arguments, Documents, Vol. I. *Corfu Channel* Case, pp. 8-9.

judgment on the jurisdiction on other elements. According to the Court :

" In support of its Application, the Government of the United Kingdom invoked certain provisions of the Charter of the United Nations and of the Statute of the Court to establish the existence of a case of compulsory jurisdiction. The Court does not consider that it needs to express an opinion on this point, since, as will be pointed out, the letter of July 2nd, 1947, addressed by the Albanian Government to the Court, constitutes a voluntary acceptance of its jurisdiction."²³

On the other hand, seven judges²⁴ expressed themselves in agreement with the Judgment of the Court, but desired to put themselves on record as being opposed to the United Kingdom Government's interpretation of the Charter on this particular point. According to the seven judges :

" The arguments presented on behalf of the United Kingdom to establish that this was a new case of compulsory jurisdiction—which arguments the Agent and Counsel for the Albanian Government sought to refute—have not convinced us. In particular, having regard (1) to the normal meaning of the word recommendation, a meaning which this word has retained in diplomatic language, as is borne out by the practice of the Pan-American Conferences, of the League of Nations, of the International Labour Organization, etc., (2) to the general structure of the Charter and of the Statute which founds the jurisdiction of the Court on the consent of States, and (3) to the terms used in Article 36; paragraph 3, of the Charter and to its object which is to remind the Security Council that legal disputes should normally be decided by judicial methods, it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction.

" On this point, the view maintained on behalf of the Albanian Government appears to us well-founded, but when that Government claims to argue therefrom that in this case the institution of proceedings by application was irregular, then we are unable, for the reasons given in the Judgment, to accept this argument."²⁵

It would seem, then, that the new Court, like the old Court, is based on the principle that acceptance of the jurisdiction of

²³ See I. C. J. Reports, 1947-1948, p. 26.

²⁴ Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha and Krylov.

²⁵ See I. C. J. Reports, 1947-1948, pp. 31-32.

the Court is completely optional and that the consent of the parties in one form or another is always the necessary prerequisite for any jurisdiction of the Court. It is also quite clear that this consent is not bound to take any particular form. Again, it has been clearly laid down both by the old Court and by the new Court that the consent of the parties need not be simultaneous and that the consent of one party may be given after a suit has been brought before the Court by another party.²⁶

(5) The so-called "forum prorogatum" rule was clearly established by the International Court of Justice in the following sentence :

" Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12, of April 26th, 1928, page 23 : " The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement." ²⁷

(6) The International Court of Justice can also give an advisory opinion on any legal question. It is of interest to note that this Article (Article 96 of the Charter) is worded in a different way from Article 14 of the Covenant of the League of Nations. Whereas the Covenant spoke of "any dispute or point," the new Charter uses the phrase "all legal questions." It cannot be seen that the changing of terms has had any great effect, apart from the terminological improvement. On the one hand, it is made quite clear that only *legal* questions can be submitted. On the other hand, it is equally clear that *all* legal questions can be submitted without distinction. It would not appear necessary to discuss at length what constitutes a legal question. That question must be settled according to the nature of each individual case, and can often be of crucial importance as seen in the proceedings concerning the advisory opinion regarding admission of new Members.²⁸ Not only the

²⁶ l.c. p. 28.

²⁷ l.c., p. 28. See article by C. H. M. Waldock in 2, *International Law Quarterly*, 1948, pp. 377 *et seq.*

²⁸ See below, paragraph (9) of this article.

General Assembly and the Security Council, but also the Economic and Social Council²⁹ and the Trusteeship Council³⁰ can ask for advisory opinions.³¹ Furthermore, the power to request advisory opinions has been accorded to most of the specialized agencies.³² It might also be mentioned that all the Trusteeship Agreements except one, namely, the Australian Agreement concerning Nauru, provide for the reference to the Court of any question or dispute concerning the interpretation of the Agreement.³³

²⁹ *Yearbook*, 1946-1947, p. 113.

³⁰ *Ibid*, 1947-1948, p. 121.

³¹ *Ibid*, 1948-1949, p. 134.

³² Agreement between the United Nations and the International Labour Organization (Approved by the General Assembly on December 14, 1946): Article IX, See *Yearbook* 1946:1947, p. 205; Agreement between the United Nations and the Food and Agriculture Organization, (Approved by the General Assembly on December 14, 1946): Article IX. (*Yearbook* 1946-1947, p. 206); Agreement between the United Nations and the United Nations Educational, Scientific and Cultural Organization (Approved by the General Assembly on December 14, 1946): Article XI (*Yearbook* 1946-1947, p. 205); Agreement between the United Nations and the International Monetary Fund (Approved by the General Assembly on November 15, 1947): Article VIII (*Yearbook* 1947-1948, p. 124); Agreement between the United Nations and the International Civil Aviation Organization (Approved by the General Assembly on December 14, 1946): Article X (*Yearbook* 1946-1947, p. 206); Agreement between the United Nations and the International Bank for Reconstruction and Development (Approved by the General Assembly on November 15, 1947): Article VIII (*Yearbook* 1947-1948, p. 124); Agreement between the United Nations and the World Health Organization (Approved by the General Assembly on November 15, 1947): Article X (*Yearbook* 1947-1948, p. 125); Agreement between the United Nations and the International Telecommunications Union (Approved by the General Assembly on November 15, 1947): Article VII (*Yearbook* 1947-1948, p. 125); Agreement between the United Nations and the International Refugee Organization (Approved by the General Assembly on November 18, 1948: Article X (See Resolutions adopted by the Economic and Social Council during its seventh session from 19 July to 29 August, 1948, pp. 54 *et seq.*); Agreement between the United Nations and the Inter-governmental maritime Consultative Organization (Approved by the General Assembly on November 18, 1948): See Final Act: United Nations Maritime Conference, Article IX (*Yearbook* 1947-1948, p. 126.)

³³ *Yearbook* 1946-1947, p. 109.

(7) The natural conclusion to draw from the jurisdictional clauses relating to specialized agencies is that these organizations cannot appear before the Court as parties to a dispute, but only in proceedings relating to an advisory opinion.³⁴ On the other hand, it seems to follow from the constitutional texts that only organizations, and not States, can ask for an advisory opinion, although many of the advisory opinions delivered by the Permanent Court in fact dealt with disputes between States. It is also of interest to note that according to these provisions, it would not seem possible for a State to proceed against an international organization before the Court, or *vice versa*. This problem was discussed at length at the preparatory sessions of the International Trade Organization.³⁵ Article 96, paragraph 5, prescribes that the advisory opinions of the Court shall be binding on the organization ; ³⁶ and a special resolution requests the Interim Commission of the International Trade Organization to enter into negotiations with the Court or its officials.³⁷ This question was debated in this Society by a

³⁴ This state of affairs may have to be changed for the future. The advisory opinion of the International Court of Justice on the legal character of the United Nations which was given in the case concerning reparation for injuries suffered by agents of the United Nations is of great interest (I.C.J. Reports 1949, pp. 174 *et seq.*) See also the interesting statement by the Belgian representative, M. Georges Kaeckenbeeck, in I.C.J. Pleadings, Oral arguments, Reparation for Injuries, p. 99.

³⁵ See here the article on the International Trade Organization by Seymour J. Rubin : " The judicial review problem in the International Trade Organization, 63 Harvard Law Review, 1949, pp. 78 *et seq.*

³⁶ "5. The Organization shall consider itself bound by the opinion of the Court on any question referred to it by the Court. In so far as it does not accord with the opinion of the Court, the decision in question shall be modified."

