UNIVERSAL
LIBRARY

OU_154472

UNIVERSAL
LIBRARY

OSMANIA UNIVERSITY LIBRARY

Call No. 341.0973/H99I v.2 Accession No. 264

Author Hyde, Charles C.

Title International Law 1947

This book should be returned on or before the date last marked below.

# INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

SECOND REVISED EDITION

---

VOLUME TWO

# INTERNATIONAL LAW

## CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

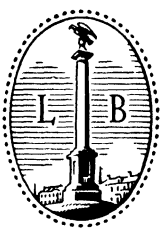
BY

CHARLES CHENEY HYDE

HAMILTON FISH PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY, COLUMBIA UNIVERSITY; FORMERLY THE SOLICITOR FOR THE DEPARTMENT OF STATE OF THE UNITED STATES OF AMERICA; ASSOCIATE OF THE INSTITUTE OF INTERNATIONAL LAW

*In Three Volumes*

VOLUME TWO




*Second Revised Edition*

BOSTON

LITTLE, BROWN AND COMPANY

1947

COPYRIGHT 1922, 1945, BY LITTLE, BROWN AND COMPANY

ALL RIGHTS RESERVED, INCLUDING THE RIGHT
TO REPRODUCE THIS BOOK OR PORTIONS
THEREOF IN ANY FORM

PRINTED IN THE UNITED STATES OF AMERICA

# CONTENTS

VOLUME TWO


PAGE

(4) Foreign Vessels of War
(a) § 250. Their Public Character and Its Proof . . . . . 823
(b) § 251. Exemption from Local Process . . . . . 824
(i) § 252. The Same . . . . . 825
(ii) § 253. The Same . . . . . 826
(c) § 254. Duty Not to Grant Asylum . . . . . 828
(d) § 255. Officers and Crews . . . . . 830
(5) § 256. Other Vessels in Foreign Public Service . . . . . 831
(a) § 257. The Same . . . . . 838
(6) § 257A. Foreign State Aircraft . . . . . 840
(7) § 258. Other Foreign Public Property . . . . . 841
(8) Extraterritorial Jurisdiction
(a) § 259. In General . . . . . 849
(i) § 260. The Same . . . . . 853
(b) § 261. Persons in Whose Behalf Extraterritorial Jurisdiction May Be Claimed . . . . . 854
(c) § 262. Classes of Actions . . . . . 857
(d) § 263. Difficulties with Turkey. Article IV of Treaty of 1830 . . 859
(e) § 264. The Legislative Function. Legislation of the United States . . 861
(f) § 265. Steps towards the Relinquishment of Extraterritorial Jurisdiction . . . . . 863
(g) § 265A. Effect of Military or Kindred Occupation upon Extraterritorial Privileges within the Same Territory . . . . . 871

2. Duties of Jurisdiction
a. § 266. Maintenance of a Judicial System. An International Standard . . . 871
§ 267. The Same . . . . . 874
b. Operation of the Judicial System
(1) § 268. When the Alien Invokes the Aid of the Courts . . . . . 879
(2) § 269. When the Aid of the Courts Is Invoked against the Alien . . . 881

3. Claims
a. § 269A. Aspects of the Responsibility of States . . . . . 882
b. § 270. Claims. In General . . . . . 886
c. Mode of Presentation of Private Claims
(1) § 271. Claims against the United States . . . . . 889
(2) § 272. Claims against Foreign Governments . . . . . 890
d. The Prosecution of Private Claims
(1) § 273. Discretion as to Presentation . . . . . 890
(2) § 274. Obstacles to Presentation . . . . . 891
e. Conditions of Interposition in Behalf of a Private Claimant
(1) § 275. Nationality of Claimant . . . . . 893
(2) § 276. Assignment of Claimant's Interests . . . . . 899
(3) § 277. Partnership Associations . . . . . 900

PAGE

(4) Corporations
(a) § 278. Interposition in Behalf of a Domestic Corporation . . . 902
(b) § 279. Interposition in Behalf of Nationals Interested in a Foreign Corporation . . . 904
§ 280. The Same . . . 906
f. Grounds of Interposition
(1) § 281. "Denial of Justice." Exhaustion of Local Remedies . . . 909
§ 282. The Same . . . 915
(2) When Local Remedies Need Not Be Exhausted
(a) § 283. When Means of Redress Are Wanting . . . 917
(b) § 284. When Local Remedies Have Been Superseded . . . 920
(c) § 285. When Unjust Discriminations Are Applied . . . 921
g. § 285A. The Relationship of a State to Events Occurring Abroad . . . 922
h. Claims Arising from Acts Primarily Attributable to the Authorities of a State
(1) § 286. Arrest and Imprisonment . . . 924
§ 286A. The Same . . . 928
(2) § 287. Acts of Judicial Officers . . . 931
(3) § 288. Acts of Other Officials . . . 934
i. Claims Arising from Tortious Acts not Primarily Attributable to the State
(1) § 289. Acts of Private Individuals . . . 937
(2) § 289A. Damages Arising from Neglect to Prosecute . . . 941
(3) Mob Violence
(a) § 290. Claims Against the United States . . . 946
(i) § 291. President Harrison's Attitude . . . 949
(ii) §292. Local Statutory Liability . . . 950
(b) § 293. Claims against Foreign States . . . 951
j. Claims Growing out of War
(1) § 294. In General. Absence of Local Remedies . . . 952
(2) § 295. Certain Hazards of War . . . 955
(3) § 295A. American Claims against Germany Arising Out of the World War 958
(4) § 295B. The Sabotage Claims against Germany Growing Out of Explosions at Black Tom and Kingsland . . . 962
(5) The Relation of the Belligerent Sovereign to Certain Acts Giving Rise to Complaint
(a) § 296. Acts of Soldiers . . . 965
(b) § 297. Acts of Private Individuals and Bandits . . . 968
(6) War Claims Against Germany under the Treaty of Versailles
(a) § 298. The General Theory of Reparation . . . 969
(b) § 299. Adjustment of Claims of Nationals of Allied and Associated Powers . . . 972
(c) § 299A. American Participation in German Reparation Payments . 974
k. The Relation of a State to Acts of Insurgents
(1) § 299B. Insurgents as Agents of a State . . . 979
(2) § 300. Acts of Unsuccessful Insurgents . . . 980
(3) § 301. Payment of Duties and Taxes to Insurgents . . . 985
(4) § 301A. Routine and Kindred Administrative Acts . . . 986
(5) § 302. Acts of Successful Revolutionists . . . 987
l. Contractual Claims Against Foreign Governments
(1) § 303. The Practice of Withholding Interposition . . . 988
(2) § 304. Instances of Interposition . . . 990
(3) § 305. The Calvo Clause . . . 994
(4) § 306. The Scope of Claims Conventions to Which the United States Has Been a Party . . . 998