³⁷ " The United Nations Conference on Trade and Employment,

Having considered the relation of the International Trade Organization and the International Court of Justice ; and

Having provided in Chapter VIII of the Charter, procedure for review by the International Court of legal questions arising out of the decisions and recommendations of the Organization,

RESOLVES that the Interim Commission of the International Trade Organization, through such means as may be appropriate, shall consult with appropriate officials of the International Court or with the Court itself, and after such consultation report to the

stimulating paper read by Mr. C. W. Jenks some time ago,³⁸ and has also been widely discussed in the doctrine.³⁹ It is interesting in connection with the advisory procedure to note that the Secretary-General of the United Nations, in appointing an Assistant Secretary-General to represent him before the Court, has taken a more active part in the work of the Court than did any Secretary-General of the League.⁴⁰

(8) The character and scope of advisory opinions were discussed at several heated debates in the General Assembly during the Second Session in 1947. A Resolution was adopted, the operative part of which runs as follows :⁴¹

“ NEED FOR GREATER USE BY THE UNITED NATIONS
AND ITS ORGANS OF THE INTERNATIONAL COURT OF
JUSTICE.

I.

THE GENERAL ASSEMBLY,

CONSIDERING THAT it is a responsibility of the United Nations to encourage the progressive development of international law ;

first regular session of the Conference of the International Trade Organization upon the questions of :

- (a) whether such procedures need to be changed to ensure that decisions of the Court on matters referred to it by the Organization should, with respect to the Organization, have the nature of a judgment ; and
- (b) whether an amendment should be presented to the Conference pursuant to and in accordance with the provisions of the annex to Article 100 of the Charter.”

³⁸ In 32, *Grotius Society*, 1946, pp. 1 *et seq.*

³⁹ See also the very pertinent remarks by Jessup in “ A Modern Law of Nations,” New York, 1948, pp. 25-26.

⁴⁰ Jenks, *l.c.*, p. 9. The Secretary-General has participated in all advisory cases before the Court. In all of them he has submitted written statements and in all except the advisory opinion on the competence of the General Assembly for the admission of new Members to the United Nations has been represented at the oral hearings. In the last-mentioned case, the Assistant-Secretary General, Dr. I. Kerno, intimated that he would be willing to appear if the Court should think this necessary.

⁴¹ Doc A-519, pp. 103-104. Assembly Resolution No. 171 (II) of November 14, 1947.

CONSIDERING that it is of paramount importance that the interpretation of the Charter of the United Nations and the constitutions of the specialized agencies should be based on recognized principles of international law ;

CONSIDERING that the International Court of Justice is the principal judicial organ of the United Nations ;

CONSIDERING that it is also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law both in regard to legal issues between States and in regard to constitutional interpretation ;

RECOMMENDS that organs of the United Nations and the specialized agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled, including points of law relating to the interpretation of the Charter of the United Nations or the constitutions of the specialized agencies, and, if duly authorised according to Article 96, paragraph 2, of the Charter, should refer them to the International Court of Justice for an advisory opinion.

II

Under Article 96, paragraph 2, of the Charter, the General Assembly is empowered to authorize other organs of the United Nations and specialized agencies to request advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities.

The Trusteeship Council, as one of the principal organs of the United Nations, and in view of the functions and powers conferred upon it by Chapters XII and XIII of the Charter, should be authorized to request advisory opinions on legal questions arising within the scope of its activities.

THE GENERAL ASSEMBLY, THEREFORE,

AUTHORIZES the Trusteeship Council to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council.

III

THE GENERAL ASSEMBLY,

CONSIDERING that, in virtue of Article 1 of the Charter, international disputes should be settled in conformity with the principles of justice and international law ;

CONSIDERING that the International Court of Justice could settle or assist in settling such disputes if, by the full application of the provisions of the Charter and of the Statute of the Court, more frequent use were made of its services ;

1. DRAWS THE ATTENTION of the States which have not yet accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraphs 2 and 5 of the Statute, to the desirability of the greatest possible number of States accepting this jurisdiction with as few reservations as possible ;

2. DRAWS THE ATTENTION of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice ;

3. RECOMMENDS as a general rule that States should submit their legal disputes to the International Court of Justice.⁴²

During this debate, the Soviet Union and certain other States expressed doubts as to the competence of the International Court to interpret the Charter of the United Nations. They argued that a proposal to the effect that the Court should be an organ of interpretation had been turned down by the San Francisco Conference. On the other hand, it was pointed out by other speakers that the San Francisco Conference had mentioned advisory opinions by the Court as one of the possible methods of interpreting the Charter.⁴³ The result of the discussions was not only the adoption of the above-mentioned Resolution, but also of a Resolution to request the advisory opinion of the Court concerning certain questions relating to the admission of new States as Members of the Organization. Several States sent in their observations in this matter and the Governments of the Soviet Union, the Ukraine Soviet Socialist Republic and Yugoslavia expressed the opinion that the Court was not competent to entertain this matter since it was a purely political, and not a legal question. These arguments were again repeated before the Court by the Yugoslav representative in the oral proceedings.

⁴² See report by Kaeckenbeeck : *Yearbook*, 1947-1948, pp. 15 *et seq.*

⁴³ See documents of San Francisco Conference, Vol. XIII, p. 709, and Goodrich & Hambro, "Charter of the United Nations," 2nd edition, pp. 547 *et seq.*

(9) The Court gave its opinion on May 28, 1948.⁴⁴ It was divided into a majority of nine⁴⁵ and a minority of six.⁴⁶ However, the majority, as well as the minority, all admitted that the Court was competent; but two dissenting judges⁴⁷ claimed that the Court should not give the opinion, although it was legally competent to do so. Their reason for this was that the Assembly Resolution, in spite of its legal terms, had a clearly political motive.

The majority stated in unequivocal terms that the question was a legal one,⁴⁸ and that it was not within the Court's province to investigate the motives of those members of the General Assembly who had voted in favour of the resolution requesting an advisory opinion.⁴⁹ The majority stated also in the following words quite clearly that the Court could give an interpretation of the Charter.⁵⁰ "Lastly, it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, 'the principal judicial organ of the United Nations,' to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers."⁵¹

Furthermore, the Court stated in the following words that it could interpret an abstract question.⁵² "It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter

⁴⁴ I.C.J. Reports, 1948, pp. 57 *et seq.*

⁴⁵ MM. Guerrero, Alvarez, Fabela, Hackworth, De Visscher, Klaostad, Badawi Pasha, Hsu Mo and Azevedo.

⁴⁶ MM. Basdevant, Winiarski, Sir Arnold McNair, MM. Read, Zoricic and Krylov. The Court was complete for this, as well as for the first case.

⁴⁷ MM. Krylov and Zoricic.

⁴⁸ I.C.J. Reports, 1948, p. 61.

⁴⁹ I.C.J. Reports, 1948, p. 61.

⁵⁰ *ibid.*, p. 61.

⁵¹ This opinion was also expressed by Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha, and Krylov, in the *Corfu Channel Case*, Preliminary Objection, I.C.J. Reports, 1948, pp. 31-32.

⁵² I.C.J. Reports, 1948, p. 61.

and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise."⁵³

(10) The practice of the Court—short as it is—has already laid down important principles. It has reaffirmed that its jurisdiction is based on consent, but has refused to restrict its jurisdiction through any formalistic claim. Consent can be given in many forms and need not be simultaneous.⁵⁴ Furthermore, it has declared itself competent to be the chief judicial organ also in the sense that it can give legal interpretations of the Charter, with all the advantages⁵⁵ and dangers⁵⁶ inherent in such a conception.

Lastly, it should be noted that this practice is in complete accordance with the progressive spirit which prevailed in the Permanent Court of International Justice.⁵⁷

⁵³ See also P.C.I.J. Series A, No. 7, pp. 18-19.

⁵⁴ I.C.J. Reports, 1948, p. 28.

⁵⁵ See Kopelmanas "L'Organisation des Nations Unies," Vol. I, 1947. *Passim* and my own article under the name Pollux in an article in XXIII British Yearbook of International Law, 1946, pp. 54 *et seq.*

⁵⁶ See dissenting opinion of Judge Krylov, I.C.J. Reports, 1948, pp. 94 *et seq.*, and article by Manley O. Hudson, XLII American Journal of International Law, 1948, pp. 15-19.

⁵⁷ See the analysis by Lauterpacht in "The Development of International Law by the Permanent Court of International Justice," London, 1934.

THE JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

By A. S. COMYNS CARR, K.C.

(Read before the Society on November 3, 1948)

Professor R. WARDEN LEE, ex-President, in the Chair.

The majority of the Tribunal, consisting of the President (Australia) and the representatives of the United States, the United Kingdom, the U.S.S.R., China, Canada, New Zealand, and the Philippines, in convicting all the twenty-five accused of some of the offences charged against them, delivered a massive and most impressive judgment.

From a legal point of view I should like to draw attention to certain points without expressing any opinion upon them. The Tribunal followed the Nuremberg judgment closely in two respects. The Indictment presented by the Prosecution in Tokyo differed in form from that presented at Nuremberg in that instead of four comprehensive counts with the details contained entirely in a narrative appendix, it itemised the charges to a much greater extent in 55 counts, many of which were different legal charges based upon the same facts, though others charged the same legal offences in respect of different countries, periods and events.

The judgment adopts the Nuremberg decision that waging and conspiracy to wage aggressive war are in themselves crimes for which individuals can be convicted and punished. The main attack upon this view, which has come from some allied as well as ex-enemy sources, is that it was not recognised before the war and is therefore *ex post facto* law, based upon the Charters of the respective Tribunals as post-war legislation. It is more correct to describe the Nuremberg Charter as an international agreement on the existing law than as legislation. The same is true as to the Tokyo Charter, which closely follows the other, in that General MacArthur in promulgating it was acting as Supreme Commander for the Allied Powers. Both Tribunals accept the Charters as binding upon them, while at

the same time coming to the conclusion that they are merely, as they claim to be, declaratory of pre-existing International Law. The Tokyo Indictment, while putting this proposition in the forefront, also put the same facts in alternative charges of murder, a method which had not been adopted at Nuremberg. The Tribunal did not find it necessary to give a decision on the murder counts, having already convicted the accused on the counts for waging aggressive war.

The reasons of the Prosecution for making this alternative charge were two. In the first place it was felt to be simpler and better that those who initiate aggressive wars should be recognised as ordinary murderers as well as being in a special criminal category of their own. Secondly, if this view of their conduct is accepted it removes any possible doubt as to the charge being *ex post facto* or based upon a legislative act of the victorious Powers. Murder is defined in the long-established law of all civilised countries as the intentional killing (including orders to kill) of a human being without lawful justification or excuse. There can be no dispute that the initiation of a war involves intentional orders to kill human beings; the only question is whether there is lawful justification. Lawful belligerency is recognised as such a justification in international law, but it must be lawful. Therefore if the war is defensive there clearly is justification, but if the belligerency is contrary to a treaty by which the Power in question is bound or otherwise to international law, the argument is that it cannot constitute a lawful justification. Whether or not it is in itself a punishable crime, it is clearly not lawful and therefore cannot be an answer to the charge of murder. There was a time when even an aggressive war was not regarded as unlawful or forbidden by any treaty. In 1914 this may still have been in doubt, though the German invasion of Belgium was a direct breach of a special treaty and justified the allied intention to try the Kaiser, embodied in the Treaty of Versailles to which Japan was a party. Since then the Kellogg-Briand Pact has clearly made aggressive war unlawful, even if it did not directly create a criminal offence. In view of the main decision of both Tribunals this question has become academic, but it may serve to allay such misgivings as remain in the minds of any international lawyers.

The only substantial defence put up for the accused as a

whole was that they acted in self-defence. This, if made out, would have been equally applicable to both forms of charge : indeed in an ordinary case of murder it is the kind of justification commonly alleged where the rest of the facts cannot be disputed. In the application of the Kellogg-Briand Pact moreover it was agreed at the time that the threatened nation was to be the sole judge of this question. The Nuremberg Tribunal decided however that this does not mean that a nation can by its own *ipse dixit* convert an obviously aggressive war into a defensive one without reasonable grounds. The Tokyo Judgment points out the manifest absurdity of this contention on the facts of Japanese aggression for many years past ; it therefore does not deal with the question whether mere economic action without threat of armed hostilities, which was all that was alleged in this case, could ever justify a war of so-called, "self-defence." The Prosecution submitted that it could not.

In the case of the Japanese wars against China from 1931 onwards, against the U.S.S.R. in 1938 and 1939, and the Pacific War in December, 1941, there was the further charge of illegality that they were all begun without any previous warning of the kind required by Hague Convention III of 1907. There was no pretence of any previous declaration with regard to the Chinese or Russian wars. In the case of the Pacific War it was alleged by the Defence that the failure to deliver a document in Washington a few minutes before instead of a few minutes after the attack upon Pearl Harbour, was accidental. The Tribunal appears, in the absence of direct evidence to the contrary, to have accepted this explanation. They find however that the attack on the British in Malaya took place more than an hour before it was even alleged that the document was intended to be delivered in Washington, and there was no allegation of any other warning, or any declaration to any British authority until some hours later. The document when delivered contained no definite declaration of war or ultimatum, but the Tribunal does not deal with the question whether it was sufficient to serve that purpose, nor with the curious defence that, as the U.S. authorities had intercepted and decoded a number of secret Japanese messages, they knew of the intention to start a war, though not of the precise time, and therefore had no cause to complain. The Tribunal, having regard to its

main decision did not consider it necessary to come to any conclusion on this aspect of the case, but it did point out that as there is no interval of time prescribed by the Convention between the declaration and the attack, the warning could in any case be illusory. If any revision of these Conventions should ever be undertaken it is to be hoped that their recommendation that the declaration should specify an interval will be followed.

The Tribunal seems also to have followed the Nuremberg precedent in the matter of sentences in that no death sentence was imposed upon any accused who was not convicted of crimes against prisoners of war or other illegal outrages. This brings me to the second point which arose in Tokyo but not at Nuremberg, on which the Tribunal did come to a decision which, if there should ever be another war, may be of considerable importance. The Prisoner of War Conventions of 1907 to which Japan was a party, and of 1929 which she agreed to observe although she had not ratified it, lay down that prisoners of war are in the power of the government, and not merely of particular commanders, of the captor nations. The question then arises as to the responsibility of individual members of that government for outrages against those prisoners. The admirable decision of the Tribunal on this point may be summarised as follows. A minister not directly charged with the duty of looking after prisoners of war will be free from responsibility if he satisfies himself that a proper system has been established for the purpose and thereafter has no reason to suspect that it is not being properly carried out. But if, as happened in the case of two of the accused, Hirota and Shigemitsu, who both held the position of Foreign Minister, the former at the time of the rape of Nanking and the latter during the greater part of the Pacific War, he receives information and complaints of outrages committed by the troops and ill-treatment of prisoners of war, and retains his office without taking adequate steps to prevent their recurrence, he makes himself responsible for that recurrence. In the case of Shigemitsu the Tribunal found mitigating circumstances and imposed a very lenient sentence. The Dutch Judge dissented with regard to the conviction of Shigemitsu on the ground that it was more expedient that a man who was found by the majority to be a moderating influence in the Cabinet should re-

main in it, even if he does by so doing condone outrages committed by the military. This hardly seems to be a legal ground, and the decision of the majority to treat it only as a mitigating circumstance may be a valuable precedent.