PAGE
(5) § 307. Public Bonds . . . . . 1004
(a) § 308. The Same . . . . . 1005
(6) The Collection of Public Debts by Force
§ 309. The Hague Convention of 1907 Respecting the Limitation of the Employment of Force . . . . . 1007
m. § 309A. Substitutes for International Adjudication . . . . . 1010
4. Extradition
a. § 310. Preliminary . . . . . 1012
b. Extradition Without Treaty
(1) § 311. Refusal by the United States . . . . . 1015
(2) § 312. Requests on Grounds of Courtesy . . . . . 1015
c. Treaties of the United States
(1) § 313. Policy . . . . . 1016
(2) § 314. Offenses Generally . . . . . 1018
(3) Political Offenses
(a) § 315. Development of the Rule . . . . . 1019
(b) § 316. Reservation in Treaties of the United States. Assassination of the Head of a State . . . . . 1020
(i) § 317. The Same . . . . . 1024
(c) § 318. Burden of Proof . . . . . 1023
(d) § 318A. Military Offenses . . . . . 1026
(4) Nationals
(a) § 319. Of the Country of Refuge . . . . . 1027
(b) § 320. Of a Third Country. Competing Requests . . . . . 1029
(5) § 321. Irregular Recovery of Fugitive . . . . . 1031
(6) Limitations as to Trial
(a) § 322. Offenses Other Than Those for Which Accused Was Extradited 1032
(b) § 322A. Re-extradition . . . . . 1035
(c) § 323. Limitation of Trial by Lapse of Time. Certain Other Restrictions . . . . . 1036
(7) § 324. Requisition. Mandate . . . . . 1037
(8) § 325. Provisional Detention . . . . . 1039
(9) Interpretation
(a) § 326. The General Principle . . . . . 1041
(b) § 327. Conviction *Par Contumace* . . . . . 1042
(10) § 328. Scope of Treaties with Respect to Areas Covered . . . . 1043
(11) § 329. Fugitives from Justice . . . . . 1046
d. Some Aspects of Procedure in the United States
(1) § 330. In General . . . . . 1047
(2) § 331. Magistrates . . . . . 1049
(3) Complaint
(a) § 332. Authority . . . . . 1051
(b) § 333. Information and Belief of Complainant . . . . . 1052
(c) § 334. Form of Charge . . . . . 1052
(4) Evidence
(a) § 335. Amount of Proof Required of Demanding Government . . 1053
(b) § 336. Defensive Testimony . . . . . 1055
(c) § 337. Scope of Inquiry in *Habeas Corpus* Proceedings . . . . 1056
(i) § 338. The Same . . . . . 1057
(5) Surrender
(a) § 339. An Executive Function . . . . . 1059
(b) § 340. Executive Discretion. Obstacles to Surrender . . . . 1060
(c) § 341. Transit . . . . . 1062

## TITLE D

## NATIONALITY

PAGE

1. § 342. In General . . . . . 1064

2. The Acquisition of American Nationality by Birth
   a. With or through Citizenship
      (1) By Right of Place. *Jure Soli*
         (a) § 343. The Common Law . . . . . 1068
         (b) § 344. The Laws of the United States . . . . . 1068
      (2) § 345. By Right of Blood. *Jure Sanguinis* . . . . . 1073
   b. American Nationality as Not Derived from or Associated with Citizenship
      (1) § 346. By Right of Place. *Jure Soli* . . . . . 1079
      (2) § 347. By Right of Blood. *Jure Sanguinis* . . . . . 1081
      (3) § 347A. Analogies from *Jus Soli* . . . . . 1081
   c. § 348. The Attitude of International Tribunals . . . . . 1082
   d. § 348A. Concerning Proof of Nationality . . . . . 1083

3. § 349. Acquisition of Nationality by Revolution . . . . . 1086

4. Naturalization
   a. § 350. Definition. Regulation . . . . . 1087
   b. § 351. Voluntary Individual Action . . . . . 1088
   c. § 352. Collective Naturalization . . . . . 1090
   d. American Naturalization
      (1) § 353. Regulated by Congress. Entrusted to the Courts . . . . 1093
      (2) § 354. Persons Eligible for Naturalization as American Citizens . . . 1095
      (3) § 355. Usual Legal Conditions . . . . . 1100
      (4) Declaration of Intention
         (a) § 356. Requirements of the Law . . . . . 1101
         (b) § 357. Exceptions . . . . . 1101
         (c) § 358. Does Not Confer Citizenship . . . . . 1102
      (5) Residence
         (a) § 359. Five Years' Rule . . . . . 1103
            (i) § 360. Certain Exceptions . . . . . 1105
   e. Conventional Arrangements of the United States concerning Naturalization
      (1) § 361. Essential Features of the Treaties Concluded Before World War I 1105
      (2) § 362. Controversies with Germany . . . . . 1108
      (3) § 363. Controversies with Austria-Hungary . . . . . 1110
      (4) § 363A. Treaties Restoring Friendly Relations after World War I . . 1111
      (5) § 363B. Treaties Concluded since World War I . . . . . 1112
      (6) § 364. Naturalization not Retroactive . . . . . 1113
   f. Marriage Between Persons of Differing Nationalities
      (1) Marriage of American Women to Aliens. Reversion of Nationality
         (a) § 365. The Act of March 2, 1907 . . . . . 1114
         (b) § 365A. The Cable Act of September 22, 1922 . . . . . 1117
      (2) § 366. Marriage of Alien Women to American Citizens. Reversion of Nationality . . . . . 1118
      (3) § 366A. The Cable Act of September 22, 1922, as Amended. The Nationality Act of 1940 . . . . . 1119
   g. § 367. Effect of Parents' Naturalization on Infants. The Naturalization of Children . . . . . 1122
   h. Naturalization Ineffective as to Absent Family
      (1) § 368. Application to Wives and Children . . . . . 1124
      (2) § 369. Good Offices for Emigration . . . . . 1124

PAGE

*i.* Impeachment and Revocation of Naturalization
(1) § 370. The Law of the United States . . . . . 1125
(2) § 370A. The Position of the Department of State with Respect to Passports 1128
(3) § 371. Rule of International Action . . . . . 1129

5. Double Nationality
*a.* § 372. The Problem . . . . . 1131
*b.* The Attitude of the United States
(1) § 373. Claims by Right of Birth and During Minority . . . . . 1132
(2) § 373A. Foreign-born Persons . . . . . 1134
(3) § 374. Native-born Children . . . . . 1136
(4) § 375. Effect of Change of Parents' American Nationality . . . . 1138
(5) § 375A. Adult Persons. An American Proposal . . . . . 1140

6. Expatriation Through Naturalization
*a.* § 376. In General . . . . . 1143
*b.* § 377. Relation to Emigration . . . . . 1144
*c.* § 378. Development of the Doctrine in the United States . . . . . 1146
*d.* § 379. Significance of the Existing Law . . . . . 1148
*e.* § 379A. Action of The Hague Conference of 1930 . . . . . 1149
*f.* Contrasting Views of Certain Foreign States
(1) § 380. Respecting Effect of Naturalization . . . . . 1151
(2) § 381. Difficulties Respecting Military Service . . . . . 1155
(3) § 381A. Conventions Restricting Exactions of Military Service . . . 1157
*g.* Modes of Expatriation of American Nationals
(1) § 382. Naturalization in a Foreign State . . . . . 1159
(2) § 383. Oath of Allegiance to a Foreign State. The Matter of Minority . 1160
(3) § 384. Residence of a Naturalized National in a Foreign Country. Renunciation of Naturalization . . . . . 1163
(4) § 384A. A Limitation When the United States Was at War . . . . 1165
(5) § 385. Residence Abroad of the American Wife of an Alien . . . . 1166
(6) § 386. Repatriation of Persons Who Lost American Citizenship in Connection with Services under Certain Foreign Belligerents during World War I . . . . . 1167
(7) § 387. Miscellaneous Acts Productive of Loss of American Nationality . 1168
*h.* § 387A. Non-exclusion of Stateless Persons from the Territory of the State of Which They Were Formerly Nationals . . . . . 1169

7. Loss of Privilege of National Protection
*a.* Foreign Domicile
(1) § 388. Native Citizens . . . . . 1170
(2) § 388A. American Citizens or Nationals Born Abroad of American Parentage . . . . . 1173
(3) § 389. Naturalized Citizens . . . . . 1174
(4) § 390. Residence in Some Oriental Countries . . . . . 1176
(5) § 391. Americans as Missionaries Abroad . . . . . 1177
*b.* Other Acts
(1) § 392. Participation in the Political Life of a Foreign State. Fugitives from Justice . . . . . 1177
(2) § 393. Unneutral Conduct . . . . . 1178

8. § 394. Seamen . . . . . 1179

9. § 394A. Corporations . . . . . 1181

10. § 395. Care of Indigent Nationals . . . . . 1182

PAGE

11. The Temporary Protection of Domiciled Aliens Declaring an Intention to Become American Citizens
    *a.* § 396. Thrasher's Case. Koszta's Case . . . . . 1183
    *b.* § 397. The Act of March 2, 1907 . . . . . 1184

12. § 398. Extraterritorial Industries of American Nationals . . . . . 1186

TITLE E

AMERICAN PASSPORTS

1. § 399. In General . . . . . 1188
2. § 399A. Types of Passports . . . . . 1192
3. § 400. To Whom Issued . . . . . 1193
4. § 401. Grounds of Refusal . . . . . 1195
5. International Effect
    *a.* § 402. Evidential Force . . . . . 1197
    *b.* § 403. Visa . . . . . 1198
6. § 404. Local Papers . . . . . 1201
7. War Regulations
    *a.* § 405. In General . . . . . 1202
    *b.* § 406. Regulations of the United States as a Belligerent . . . . . 1204
    *c.* § 406A. Restriction of American Passports Against Travel to Belligerent and Other Countries Engaged in Conflict Since World War I . . . . . 1207
8. § 406B. The Registration of Nationals . . . . . 1208

PART III

DIPLOMATIC INTERCOURSE OF STATES

TITLE A

§ 407. In General . . . . . 1211

TITLE B

AGENTS OF A STATE

1. § 408. The President of the United States . . . . . 1214
2. § 409. Communications through Non-Governmental Channels . . . . . 1216
3. § 410. The Secretary of State as Organ of Correspondence. The President . . 1219
4. § 410A. Direct Negotiations between Heads of Governments . . . . . 1221
5. Diplomatic Missions
    *a.* § 411. Classification of Diplomatic Representatives . . . . . 1222
    *b.* § 412. Secretaries of Embassy or Legation. Counselors of Embassy or Legation 1225
    *c.* § 413. Attachés . . . . . 1226
    *d.* § 414. Commissioners and Special Envoys . . . . . 1227
    *e.* § 415. Agents . . . . . 1230
    *f.* § 416. Non-Diplomatic Missions . . . . . 1231
    *g.* § 416A. Non-Diplomatic Persons Not Associated with Diplomatic Missions . 1232
    *h.* § 417. Foreign Diplomatic Missions in the United States . . . . . 1234

## TITLE C

## BEGINNING AND END OF MISSION

PAGE

1. § 418. Appointments . . . . . 1236
2. § 419. Reciprocity of Treatment . . . . . 1237
3. Credentials and Reception
   *a.* § 420. Letters of Credence . . . . . 1238
   *b.* § 421. End of Mission . . . . . 1239
4. Question of Personal Acceptability
   *a.* § 422. A Minister Must Be Personally Acceptable. Refusal to Receive . . 1242
   *b.* Request for Recall. Dismissal
      (1) § 423. The Principle Involved . . . . . 1243
      (2) § 424. Cases in the United States . . . . . 1245
   *c.* § 425. American Nationality as Obstacle to Reception . . . . . 1247

## TITLE D

## THE RIGHTS AND DUTIES OF MINISTERS

1. Right to Protection
   *a.* § 426. Of Person and Reputation . . . . . 1249
   *b.* § 426A. Of a Minister with Whose Country the Receiving State Becomes at War 1250
   *c.* § 427. Of Domicile and Property. Archives . . . . . 1251
   *d.* § 427A. Removal of Diplomatic Mission from Territory under Control of State to Which it is Accredited . . . . . 1254
2. Right of Official Communication
   *a.* § 428. In General . . . . . 1255
   *b.* § 429. Couriers and Bearers of Despatches . . . . . 1259
3. Miscellaneous Privileges
   *a.* § 430. Display of National Flag . . . . . 1260
   *b.* § 431. Liberty of Worship . . . . . 1260
   *c.* § 432. Transit . . . . . 1261
   *d.* § 432A. Freedom of Movement in Territory of State to Which Accredited . . 1263
4. Jurisdictional Immunities
   *a.* § 433. Early Practices . . . . . 1263
      (1) § 434. The Same . . . . . 1265
   *b.* § 435. Exemption from Judicial Process . . . . . 1266
   *c.* § 436. Giving of Testimony . . . . . 1270
   *d.* § 437. Property . . . . . 1271
   *e.* § 438. Persons Other than Heads of Missions . . . . . 1272
   *f.* § 439. Ministers Recalled or Not Received . . . . . 1275
   *g.* § 440. Taxation . . . . . 1276
      (1) § 440A. The Same . . . . . 1278
   *h.* § 441. Customs Duties . . . . . 1281
   *i.* § 442. Police Regulations . . . . . 1284
5. § 443. Asylum in Embassies and Legations . . . . . 1284
   *a.* § 443A. Mission Premises as a Place of Refuge in a Bombarded Area . . . 1290
6. The Functions of a Diplomatic Officer
   *a.* § 444. In General . . . . . 1290
   *b.* § 445. Representation in Behalf of His State as a Whole . . . . . 1291
   *c.* Representation of His Countrymen
      (1) § 446. Protection . . . . . 1293