A question which led to some difference of opinion among the Judges relates to the position of the Emperor and the effect, if any, which the decision not to include him among the accused should have upon the conviction or sentence of the remainder. In the general practice of criminal law as I know it, each accused has to be judged on his own merits, without regard to those of any other person whether accused or not, except in so far as that other person may have led him by deception, coercion, or influence into the commission of the crime. This may in an extreme case amount to a defence, or more usually only to mitigation. No one of the accused alleged, or on any facts which came to light could have alleged, that he was in any way deceived, coerced or induced by the Emperor to do what he did. If the Emperor had been put upon trial it might well have been alleged on his behalf that he was deceived, induced, or even coerced into playing his part in the matter by some of the accused and others who died before or during the trial. I cannot express any opinion as to how far such a defence would have prevailed, but with respect I find it difficult to understand how under the circumstances the Emperor's absence from the dock can have any bearing upon the cases of those who were there.

The question has often been asked whether the conviction and punishment of major war criminals on charges arising out of aggressive war serves any useful purpose. It is said that no member of a government which may be minded to start another war is likely to be deterred by fear of the consequences to himself if it fails; also that a victor in such a war may condemn his opponents without the scrupulous fairness which has been displayed in both the recent trials. There may be some truth in these views, and yet there is great value in making the rules and principles of international law clear beyond a doubt both in the Charters solemnly agreed upon by all the most powerful Nations of the world, and in the judgments of Tribunals upon which they were all represented. Even those who may have doubts as to whether this law had been

made sufficiently clear before these judgments were given must acknowledge the importance of having them reiterated now.

The judgments of the two Tribunals have however another most important value. Never before has it been possible for the facts of a vital period of history to be so fully investigated and the evidence sifted in proceedings in which both sides were fully represented, and set forth in authoritative judgments. Although many important documents were lost, destroyed or concealed, a vast and indeed surprising number were discovered both in Germany and Japan, including many of vital importance. Thus it has been possible for facts which would otherwise have been unknown, or only suspected, to be proved in open court. The judgment of the Tokyo Tribunal is most full and careful and makes fascinating reading. It is only possible in the space available to summarise, and to draw attention to a few of the most vital matters, some of which were previously unknown. At the time when the Indictment had to be drawn up, and the choice had to be made of those to be put in the dock from a number of suspects, by no means all of the evidence which ultimately became available had been discovered or fully examined. It was remarkably gratifying to find how, as the case progressed and fresh evidence came to light, it only confirmed and amplified the case as originally presented, and (though a few may have been lucky to escape) justified the selection of the accused. The story as unfolded in the judgment is one of a grandiose plot which originated in the late 1920's in the minds of a few officers and civilians, and grew until it became the dominating purpose, in varying degrees and with occasional variations of emphasis, of every successive government of Japan. The story of the "Mukden Incident" of September 18th, 1931 which was only partially discovered by the Lytton Commission (which of course did not have access to the inside information ultimately unearthed by the Prosecution) is fully told in the judgment and it is shown to have been deliberately created by the group above-mentioned. The army took full and immediate advantage of it and, in spite of increasingly feeble resistance from successive governments or members of them, never stopped until they had occupied the whole of Manchuria and Jehol. It was not long before this had become the official policy of the Government who recognised the puppet Empire of Manchukuo under Pu-Yi,

and laid their plans for the economic exploitation of the country for the benefit of what was euphemistically called "Japan's national defence," but which as the Tribunal found, was only camouflage for her preparations for aggressive war. In the beginning the main objective of these preparations was the U.S.S.R., an objective which was never abandoned. It is curious to observe the methods by which the army gradually obtained control of the government of Japan and in the end carried it on with the willing aid of a few civilians, almost all career officials, who alternately held cabinet posts and returned to their normal duties. The navy men, except in the matter of increasing the strength of their own service, were apt to form a more cautious element. The old constitution of Japan was on the whole capable of developing on democratic lines and in the 1920's it bade fair to do so. But it contained two major defects. The Diet had only an imperfect control over finance, and secondly and more important in the result, the army and navy had the right, through three senior officers in each service, to nominate their own ministers in any cabinet, and after 1936 these had to be senior officers on active service and therefore personally subject to orders. The navy never seems to have made use of this power to enforce its own views, whether in accord with or opposition to those of the army; but the latter discovered that by refusing to nominate a minister, or by forcing his resignation and providing no successor, they could effectively prevent the formation of, or bring down, any government. This power they effectively used on several critical occasions. The general staffs also had a weapon in that they had the right to conduct operations independently of the cabinet and service ministries; this was more apparent than real because the latter could if they had liked, but never did, curb them by cutting off supplies. All this does not excuse the civilian members of cabinets, because any member could either resign, or still more effectively refuse either to agree with his colleagues or resign, which by Japanese practice would have forced the resignation of the whole cabinet. This was illustrated by two occurrences in 1941 and 1942. But it shows the way in which the army obtained effective control and enforced its policies both at home and abroad. These constitutional methods were effectively supplemented by assassinations, military outbreaks, and threats of both, though it was never

possible, either in such half-hearted attempts as were made by Japanese governments, or for the Prosecution at the trial, to obtain direct evidence to fasten the responsibility for these occurrences upon any of the higher officers.

After the completion of the conquest of Manchuria in 1934 there was a lull in the general fighting in China until the Marco Polo Bridge incident of July 1937. Meanwhile however by threats and intrigue Japanese or puppet control of Inner Mongolia and to a lesser extent of North China was established. A much more important event occurred during this period. By a series of conferences in the summer of 1936, under the premiership of Hirota, a national policy was adopted which really comprised the whole of the conspiracy as found by the Tribunal and as it ultimately developed in action. From this time onward this plan was never substantially varied in its main objects, in spite of later changes of emphasis dictated by circumstances. The Tribunal found that the Marco Polo Bridge incident, and its rapid extension to a full-scale invasion of China, was part of a plan to secure Japan's rear in view of a contemplated attack upon the U.S.S.R. It coincided with further plans for the mobilisation of industry in Japan, Manchuria and North China in preparation for larger enterprises in South-East Asia which, had it been recognised in 1936, would probably involve war with the U.S.A. and Britain.

A most important fact is that all through the China War from 1937 to 1941 Japan was only using a modest proportion of her rapidly expanding output of war material for that purpose, and was storing up the remainder for other contemplated wars. One of the accused boasted of this in 1942. Another is that, all through, 1941 was set as the date-line for these preparations to be ready. They included a large expansion of the navy, in anticipation of which Japan withdrew in 1936, having given notice in 1934, from the international limitation agreements. The China war did not yield the quick results anticipated and early in 1938 a curious situation arose in which the general staff were pressing for its early termination on almost any terms in order to press forward with preparations against the U.S.S.R., but the civilian ministers frustrated their efforts and insisted on the extermination of the Chinese resistance. In the summer of 1938, and again in that of 1939, attacks were made on the Russian and Outer Mongolian borders which at

first sight looked like accidental clashes between frontier guards, but which in the end were proved to the satisfaction of the Tribunal to have been deliberate but unsuccessful trials of strength to test the Russian power of resistance in the Far East, and therefore aggressive wars.

Meanwhile in 1938 the National General Mobilisation Law was passed, which together with the industrial programme was the foundation on which the whole strength of Japan was built up to the formidable pitch which it reached in 1941. Co-operation between Japan, Germany and Italy started with the Anti-Comintern Pact in 1936, with its secret protocol directed against the U.S.S.R. At first Germany was not in favour of Japan's war in China, and endeavoured to negotiate terms, but changed her policy in 1938, in which year there began a long series of negotiations for a closer alliance between the three Powers. These were interrupted by the Non-Aggression Pact between Germany and the U.S.S.R. just before the outbreak of the European war in September, 1939, which Japan regarded as a breach of faith by Germany. But they were resumed later and culminated in the Tri-Partite Pact of September 1940. Thus did Japan's grandiose scheme of domination of East Asia and the Pacific merge into an even more grandiose scheme of joint world domination. The successes of Germany in Europe placed the colonial possessions of Britain, still more of the Netherlands and most of all of France, in the Far East in a dangerously vulnerable position. In the last case the co-operation of the Vichy government with Germany enabled Japan to establish bases in Indo-China in an apparently peaceful manner which she used against China and later against British Malaya, Hong Kong, the Netherlands East Indies and the Philippines. Preparations for the occupation of these territories in the spring of 1941 included the printing in Japan of currency notes for the purpose. About the same time the attack on Pearl Harbour was being planned and prepared. The situation however was complicated in the first half of that year by the conclusion of a Non-Aggression Pact between Japan and the U.S.S.R., followed almost immediately by the sudden and unprovoked invasion of the U.S.S.R. by Germany. The author of the Pact promptly advocated breaking it and joining in the German attack. It was clearly proved that the only thing which deterred Japan from doing so was doubt as to her

ability to make a success of it at the same time as her advance into South-East Asia and probable war with the U.S.A. On several occasions during the Pacific War the project was reconsidered on the same lines under German pressure, but with the same result. Of course the mere threat of it helped the Germans by immobilising a large Russian force in the east.

The Japanese navy, although it had evolved the Pearl Harbour plan early in 1941, remained until near the end sceptical as to Japan's ultimate success, and therefore a restraining force on the impetuosity of the army, who wanted to start the war in the middle of October. Nagano, the naval Chief of Staff, who died during the trial, was opposed to it during the summer, but changed his mind in November, and together with Shimada, the new Navy Minister in Tojo's cabinet, then gave his approval. Such opposition as there was at one time to the war was based on purely prudential grounds, and faded out as soon as the naval authorities gave their consent.

It is difficult to be sure what was the real object of the prolonged and somewhat involved negotiations with the U.S.A., which proceeded at intervals from April to November 1941. It may be that in the minds of some of the Japanese participants there was a genuine hope of achieving their ends by diplomacy, but it was clear that they were at no time prepared to accept the only terms on which the U.S. would, or honourably could, agree. If not in the beginning, certainly in the later stages, it must have become clear to all that they were mere camouflage to provide time for the completion of Japanese military preparations. Prince Konoye, who committed suicide to evade arrest, was clearly one of the principal conspirators from 1937 onwards, but the part he played in 1941 was an enigma.

The Tribunal summarised exhaustively the horrors of Japanese treatment of prisoners of war and civilians in every theatre of war. If one compares this with the German outrages and asks which was the worst, it is hard to give an answer. As far as American and British prisoners were concerned, the death-rate among those in Japanese hands was five times as high as in the case of Germany. The latter committed by far their worst brutalities on their Eastern front, where there was no doubt that they were dictated by deliberate

policy, for a purpose. Though there was a good deal of this also among the Japanese, more may perhaps be attributable to natural brutality, arrogance, and in some cases careless incompetence. Moving among the apparently docile, polite and rather kindly Japanese folk during the occupation, it was sometimes hard to remember that they were the same people who had committed such wide-spread and unspeakable horrors.

I should like to conclude these remarks on a more personal note. Not only did I, during an unexpectedly long participation in this international trial in Tokyo, make a large number of friendships among my colleagues of all the eleven participating countries, but I found it intensely interesting to study the various legal systems in which they had been trained. Several legal problems arose in the course of the trial which required that international law should be ascertained by a comparison of the municipal laws of all the principal nations. In preparing these studies of course I had immense assistance from discussion with my colleagues from other countries. In matters of evidence and procedure also the Tribunal was by the Charter required to evolve its own rules unfettered by those in force in any particular country. By a process of trial and error a system⁹ was gradually evolved which aimed at incorporating from the methods of all the nations assembled those best suited to the purpose in hand. Many of us have probably returned to our respective countries somewhat shaken in our complacent belief that our own system is necessarily in all respects the best in the world.

Language difficulties in such a trial are of course immense, far worse in Tokyo than Nuremberg. The climax was reached when a witness (a very good one) from Outer Mongolia countered a defence challenge as to the correctness of his diction by explaining that the objector only understood colloquial Outer Mongolian, whereas he was speaking classical Outer Mongolian. Apart from such extreme cases, I cannot withhold a tribute of admiration for the skill of the interpreters and translators who coped so successfully with this modern Tower of Babel. I hope the trial has contributed something to international understanding and goodwill.

THE CONTINENTAL SHELF

By SIR CECIL HURST, G.C.M.G., K.C.B., K.C.

(Read before the Grotius Society on December 1, 1948)

Let me preface the paper which I am about to read to you by saying that I have not written it with the intention of laying before you any definite opinions or conclusions which I myself have reached, but for the purpose of stimulating thought and discussion among international lawyers. It deals with a subject which to my mind requires exhaustive examination and investigation. There are few opinions expressed in the following pages which I should not be prepared to modify, if the examination which I think the subject requires showed that these opinions were unsound or unwarranted.

The paper deals as you know from its title with the "Continental Shelf." The resources of the Continental Shelf were the subject matter of a Proclamation issued by the President of the United States on Sept. 28, 1945. So much turns on the contents of the Proclamation, and so much can be learned, or is suggested, by what is said, or is not said, in the text of it, and in the Executive Order of the same date, which accompanied its issue, that it would be well for me to begin by reading to you the two Documents. I have taken the text from vol. 40 of the American Journal of International Law, 1946, section I, Official Documents pp. 45 and 47.

Text of the President's Proclamation of Sept. 28, 1945, as to the Natural Resources of the Continental Shelf.

Whereas the Government of the United States of America aware of the long range world wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged ; and

Whereas its competent experts are of the opinion that such resources underlie many parts of the Continental Shelf off the coasts of the U.S.A. and that with modern technological progress their utilization is already practicable, or will become so at an early date ;

and

Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken ; and

Whereas it is the view of the Government of the U.S.A. that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the Continental Shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon co-operation and protection from the shore, since the Continental Shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appertenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for the utilization of these resources ;

Now, therefore, I, Harry S. Truman, President of the U.S.A., do hereby proclaim the following policy of the U.S.A. with respect to the natural resources of the subsoil and sea bed of the Continental Shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the U.S.A. regards the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas, but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

In cases where the Continental Shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles.

The character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected.

In witness whereof,

H. S. TRUMAN.

By the President, Dean Acheson, Acting S.S.

Executive Order of the President reserving and placing certain resources of the Continental Shelf under the control and jurisdiction of the Secretary of the Interior.

September 28, 1945.

By virtue of and pursuant to the authority vested in me as President of the United States, it is ordered that the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high

seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes pending the enactment of legislation in regard thereto. Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the Continental Shelf within or outside of the 3 mile limit.

HARRY S. TRUMAN.

The White House,
September 28, 1945.

The paper which I have prepared is based almost entirely on the Proclamation issued by the President of the U.S.A. I have not attempted to deal with the Decrees which since Sept. 1945 have been issued in Mexico, the Argentine, Chile, Peru and Costa Rica. These all embody in varying terms the policy set forth in the Proclamation of claiming to control vast spaces of the submarine areas round the coast of the country concerned. In some cases these Latin American Decrees purport to appropriate the seas themselves contiguous to the coast. The points of principle which call for more immediate investigation and examination in connection with the claim to the Continental Shelf and its resources are more easily appreciated if our study is limited to the one instrument.