PAGE
(2) § 447. Support of Private Interests . . . . . 1294
(3) § 448. Presentations at Court . . . . . 1294
*d.* Good Offices for Third States or their Nationals
(1) § 449. In Countries where Diplomatic Representation Is Lacking . . 1295
(2) § 450. Nationals of Belligerent States . . . . . 1296
*e.* Miscellaneous Restrictions Imposed upon a Diplomatic Officer by His Own State
(1) § 451. Residence and Continuance of Mission . . . . . 1299
(2) § 452. Non-Interference in Politics. Speeches. Presents . . . . . 1300
(3) § 453. Marriages . . . . . 1302

TITLE E

OFFICIAL NEGOTIATIONS

1. § 454. The Diplomatic Channel . . . . . 1303
2. § 455. Language. Tone. Style . . . . . 1304
3. § 456. Publication . . . . . 1304

TITLE F

CEREMONIAL

1. § 457. Observance of Formalities . . . . . 1307
2. § 458. Rules of Precedence . . . . . 1308
3. § 459. Ambassadorial Privileges . . . . . 1309

PART IV

CONSULS

TITLE A

§ 460. Classes and Titles . . . . . 1312

TITLE B

§ 461. Appointment of American Consular Officers . . . . . 1314

TITLE C

EXEQUATUR

1. § 462. Nature and Effect. Conditions of Issuance . . . . . 1315
2. § 463. Refusal or Revocation. Place of Service . . . . . 1317
3. § 463A. Unrecognized Governments . . . . . 1320

TITLE D

PRIVILEGES AND IMMUNITIES

1. § 464. Under International Law and Treaty . . . . . 1322
§ 464A. The Same . . . . . 1323
2. § 465. Respect for the Consular Function . . . . . 1325
3. § 466. Protection of the Person of a Consul . . . . . 1327
4. § 467. Protection of the Consular Archives, Office and Dwelling . . . . 1328

PAGE

5. Correspondence
   *a.* § 468. With Governmental Agencies of the Consul's State . . . . . 1330
   *b.* § 469. Interposition with Local Authorities . . . . . 1333

6. Certain Accessory Privileges
   *a.* § 470. Display of Arms and Flag . . . . . 1335
   *b.* § 471. Ceremonial and Rank . . . . . 1336
   *c.* § 472. Exemption from Taxation . . . . . 1337
   *d.* § 473. Customs Duties . . . . . 1339
   *e.* § 473A. Exemptions from Public Service . . . . . 1340
   *f.* § 473B. Asylum in Consulates . . . . . 1340

7. Amenability to Local Process
   *a.* § 474. Civil Process . . . . . 1340
   *b.* § 475. Criminal Process . . . . . 1342
   *c.* § 476. The Giving of Testimony . . . . . 1343

8. Privileges in Relation to Deceased Countrymen
   *a.* § 477. In General . . . . . 1346
   *b.* § 478. Notification of the Deaths of Fellow-Countrymen . . . . . 1346
   *c.* § 479. Temporary Possession of the Assets of an Estate . . . . . 1347
   *d.* § 480. Administration of Estates . . . . . 1349
   *e.* § 481. Representation of Non-Resident Heirs or Dependents . . . . 1353
   *f.* § 482. The Most-Favored-Nation Clause . . . . . 1355

9. Shipping and Seamen
   *a.* § 483. Jurisdiction in Controversies Respecting Seamen . . . . . 1356
   *b.* § 484. Reclamation of Deserting Seamen . . . . . 1358
   *c.* § 485. Matters of Wreck and Salvage . . . . . 1359
   *d.* § 485A. Ships' Papers . . . . . 1360

10. Notarial Functions
   *a.* § 486. Administration of Oaths . . . . . 1361
   *b.* § 487. Authentication of Documents . . . . . 1362

11. § 488. Miscellaneous Duties . . . . . 1365

# PART V

## AGREEMENTS BETWEEN STATES

### TITLE A

§ 489. Preliminary. Nature of Contractual Obligations . . . . . 1369

### TITLE B

### VALIDITY

1. § 490. Restrictions of International Law . . . . . 1374

2. § 491. Restrictions Imposed by a General Convention. Article XVIII of the Covenant of the League of Nations . . . . . 1375

3. § 492. Capacity to Contract . . . . . 1377

4. § 493. Manifestation of Assent. Compulsion . . . . . 1379

5. § 493A. Error . . . . . 1381

PAGE

6. § 494. Constitutional Limitations . . . . . 1383

7. Constitutional Limitations of the United States
   *a.* § 495. Provisions of the Constitution . . . . . 1387
   *b.* §.496. Limitations of the Agreement-Making Power of the United States as a Whole . . . . . 1387
   *c.* Matters Pertaining Directly to Affairs of States of the Union
      (1) § 497. The Principle Involved . . . . . 1390
      (2) § 498. Instances of Treaties Concerning Matters Normally under State Control . . . . . 1393
         (*a*) § 499. The Same . . . . . 1394
         (*b*) § 500. The Same . . . . . 1395
      (3) § 500A. Relationship to International Concerns . . . . . 1396
      (4) § 501. Cessions of State Territory. Boundaries . . . . . 1398
      (5) § 502. Some Conclusions . . . . . 1400
   *d.* Other Problems of Constitutionality
      (1) § 503. Agreements Calling for Legislative or Other Action or Inaction . . 1401
      (2) § 504. Agreements to Refer Differences to International Judicial Tribunals or Commissions . . . . . 1403
   *e.* The Manner in Which the United States May Contract Agreements Other Than Treaties
      (1) § 505. Preliminary . . . . . 1405
      (2) § 506. Executive Agreements in Pursuance of Acts of Congress . . . 1406
      (3) § 507. Adjustment of Claims against Foreign States. Recourse to Arbitration . . . . . 1409
      (4) § 508. Important Protocols and Other Agreements Concerning Political Affairs . . . . . 1411
      (5) § 509. *Modi Vivendi* . . . . . 1416
      (6) § 509A. Some Conclusions . . . . . 1416

## TITLE C

## NEGOTIATION AND CONCLUSION

1. § 510. Persons Capable of Signing Agreements . . . . . 1419

2. § 511. Full Powers . . . . . 1420

3. Formalities
   *a.* § 512. Language . . . . . 1422
   *b.* § 512A. Description of the Parties . . . . . 1424
   *c.* § 513. The Alternat . . . . . 1427
   *d.* § 514. Protocols . . . . . 1427
   *e.* § 515. Signature. Seal . . . . . 1428