It is strange that the issue of the President's Proclamation—now more than three years ago—attracted so little attention outside the United States. I think this can only be explained by the fact that in September 1945, the Allies were just finishing the struggle against Nazi Germany. The ideas of every Allied national were then directed entirely to the coming of peace. Furthermore many periodicals devoted to international law had suspended publication during the war with the result that the usual means of drawing the attention of international lawyers to the importance of the issues involved were lacking; but to me I admit it is curious that international legal opinion in Europe has remained so unmoved with regard to this question of the Continental Shelf during the period that has elapsed since the Allied victory in the West and while there has been

time to take stock of the situation in the post-war world. In the United States it is different, but even there the discussions, so far as I can judge, have been in great measure limited to the issues between the Federal Government and the Governments of the several States of the Union as to which of them is entitled to the ownership of the products to be won from the Continental Shelf, and entitled therefore to exercise control over the operations for winning the said products.

With the competing claims of the Federal Government and of the State Governments we in Western Europe are not concerned. The international issues involved are in my view so complicated and so far reaching that I think we shall do well to limit our discussions to the international side of the question and leave aside any internal or national aspect. It is all to the good, however, to see that public opinion in the international law world is at last waking up to the importance of studying the meaning and the implications of the policy set forth in the Proclamation. Both the Institute of International Law and the International Law Association have appointed Commissions to study the subject, or are in process of doing so. The first point I want you to notice is that neither of the documents I have read to you give any definition of the term "Continental Shelf" or any explanation as to its meaning. The Proclamation merely uses the phrase as one which everybody will understand. The draftsman of the Proclamation may have been wise in so doing, but for the purposes of our discussion we must be reasonably clear as to what we understand by the term. I think that what is meant is this. In general the sea bed on the seaward side of low water mark shelves gradually—not suddenly or precipitously—but slowly—so that a considerable distance seawards will have to be traversed before one reaches very deep water. It is the subsoil below this shelving area which is described as the Continental Shelf. If you can picture to yourself a configuration of the sea bed where at, or just beyond, low water mark there were an immense downward precipice in height equal to the vast depth to be found in places in the Pacific Ocean, there would be, as I understand the phrase, nothing that could be described as the Continental Shelf.

Even if that idea, however, is correct, it still leaves open the question how far, where there is a gradually shelving sea

bed, does the area which can be described as the Continental Shelf extend. Here neither the Proclamation nor the Executive Order give us any help. Clearly the area must have been intended to be large, or there would have been little need of the sentence in the middle of the operative part of the Proclamation: "In cases where the Continental Shelf extends to the shores of another State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles." Cases must therefore have been in the minds of the draftsman of the Proclamation where the entire submarine area between the coasts of the United States and that of a State facing the United States could be described as the Continental Shelf of one or other of them.

Though the two documents I read to you do not help us as to the limits of the Continental Shelf, the idea must have been prevalent in the United States that the seaward limit of the Continental Shelf is the 100 fathom line, i.e. the place where the sea attains a depth of 600 feet, for I find the following sentence in an article about the Continental Shelf by Professor Borchard: "... the resources themselves in or under the Continental Shelf *up to a water depth of 600 feet* are claimed as within the jurisdiction and control of the United States." I am told also that there was a press release from the White House simultaneously with the issue of the Proclamation in which this limitation of the Continental Shelf was mentioned. I imagine, therefore, that the term "Continental Shelf" and its limitation to the area within the 100 fathom line were generally understood by the oil world.

To the international lawyer much more than to the oil expert, the thought will at once arise—is the extent of the Continental Shelf a question to be decided on the facts or is it a mere question of distance? If the idea of the Continental Shelf is accepted, does the extent of it depend on the configuration of the sea bed? Must there be that gradually shelving sea bottom that I tried to describe just now? Or is all the area within the 100 fathom line, irrespective of ups and downs in the sea bottom, to be included? The point is obscure.

A second point I want you to notice is that though the terms of the Proclamation—particularly the first para. of the

preamble—show that it was principally petroleum which the American Government had in mind when proclaiming this new policy, its operation is not limited to petroleum. The language used covers all the resources to be obtained from the Continental Shelf: the preamble—para. I—says “petroleum and other minerals;” the operative sentence says comprehensively “the natural resources of the subsoil and sea bed of the Continental Shelf.” This is a matter to which I shall have to return later, because it is important from the point of view of harmonizing the policy put forward in the Proclamation with our present day understandings of international law. For the moment, however, we must realise and must accept the fact that it is the world’s urgent need of petroleum that has led to the adoption of this new policy. We cannot contest what is indicated in the preamble. It is today the fact and will I suppose be so for some time to come, that one of the world’s most urgent requirements is oil—oil, oil and more oil. It is also the case, that there is good reason to think that the world is using petroleum so fast that the supplies may become exhausted.

Now in the face of an increasing demand for a diminishing supply I feel—and I hope that you will all agree with me—that international lawyers must approach this subject of the Continental Shelf on a realistic basis. It is useless to underestimate the need for petroleum in the modern world. To take only one aspect of it. We are told that the number of mouths to be fed in the world is increasing at the rate of 65,000 a day. If so, the mechanization of the agricultural industry all over the globe is a matter of prime importance, and tractors and other agricultural implements all want petroleum products. It is this kind of consideration that I have in mind when I say that international lawyers must consider all the problems connected with the policy embodied in this Continental Shelf Proclamation on a realistic basis. We must do so, I think, fully realising that some of our old ideas about international law may be found to be inadequate, or even unsatisfactory, in the light of modern requirements. Again, the consideration advanced in the second paragraph of the preamble of the Proclamation is one which we cannot contest; viz. that supplies of petroleum can be obtained from the subsoil of the Continental Shelf beyond the limits of territorial waters. I

believe that this is already being done in places to an appreciable extent. Derricks or stagings are erected from the sea bed to the surface of the sea, strong enough to withstand the force of the winds and waters, even in time of tempest, and strong enough to support the machinery for drilling the bore holes, and also that for bringing the petroleum to the surface and pumping it into tankers, or perhaps into pipe lines which will convey it to the shore.

If the world must have petroleum and petroleum is present in available quantities in the Continental Shelf, and the engineering experts say that from such sources it is a feasible proposition to obtain it, the necessary operations to obtain it will be undertaken. That is the situation which international lawyers must face.

Now let me pass on to some of the legal points I want to mention. The first is that the text of the Proclamation does not purport to effect any extension of the sovereignty of the United States. In fact the language used points the other way; the operative part of the Proclamation describes the Continental Shelf as "beneath the high seas" and again the last sentence of the operative part says "The character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way affected." The international law world would hesitate to admit that if the waters above the Continental Shelf are high seas, they are, or can be, subject to the sovereignty of the State. The Proclamation must therefore be read as not affecting any immediate extension of American sovereignty over the Continental Shelf. Yet one cannot read the document as a whole without feeling that the Proclamation was intended to have some immediate effect, a consequence at least as extensive as the staking out of a claim by the contiguous State to the exclusive right to develop the resources of the Continental Shelf, as and when such development could be taken in hand. No-one can, I think, read the Proclamation without feeling that it was intended to give notice to the world that so far as the Continental Shelf was contiguous to the American coast, the Government of the United States claimed, and intended to exercise, an exclusive right to develop its resources as, and when, and how it liked: and *that* whether the Continental Shelf lay within or without the limits of the marginal belt of

territorial waters. To the layman this is, at the least, the staking out of a claim to exclusive control.

But does international law, as at present understood, admit the staking out of a claim by unilateral action, such as the Proclamation of Sept. 1945, to an exclusive right on the part of the contiguous State to control future developments in an area beyond the limits of its sovereignty as and when it considers that such developments have become feasible ? And yet ! look at the problem in the light of the present day situation ; the need of oil, the immense advance in engineering skill and the power of the oil world. Could any powerful State be expected to tolerate the initiation of great development works by some foreign business organisation to extract mineral wealth from the sea bed just outside the limits of its territorial waters without having some say in the matter ? Would anyone maintain that it was just that where the State off whose shores such developments were started was a weak State, an international tribunal deciding disputes before it on the basis of international law, or an outside body to which the weak State appealed for help, should be obliged to say that the rules of international law gave the State no right to object ?