4. Ratification
   *a.* § 516. Its Place in Treaty-Making. Freedom to Withhold It . . . . . 1429
   *b.* Ratification by the United States
      (1) § 517. The President . . . . . 1433
      (2) § 518. The Senate . . . . . 1434
   *c.* Aspects of Reservations
      (1) § 519. In General . . . . . 1435
      (2) § 519A. Reservations to Multi-Partite Agreements . . . . . 1439
   *d.* § 520. Exchange of Ratifications. Deposit of Ratifications . . . . . 1444
   *e.* § 520A. Adherence . . . . . 1447
   *f.* § 521. Proclamation . . . . . 1448
   *g.* § 521A. Aspects of Personal or Governmental Undertakings . . . . . 1449

## TITLE D

## OPERATION AND ENFORCEMENT OF TREATIES

PAGE

1. § 522. Date of Taking Effect . . . . . 1451

2. Some Aspects of Performance
   *a.* § 523. In General . . . . . 1454
   *b.* Legislation Necessary to Performance
      (1) § 524. Appropriations of Money . . . . . 1455
      (2) § 525. Certain Other Legislative Requirements . . . . . 1457
   *c.* Judicial Action
      (1) § 526. Province of the Courts of the United States . . . . . 1458
      (2) § 527. Political Questions . . . . . 1461
      (3) § 528. Absence of Necessary Legislation . . . . . 1462
      (4) § 529. Acts of Congress at Variance with Treaties . . . . . 1463
   *d.* § 529A. Aspects of the Relationship of Third States to Treaties . . . . 1466

## TITLE E

## THE INTERPRETATION OF TREATIES

1. § 530. The Nature of the Problem . . . . . 1468

2. § 531. Sources of Interpretation . . . . . 1471

3. Certain Cases
   *a.* § 532. The Aroa Mines Case . . . . . 1473
   *b.* § 533. The North Atlantic Coast Fisheries Arbitration . . . . . 1475
   *c.* § 533A. In the Matter of the *David J. Adams* . . . . . 1476

4. The Attitude of the Supreme Court of the United States
   *a.* § 533B. Concerning a Liberal Construction . . . . . 1478
   *b.* § 533C. Avoidance of Restrictive Rules of Evidence . . . . . 1481
   *c.* § 533D. Preparatory Work . . . . . 1482
   *d.* § 533E. Miscellaneous Considerations . . . . . 1483

5. The Interpretation of Treaties by the Permanent Court of International Justice
   *a.* § 533F. Deference for the Form of a Text . . . . . 1486
   *b.* § 533G. Versions in Differing Languages . . . . . 1493
   *c.* § 533H. Some Miscellaneous Considerations . . . . . 1494

6. § 534. Declarations of Negotiators . . . . . 1497

7. § 535. So-called Rules of Construction . . . . . 1498

8. The Most-Favored-Nation Clause
   *a.* § 536. Conditional and Unconditional Pledges . . . . . 1502
   *b.* § 537. Consular and Other Privileges . . . . . 1512

## TITLE F

## TERMINATION OF TREATIES

1. § 538. Preliminary . . . . . 1516

2. § 539. Notice Pursuant to Agreement . . . . . 1517

3. § 540. Later Agreement Superseding Earlier One . . . . . 1521

4. Changed Conditions
   *a.* § 541. In General . . . . . 1523

PAGE

*b.* Political Changes
(1) § 542. Changes in Form of Government . . . . . 1528
(2) Changes in the Identity of a State
(*a*) § 543. Loss of State Life through Absorption by Another State . . 1529
(*b*) § 544. Where Identity of a State Has Not Been Wholly Lost . . 1535
(*c*) § 544A. Losses of Territory or of Territorial Control . . . . 1536
(*d*) § 545. Formation of a New State by Separation from Another . . 1538
5. § 546. Denunciation by One Party . . . . . 1541
6. Outbreak of War Between Contracting Parties
*a.* § 547. In General . . . . . 1546
*b.* § 548. Stipulations Applicable to a State of War . . . . . 1548
*c.* § 549. Stipulations Creating Permanent Rights . . . . . 1549
*d.* § 550. Certain Other Classes of Agreements . . . . . 1551
*e.* § 550A. Aspects of Multi-Partite Agreements . . . . . 1555
*f.* § 551. The Treaty of Versailles with Germany . . . . . 1556

# PART VI

## DIFFERENCES BETWEEN STATES. MODES OF REDRESS OTHER THAN WAR

### TITLE A

### AMICABLE MODES

1. Non-Judicial Means
*a.* § 552. Negotiation . . . . . 1559
*b.* Good Offices and Mediation
(1) § 553. Significance of the Term "Good Offices" . . . . . 1561
(2) § 554. The Relation of Mediation to Good Offices . . . . . 1563
(3) § 555. The Hague Conventions of 1899 and 1907 . . . . . 1564
(4) § 555A. Multi-Partite American Conventions . . . . . 1565
(5) § 556. The Practice of the United States . . . . . 1566
*c.* International Commissions of Inquiry
(1) § 557. The Hague Conventions of 1899 and 1907 . . . . . 1568
(2) § 558. Treaties of the United States. The Bryan Peace Plan . . . . 1570
*d.* § 558A. International Commissions of Conciliation . . . . . 1572
(1) § 558B. The Same . . . . . 1578
2. Judicial Means
*a.* Arbitration
(1) § 559. Definition. Character . . . . . 1579
(2) § 560. Arbitrable Differences . . . . . 1582
(*a*) § 561. The Same . . . . . 1586
(3) Recourse to Arbitration by the United States
(*a*) § 562. In General . . . . . 1586
(*b*) § 563. Territorial Differences . . . . . 1587
(*c*) § 564. Certain Differences, Other than Territorial, of Great International Significance . . . . . 1592
(i) § 565. The Same . . . . . 1593
(*d*) § 566. The United States as a Party to Treaties for Obligatory Arbitration . . . . . 1598
(i) § 567. The Same . . . . . 1599
(ii) § 567A. The Same . . . . . 1601

PAGE

(4) The Hague Conventions of 1899 and 1907, for the Pacific Settlement of International Disputes
(a) § 568. Declarations Respecting the System of Arbitral Justice . . 1605
(b) § 569. The Permanent Court of Arbitration . . . . . 1606
(c) § 570. Arbitral Procedure . . . . . 1608
(d) § 571. Arbitration by Summary Procedure . . . . . 1612
(5) § 572. The Court of "Judicial Arbitration" Proposed by the Second Hague Peace Conference . . . . . 1612
(6) The Permanent Court of International Justice
(a) § 573. Organization . . . . . 1614
(b) § 574. Competence . . . . . 1619
(c) § 575. Procedure . . . . . 1620
(d) § 575A. Advisory Opinions . . . . . 1622
(e) § 576. The Place of the Court in the International Society . . . 1623
(7) Powers and Functions of Arbitral Tribunals
(a) § 577. Limitations of the Powers of Arbitrators . . . . . 1626
(b) § 578. Cessation or Absence of Arbitral Functions . . . . . 1628
(8) § 579. Payment and Distribution of Awards . . . . . 1630
(9) § 580. Barring of Unpresented Claims . . . . . 1632
(10) Finality of Awards
(a) § 581. Rule of *Res Judicata*. Rehearings and Revisions . . . . 1633
(b) § 582. Award Outside of Limits of Submission . . . . . 1636
(c) § 583. Unconscionable Awards . . . . . 1640
(11) § 538A. Arrangements Contemplating Arbitration . . . . . 1642
b. § 584. Joint Commissions . . . . . 1644
c. § 585. The Covenant of the League of Nations . . . . . 1648
d. § 585A. The United States as a Coöperator with the League of Nations in Efforts to Adjust Controversies Pertaining to the Far East . . . . 1651

## TITLE B

## NON-AMICABLE MODES SHORT OF WAR

1. § 586. In General . . . . . 1654
2. § 587. Withdrawal of Diplomatic Relations . . . . . 1656
3. § 588. Retorsion. Retaliation . . . . . 1657
4. Reprisals
a. § 589. The Growth of the Practice . . . . . 1660
b. § 590. The Practice of the United States . . . . . 1662
(1) § 591. The Tampico Incident, 1914 . . . . . 1664
(2) § 591A. The Corfu Incident, 1923 . . . . . 1666
5. § 592. Pacific Blockade . . . . . 1667
6. § 593. Embargo . . . . . 1671
a. § 594. The Same . . . . . 1673
7. § 595. Non-intercourse . . . . . 1674
§ 595A. Increases or Decreases of National Armaments . . . . . 1675

(4)

FOREIGN VESSELS OF WAR

(*a*)

§ 250. **Their Public Character and Its Proof.** A naval vessel built and launched within the territory of a State other than that of the owner, does not acquire the status of a foreign vessel of war until the flag of the sovereign is hoisted upon her. Prior to that time certain immunities from local jurisdiction may doubtless be claimed in behalf of the ship, on the ground that she is the property of a foreign power. She does not, however, possess a quality such that acts committed on board of her, are, for any reason, to be regarded as not cognizable in the local courts.[1]

The public character of a foreign vessel, whether a ship of war or of any other type or class within that broad category, is a matter of fact which ought to be susceptible of proof. The requisite evidence may come from various sources, such as the commission of the commander, the nature of the flag that is hoisted and the circumstances when it is flown, or the statement of the commander on his word of honor.[2] Whether a foreign ship is a vessel of war and falls within the

---

It is believed that even if the petitioner's contention was sound respecting his right to have the question of his immunity from prosecution determined on *habeas corpus* proceedings, the Act of Congress on which he relied would not have sufficed to justify his release even had he proved conclusively his domicile to be in Germany and express authorization from the German Government. It cannot be admitted that the law of nations, to which the statute adverts, bases a right of exemption upon the foreign governmental authorization of the actor save when the foreign sovereign is itself excused from disregarding the supremacy of a friendly State within the limits of its territory.

*Cf.* United States *v.* Thierichens, 243 Fed. 419.

§ 250. [1] See Tucker *v.* Alexandroff, 183 U. S. 424, 442. A majority of the court was of opinion, however, that a Russian governmentally owned ship under construction at Philadelphia for the Russian Navy was, according to Art. IX of the treaty between the United States and Russia of Dec. 18, 1832, in relation to the reclamation of deserting seamen, to be deemed a ship of war, even though at the time the vessel had not been commissioned for active service. It may be observed that under the contract of construction the contractors agreed that "the flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property." (*Id.*, 440.) From the opinion of the court through Mr. Justice Brown, Mr. Justice Gray, with whom concurred Chief Justice Fuller and Justices Harlan and White, dissented. It should be noted that the question for adjudication pertained to the interpretation of a treaty rather than to the conditions or circumstances when in general a vessel might be deemed to become a vessel of war.

[2] Declared Story, J., in The Santissima Trinidad, 7 Wheat. 283, 335–336: "In general the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. . . . The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable."

See discussion in Higgins' 8 ed. of Hall, § 44, quoted in Naval War College, Int. Law Topics, 1906, 122 (as from Hall, 5 ed., 161). According to that writer: "The character of a vessel professing to be public is usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by the competent authority within the State itself. *A fortiori* attestation made by the government itself is a bar to all further enquiry." . . .

class of public ships that may be fairly so described is not likely to present a question of which the solution is difficult.[3] In seeking to ascertain the character and scope of exemptions from the local jurisdiction of foreign public ships of any type or class, it will be found that the precise problem for solution has in recent years in American tribunals rarely concerned the question whether a ship was to be regarded as a vessel of war, but rather whether the craft was, by reason of its use or occupation, "such a public vessel" [4] that it should be denied exemptions from jurisdiction that were accorded certain other public vessels not so engaged.[5] It must be acknowledged that a foreign vessel of war is a public ship.

(*b*)

§ 251. **Exemption from Local Process.** Opinion in the United States respecting the existence and scope of immunities to be accorded foreign vessels of war has undergone a marked development since the close of the eighteenth century.[1] In June, 1794, Mr. Bradford, Attorney-General, was of opinion that a writ of *habeas corpus* might be awarded to bring before a local court an American citizen unlawfully detained on board of a foreign vessel of war.[2] The same year, however, Mr. Randolph, Secretary of State, informed the British Minister that such a vessel within a friendly port was ordinarily exempt from the local jurisdiction.[3] In 1799, Mr. Lee, Attorney-General, was of opinion that civil or

---

"The act of commissioning a vessel is an act of sovereignty, and no act of sovereignty can be done within the dominions of another sovereign without his express or tacit permission. Without such leave a commission can only acquire value as against the State in which a vessel has been bought, or has been built and fitted out, at the moment when she issues from the territorial waters. Up to that time, though invested with minor privileges, she is far, if she be a ship of war, from enjoying the full advantages of a public character. It is needless to say that on the other hand if the vessel re-enters the territorial waters five minutes after she has left them she does so with all the privileges of a public vessel of her State. It is to be noted that tacit leave to commission a ship cannot be lightly supposed. A State must always be presumed to be jealous of its rights of sovereignty, and either strong circumstances implying recognition in the particular case, or the general practice of the State itself, must be adduced before the presumption can be displayed."

[3] For definitions of vessels of war, see *infra*, § 705.