One provision in the preamble to the Proclamation suggests that it was intended that there should be a distinction between the legal situation before development of the resources of the Continental Shelf began, and the situation after such development had begun. Let me read you para. 3. "Whereas recognised jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken."

On the other hand is it possible on the basis of this one sentence taken by itself to say that the intention of the Proclamation was to draw a distinction in law between the claims to the Continental Shelf and its resources before any development of such resources began and the claims to the Shelf and its resources after development had begun. I think it is doubtful whether any such distinction can be made. One may I suppose regard the Executive Order issued by the President on the same day as the Proclamation as constituting something in the nature of an official counterpart of the Proclamation, and therefore affording some guide to the Proclamation's interpretation. The Executive Order draws no distinc-

tion between the situation before and the situation after, the commencement of development work. Let me read the words again. "It is ordered that the natural resources of the subsoil and the sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States declared this day by Proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes pending the enactment of legislation in regard thereto."

Taking the two documents together I think one must deduce from the text an intention on the part of the United States Government to claim as from the issue of the Proclamation and without waiting for the commencement of any development work an exclusive right to control the Continental Shelf adjacent to the coasts of the U.S.A. and thereby to control all operations for winning its resources, whether within or outside of the three mile limit. But still you will observe no claim to sovereignty over the whole of the Continental Shelf, no claim to sovereignty over the waters above the Continental Shelf: on the contrary specific mention of the Shelf as "beneath the high seas" also a reference to the three mile limit as a circumstance that is irrelevant as regards the functioning of the policy proclaimed in the Proclamation. A claim to jurisdiction certainly—an intimation that other Governments and States would be expected to acquiesce in the American claim to jurisdiction—at least that I suppose is the implication underlying the addition of the word "recognised" before jurisdiction, a claim to control over all the operations for the purpose of developing the resources of the subsoil below the sea bed—and if I understand rightly the intention of paras 4 and 5 of the preamble of the Proclamation, a claim to *exclusive* control. It is there stated that such control must be exercised by the coastal State and obviously there can be but one coastal State—but in words no clear claim to sovereignty.

If that is a correct description of the meaning of the Proclamation, however, the difficulty is that the distinction between the jurisdiction and the exclusive control which are claimed and sovereignty is so small as to be little more than a question of name. Sovereignty is not an easy term to define,

but in a case of this sort, I think we are entitled to look at the facts of the situation more than at the language used. Stripped of the semi-philosophical language in which it is so often defined in the text books, I do not think that sovereignty denotes more than the right and the determination of a State to be master in its own household, and the limits, i.e. the geographical limits, within which a State is sovereign are the limits of the area within which the State is entitled so to be master. One cannot read this Proclamation without feeling that within the area of its Continental Shelf, the United States is claiming rights which are as large as sovereignty; the claim may be unjustified and impossible in law—that is another matter. What I am suggesting at the moment is that if the rights claimed over the Continental Shelf and its resources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation. If the rights claimed are less in extent than sovereignty, it is difficult to see the justification for the exclusive nature of the control claimed. Note that though the Proclamation indicates complete willingness to discuss with any other State concerned the question where the boundary between their respective Continental Shelves may lie: it gives no indication of any willingness to discuss with another State any questions of what the United States may or may not do in connection with the resources of what it proclaims to be *its* Continental Shelf, or with the steps it takes for the purpose of winning these resources from the sea bed and the subsoil of the Continental Shelf.

Let me mention another point. If the right of jurisdiction and exclusive control which is claimed is less in measure than a right of sovereignty, and the area in consequence lies outside the area of the State's sovereignty, the area must, unless it lies within the area where some other State is sovereign, constitute a "*res nullius*." That seems to be difficult to reconcile with the claims to jurisdiction and exclusive control asserted in the Proclamation.

Before I leave this question of the nature and extent of the claims by the contiguous State to jurisdiction and control over the Continental Shelf adjacent to its coasts, I ought to mention the agreement between the United Kingdom and Venezuela about the Gulf of Paria. The Gulf of Paria is a large expanse of water between Trinidad and Venezuela about

70 to 80 miles from E. to W. and 50 miles from N. to S. It is, I suppose, an oil bearing area: probably its waters are of no great depth nor is it likely to become a highway of maritime traffic. In 1942 a treaty was concluded between this country and Venezuela with regard to the submarine areas of this Gulf. The preamble states it to be concluded because the parties are desirous of making provision in a spirit of goodwill for defining as between themselves their respective interests in the submarine areas of the Gulf. By Article 2 the King declares that he will not assert any claim to sovereignty or control over the part of the submarine area of the Gulf lying on one side of a line—that line being laid down in Article 3—and the President of Venezuela declares that he will not assert any claim to sovereignty or control over the parts of the submarine area lying on the other side of the line. Each of the parties in like manner declares that he will recognize any right of sovereignty or control lawfully acquired by the other in the areas on their respective sides of the line. The submarine areas of the Gulf are defined in Article I as meaning the sea bed and subsoil outside of the territorial waters of the High Contracting Parties; and Articles 5 and 6 limit the effect of the treaty to the submarine area of the Gulf and provide that it shall not affect the status of the islands, islets and rocks above the surface of the sea together with their territorial waters and also that it shall not affect the status of the waters of the Gulf or any rights of passage or navigation on the surface of the seas outside territorial waters. An understanding by a High Contracting party to a treaty that he will not claim sovereignty or control in the submarine area on the other party's side of the line and will recognise any right of sovereignty or control acquired there by the other party, is very suggestive that on his own side of the line that party intends to enjoy sovereignty or control over the submarine area. That intention is borne out by the subsequent events. Very shortly after the conclusion of the treaty, the President of Venezuela proceeded to annex so much of the submarine area of the Gulf of Paria as lay on his side of the line and the King proceeded to annex the remainder of the submarine area. It is interesting to note that though the treaty was concluded three-and-a-half years before the President's Proclamations about the Continental Shelf, it is curiously similar to the Proclamation in some of its features.

It is limited to the submarine areas of the Gulf, i.e. the sea bed and subsoil outside of the territorial waters of the parties : it contains a saving for the status of the islands, islets and rocks and the territorial waters round them : it preserves the status of the waters of the Gulf, making no attempt to appropriate them, and it forbids all interference with the rights of navigation. So far as the waters of the Gulf were high seas at the time of the conclusion of the treaty, their status as such is preserved. Can the Continental Shelf Proclamation of Sept. 1945 be interpreted in the same way ? Can some of the difficulties which I have been suggesting about the right to jurisdiction and control being so far reaching as to be practically identical with sovereignty in an area where the waters are described as high seas, be got over by restricting these claims to jurisdiction and control to the submarine area ? It is one of the many questions in connection with this Continental Shelf policy—if I may so describe it—which international lawyers should thresh out.

Hitherto it has, I believe, been generally assumed that the limit of a State's sovereignty is a vertical straight line stretching upwards and downwards *ad infinitum* from the starting point. Was the Continental Shelf policy intended to introduce a new system ? A system under which the limits of a State's sovereignty would be a line which made a gigantic zigzag. A line, that is to say, which starting from the bed of the sea at the limit of territorial waters went upwards vertically to the surface of the water and on upwards *ad infinitum* through the air space—but instead of going downwards *ad infinitum* went laterally in a more or less horizontal direction along the sea bed till it reached the limits of the Continental Shelf and there made an angle and went downwards *ad infinitum*. The result would be that the land mass of the Continental Shelf—though itself subject to state control and jurisdiction so complete as to be equivalent to sovereignty—would be covered by a mass of water of which the status would be that of high seas and therefore technically a "res nullius," the airspace above the sea being in the same way outside the limits of the State's exclusive control or sovereignty.