It may be observed that the Institute of International Law in its Rules concerning the Régime of Sea-going Vessels and their Equipment in Foreign Ports in Time of Peace, adopted at Stockholm, in 1928, referred in Art. 10 to vessels of war as "all ships under the command of a naval officer of the State furnished with naval equipment and authorized to fly the flag and pendant of the navy or other distinctive emblems prescribed by the national regulations." (*Annuaire*, XXXIV, 739.)

[4] See Ex Parte Muir, 254 U. S. 522, 531.

[5] See Other Vessels in Foreign Public Service, *infra*, § 256.

§ 251. [1] Opinion in England seems to have undergone an equally great change, since Lord Stowell, in 1820, advised His Majesty's Government relative to the case of an Englishman who, as a political fugitive, took refuge on board a British man-of-war at Callao. Report of Royal Commission on Fugitive Slaves, LXXVI, 226, cited in Westlake, 2 ed., I, 268. Concerning the history of opinion and usage respecting the immunities of vessels of war, see Hall, Higgins' 8 ed., § 54.

[2] 1 Ops. Attys.-Gen., 47. In concluding his opinion the Attorney-General declared that while a writ of *habeas corpus* might be legally awarded in a case such as that confronting him, "the respect due to the foreign sovereign" might require that a "clear case be made out before the writ be directed to issue."

[3] Communication to Mr. Hammond, July 23, 1794, 7 MS. Dom. Let. 55, Moore, Dig., II, 574. See, also, Mr. Randolph, Secy. of State, to Mr. Fauchet, French Minister, Nov. 17, 1794, 7 MS. Dom. Let. 403, Moore, Dig., II, 574.

criminal process might be served on board of a British man-of-war within the waters of the United States.[4] It should be observed that an Act of Congress of June 5, 1794, had authorized the President to employ the military and naval forces of the United States or its militia, to enforce the obedience of foreign public armed vessels to the process of courts of the United States.[5] In 1805, Congress reasserted the right, and made provision for the exercise of jurisdiction over persons committing offenses, even as slight as misdemeanors, on foreign vessels of war within the waters of the United States.[6] The President, in pursuance of the requirement that he issue instructions for carrying the act into effect, did issue instructions, which carefully avoided the possibility of a resort to force in order to effect an arrest, unless under the express direction of the Executive.[7]

(i)

§ 252. **The Same.** In 1812, in the case of *The Schooner Exchange* v. *McFaddon*, the Supreme Court of the United States rendered a decision which has since guided the legislative and judicial departments of the Government.[1] The case raised the question whether a vessel commissioned as a man-of-war by the French Government was, upon entering a port of the United States, subject to the jurisdiction of a local court, whose aid was invoked by former owners of the vessel to determine whether their title had been lawfully divested by French authority. Chief Justice Marshall, in the opinion of the Court, adverted to the exclusive and absolute jurisdiction of a State within its own territory. He declared that any restriction thereof was to be derived from the nation's consent; that such consent might be express or implied, and might in some instances be tested by common usage, and by common opinion growing out of that usage. He said that a public armed vessel

> constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality. . . . Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as hav-

[4] 1 Ops. Attys.-Gen., 87.
[5] Sections 7 and 8, Chap. 50, 1 Stat. 384.
[6] Sections 1 and 7, Chap. 41, Act of March 3, 1805, 2 Stat. 339 and 342. See, also, statement in Moore, Dig., II, 575.
[7] Instructions of May 29, 1805, contained in Moore, Dig., II, 575, *citing* Circulars, Dept. of State, I, 3, 4.
§ 252. [1] 7 Cranch, 116, Moore, Dig., II, 576–577.

ing imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.[2]

It is not surprising that the learned Chief Justice understood clearly that all exemptions from jurisdiction were necessarily derived from the consent of the territorial sovereign, or that he appreciated the force of the reasons why that consent, in the case of foreign vessels of war, ought to be given. It is of greater significance that, in view of the previous attitude of his own country, he concluded that such consent was in fact to be ascribed to the United States or to nations generally. The decision was due to the assumption that a State such as his own intended to act in good faith, and to the belief that there should be imputed to it actual consent to whatever yielding of jurisdiction the observance of good faith might demand. The declaration, on the other hand, that a State might, if it so desired, and sufficiently made known its intention, withhold consent and retain jurisdiction, is also of importance. It was not intimated (nor was there need of intimation) that such action would constitute an abuse of power. The Court was confronted with a simple problem: to decide whether the statutes of a State, descriptive of the ordinary jurisdiction of its tribunals, ought to be so construed as to give them jurisdiction in a case in which the territorial sovereign had impliedly consented to waive its jurisdiction. On that precise question the decision was in the negative.

This case settled the law with respect to the United States. Since the decision there has been no disposition on the part of the Congress to assert jurisdiction over foreign vessels of war.[3]

(ii)

§ 253. **The Same.** At the present time a foreign vessel of war and the occupants thereof are acknowledged to be exempt from local process.[1] The ship cannot be lawfully subjected to a civil action arising, for example, from a claim for salvage,[2] or to a criminal action arising from the violation of a local regulation. No occupant while remaining on board the vessel is subject to the local jurisdiction,

[2] 7 Cranch, 144 and 146.

[3] The Act of May 15, 1820, forbidding foreign armed vessels for a period of two years to enter any harbors of the United States, other than those specified in the Act, 3 Stat. 597, was primarily an assertion of the right to exclude such vessels from territorial waters, rather than an exercise of jurisdiction over those permitted to enter therein. See statement in Moore, Dig., II, 564. See, also, Mr. Evarts, Secy. of State, to Mr. Comacho, Venezuelan Minister, Dec. 9, 1880, MS. Notes to Venezuela, I, 210, Moore, Dig., II, 565.

§ 253. [1] In addition to The Schooner Exchange *v.* McFaddon, 7 Cranch, 116, see Mr. Marcy, Secy. of State, to Mr. Dobbin, Secy. of Navy, April 21, 1856, 45 Dom. Let. 212, Moore, Dig., II, 578; Opinions of Mr. Cushing, Atty.-Gen., April 28, 1855, and Sept. 6, 1856, 7 Ops. Attys.-Gen., 122, 131, and 8 Ops. Attys.-Gen., 73, Moore, Dig., II, 578; Dana's Wheaton, Dana's Note No. 63. Also The Pampa, 245 Fed. 137.

[2] See Berizzi Bros. Co. *v.* S.S. Pesaro, 271 U. S. 562; also The Constitution, L. R. 4 P. D. 39, 45, Moore, Dig., II, 579. Concerning circumstances when a foreign vessel of war as plaintiff in a suit brought against another vessel may be compelled to give security for damages, see The Newbattle, L. R. 10 P. D. 33, Moore, Dig., II, 579.