If its provisions are to be taken literally, the treaty of 1942 between the United Kingdom and Venezuela must, in the light of the annexations of the submarine areas of the Gulf which

have taken place since the conclusion of the treaty, be read in that sense. If I am right in saying that this must be the situation which has existed in the Gulf of Paria since 1942, one cannot say that in theory the same system might not prevail wherever the Continental Shelf system was proclaimed and admitted. Whether it would and could work satisfactorily in practice seems to be more doubtful. The means by which petroleum must be obtained from submarine wells in the Continental Shelf illustrate the difficulties. If petroleum is already being obtained in this way in the Gulf of Paria, I can only suppose that the system does work satisfactorily there for the reason that the waters are shallow and there is little maritime traffic, consequently the stagings or derricks supporting the pipes to the wells need not be very large nor would they materially inconvenience the small amount of shipping frequenting the Gulf.

Let us however look at the question from the legal point of view. International lawyers are, I fancy, still not agreed as to whether the occupation of limited areas of the sea bed for the protection of sedentary fisheries is a valid appropriation of such parts which ought to be recognised universally. In some of the articles and papers I have read about this question of the Continental Shelf, I find references made to an article which I wrote five and twenty years ago in the *British Year Book of International Law*. In that article I urged that claims to exclusive control—sovereignty if you like—ought to be recognised to submarine banks outside the limits of territorial waters where there were valuable pearl fisheries, or beds of edible oysters which required watching and protecting, or sponge fisheries, or chank sedentary fisheries which could be the subject of a valid occupation of the sea bed without the least interference with fishery rights in the open sea i.e. the fishing for swimming fish—or with general rights of navigation. That view I still believe to be correct. After all it was not an original idea on my part; I was only following in the footsteps of Vattel when he wrote, “Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?” For three reasons, however, it is, in my view, difficult to apply the same principle to the Continental Shelf. The first is the magnitude of the areas of the Continental Shelf as compared with the small extent of the banks or beds where these sedentary

fisheries exist; the second is the variety of the resources capable of being obtained from these submarine areas; and the third is the impossibility of obtaining some of them without the erection of installations which would be a serious hindrance to navigation.

As regards the first—if we adopt the 100 fathom line as the limit of the claims to jurisdiction and control over the Continental Shelf—we must realize that the area to which the claims extend is enormous. I came across a statement in a paper which I was reading on this subject in which it was said that the area of the Continental Shelf of the United States within which the Proclamation of 1945 would operate was 750,000 square miles: and that the width of the Continental Shelf was estimated at 250 miles. As regards this country the 100 fathom line to the west of Scotland and Ireland passes far to the west of the Shetlands, the Hebrides and Achill Head, well out in the Atlantic; practically the whole of the North Sea lies above the Continental Shelf of the countries bordering upon it—so does the English channel, *in toto*. Would it be satisfactory that Holland and the United States should be unable to arrange for laying a submarine cable from Rotterdam to New York without violating the sovereignty of this country, or that Belgium in the same way should be obliged to violate the sovereign rights of another State if she laid a cable from Antwerp to the territory of the Congo?

The second difficulty is that though it is the known existence of petroleum which has led to this new policy as regards the resources of the Continental Shelf being put forward, there is nothing in the Proclamation itself which limits its operation to petroleum. The first sentence of the preamble says "petroleum and other minerals," and the operative part of the Proclamation covers all the resources of the Continental Shelf. Who knows that the scientific discoveries of tomorrow may not lead to our finding that some use of great importance to the world may not be made of the chalk which forms, I believe, the subsoil of the sea bed of the English Channel? I would stress this point in order to guard against any impression arising among the international lawyers of Western Europe that we need not worry about the problems connected with the Continental Shelf because there is no reason to think that there are any oil deposits in this part of the world. We must

examine the problems that arise on the basis that the new policy applies to all the resources which can be obtained from the sea bed and its subsoil. Arguments which may justify sovereignty being recognised over the small banks where oysters or sponges may be gathered on the surface of the sea bed can scarcely apply to the works and installations necessary for the extraction of minerals on a large scale from vast areas of the high seas.

The third difficulty in the way of applying this principle about sedentary fisheries to the Continental Shelf policy is that if the Continental Shelf is to extend to the 100 fathom line, it will apply to places like the English Channel, which are great highways of maritime traffic, and where the erection of the stagings or derricks necessary for the extraction of anything from the sea bottom are bound to constitute a serious obstacle to shipping.

It is more than likely that if the policy with regard to the resources of the Continental Shelf were limited to the winning of petroleum, no great inconvenience would be caused to navigation. Neither the Gulf of Paria, nor the Gulf of Mexico, nor the coasts of California are likely within the near future to become so crowded with shipping that the works erected to obtain the petroleum would impede maritime traffic, but it is difficult to see how in law it could be legitimate for a State to insist on special rights of jurisdiction and control off its coasts for the working of petroleum which were not equally to apply to the working of bauxite or uranium. It is equally difficult to see how in law the special rights of control over the resources of the Continental Shelf could depend on the volume of shipping passing over it. The difficulty scarcely seems to be met by a saving clause in the instrument embodying the claim to the effect that the free and unimpeded navigation of the high seas above the Continental Shelf is not affected. In practice the system of maintaining the existing limits of the sovereignty of the State on the surface of the sea, so as to preserve its character as high seas, when outside the limits of territorial waters, but of recognising a claim to special rights of jurisdiction and exclusive control over a vast area of sea bed and subsoil would be found, I fear, to be too intricate to give satisfaction.

To show you the sort of complications which might arise, let me take an imaginary case based on the conditions which

existed in the old days of naval warfare, days when it was open to a State to remain neutral and when many did so. Imagine the case of a country exploiting the resources of its Continental Shelf by means of installations outside the three mile limit through which it was obtaining petroleum from below the sea bed. A war breaks out in which the State remains neutral. While the petroleum being obtained in this way is underground it is neutral property. The State would certainly claim that the petroleum was within its own territory and as such neutral property. As the petroleum passes up the bore-hole and when it is above sea level it is neutral property on the high seas, but not on board ship, and not, so far as I know, falling within any category of neutral property which is at present exposed to capture by the exercise of belligerent rights on the part of the State at war. As and when the petroleum is pumped into the hold of a tanker, it becomes contraband of war, if an enemy destination can be proved. If on the other hand it passes into a pipe line leading to the shore, it is immune from capture as contraband, but exposed to the almost certain risk of belligerent action against so much of the pipe line as is outside the three mile limit in order that potential supplies of war material may be prevented from reaching the enemy.

This type of hypothetical case would make an excellent question for an examination paper, but would its complications be satisfactory in practice ?

Another subject which will require careful examination is whether the stagings erected to protect the bore holes and the pipes for petroleum wells in the Continental Shelf, where the depth of water is considerable, will not constitute artificial islands—and if so—what will be their status : will they be surrounded by a belt of territorial waters ? They will certainly be capable of effective use and occupation and will be permanently above high water. They would seem therefore to comply with the test of what constitutes an island. I have no time to deal with this matter now. I can only mention it as one which must be considered.

I could continue almost indefinitely indicating points which to my mind require investigation by legal experts, if this principle of the Continental Shelf and the working of its resources is accepted, as I suppose it will be. Let me repeat that my purpose has been to provoke study and enquiry on the subject

and let me say once more that if some of my ideas are thought to be disquieting—and they certainly are so to myself—I shall be delighted to be corrected.

Let me add one last word. I have indicated many questions which to my mind require examination in connection with this new policy proclaimed in the Proclamation of September 1945, but the world wants oil and I think we ought all to approach the study not with the idea of magnifying the objections but with the intention of finding ways of overcoming the difficulties with which the whole subject is surrounded.

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