*Cf.*, also, Naval War College, Int. Law Situations, 1907, 22–45, containing the decision of Sir Francis Piggott in the case of *The Alexander*, a United States naval auxiliary vessel which had been subjected to a civil suit arising from a collision in the harbor of Hong Kong, in 1906.

notwithstanding his infraction of the local criminal code by an act committed on shore or taking effect there.[3] The claim to immunity from the local jurisdiction may, however, be waived.[4]

The vessel of war and its occupants owe, nevertheless, well-defined duties to the territorial sovereign. The former is obliged to respect, for example, local regulations pertaining to navigation and quarantine,[5] and special obligations, when, in time of war, the vessel attached to a belligerent service enters a neutral port. Disregard of them may compel the territorial sovereign to resort to measures of prevention, and if need be, to cause the ship to depart from its waters.[6] Moreover, it may not unreasonably request of the commander or of his government the surrender of an inmate whose conduct has wrought grave harm ashore in violation of the local criminal law.[7] "According to current practice, represen-

[3] See opinions of Mr. Cushing, Atty.-Gen., April 28, 1855, and Sept. 6, 1856, 7 Ops. Attys.-Gen., 122, and 8 Ops. Attys.-Gen., 73, Moore, Dig., II, 578; Mr. Fish, Secy. of State, to Commodore Case, Jan. 27, 1872, 92 Dom. Let. 322, Moore, Dig., II, 579 and 588.

See, also, Arts. XV and XVI of Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire*, XVII, 273, 277, J. B. Scott, Resolutions, 143, 147. *Cf.* Arts. 16, 17 and 18 of Regulations concerning the Régime of Sea-going Vessels and their Crews in Foreign Ports in Time of Peace, adopted by the Institute at Stockholm, in 1928, *Annuaire*, XXXIV, 741–742.

In October, 1923, the Mexican gunboat *Bravo* entered the port of New Orleans. A considerable portion of the crew deserted the ship, were arrested by local police and returned to the vessel. In January, 1924, effort was made, by *habeas corpus* proceedings, in the United States District Court, to obtain the release of the crew on the ground that they had been discharged. They were understood to be in sympathy with the insurrectionary movement then under way in Mexico under the leadership of General de la Huerta. Process was served on the commander of the vessel on board thereof. The Mexican Embassy at Washington requested the Department of State to intervene in the proceedings on the ground that the vessel was immune from jurisdiction. The matter was referred to the Attorney General with a request for investigation, and with the suggestion that if an attempt was being made to assert jurisdiction over a foreign vessel of war, he take advantage of a favorable opportunity to suggest to the court the immunity of such a vessel from the jurisdiction of the courts of the United States. The proceedings were discontinued by the court on being advised by the commander of the *Bravo* that he had received instructions from the Minister of the Navy ordering him to discharge the members of the crew. It should be noted that the United States Attorney at New Orleans suggested to the court the immunity from the jurisdiction of the courts of the United States of foreign vessels of war.

[4] "But if the principles which their Lordships have been discussing are accepted, the immunities which the local Courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign Court over his rights of property." (Chung Chi Cheung *v.* The King [1939], A. C. 160, 176.)

[5] See statement by Mr. Hackworth, at the beginning of § 172 of his Digest, II, p. 408.

See also Mr. Hill, Acting Secy. of State, to Secy. of the Navy, Oct. 6, 1899, 240 MS. Let. 399, Moore, Dig., II, 583; also memorandum of Mr. Lemly, Judge-Advocate-General, U.S.N., communicated to Mr. Moore, Third Assist. Secy. of State, July 6, 1891, Moore, Dig., II, 584; also Woolsey, 6 ed., 92–93. *Cf.* Access to Ports, *supra*, § 187.

[6] See, for example, § 10, Act of June 15, 1917, 40 Stat. 223, authorizing the compelling of any foreign vessel to depart from the United States or its possessions in all cases in which, "by the law of nations or the treaties of the United States, it ought not to remain."

"In foreign territorial waters, warships must respect the local laws and regulations. Any case of infringement will be brought to the attention of the captain: if he fails to comply with the notice so given, the ship may be required to depart." (Basis of Discussion No. 21, Report of Preparatory Committee for the Codification Conference of 1930, Bases of Discussion, II, Territorial Waters, League of Nations, Doc. No. C.74.M.39.1929.V, 75.)

Also, Art. 19, Harvard Draft Convention on Territorial Waters, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 245.

[7] This is the more obvious when the act complained of is committed outside of the vessel. See Mr. Fish, Secy. of State, to Commodore Case, Jan. 27, 1872, relative to the surrender

tations are made through the diplomatic channel in case of minor matters."[8]

The Department of State has expressed the view that the assessment of a tax by the authorities of a port on supplies carried aboard a foreign ship of war "is in effect the assertion of jurisdiction over the vessel and, accordingly, is hardly reconcilable with the principle of public law that national ships of war entering the ports of a friendly power open for their reception are considered to be exempted by the consent of that power from its jurisdiction."[9] Accordingly, the Government of the United States has supported the view that American war vessels are exempt from the payment of such taxes in foreign countries.[10] On the other hand, the Department of State has declared that if a tax is imposed upon the seller of the property and is merely passed on to the foreign government as part of the purchase price (as in the case of a sales tax), immunity therefrom could hardly be claimed by the interested foreign government.[11] Where a foreign public ship endeavors to sell a cargo which it may carry with a view to covering expenses of its voyage, the articles sold which will go into consumption in the United States have been declared to be subject to assessment for duty under the appropriate provisions of the statutory law.[12]

(*c*)

§ 254. **Duty Not to Grant Asylum.** The territorial sovereign may fairly and normally object to the conduct of the commander of a foreign public vessel who utilizes the exemption from local jurisdiction enjoyed by the ship, to grant asylum thereon to fugitives from justice, and thus to shield them from the operation of local laws.[1] In Regulations of the United States Navy of 1913, it was declared that "the right of asylum for political or other refugees has no foundation in international law." It was stated, however, that where frequent insur-

---

of a person charged with the commission of an offense rendered extraditable by a treaty with the demanding government, 92 MS. Dom Let. 322, Moore, Dig., II, 579.

[8] Comment on Art. 19, Harvard Draft Convention on Territorial Waters, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 329.

[9] See correspondence with France in 1925 and 1926, set forth in Hackworth, Dig., II, 413, especially Mr. Grew, Under Secy. of State, to Mr. Herrick, Ambassador to France, June 16, 1926.

[10] See Mr. Hull, Secy. of State, to Governor Rolph, Feb. 1, 1934, Hackworth, Dig., II, 414.

See also correspondence with China in 1925, set forth in Hackworth, Dig, II, 415, with reference to the freedom of duty of materials imported from the United States into China for the construction of six river gunboats for the United States Navy.

[11] Mr. Hull, Secy. of State, to Mr. Taylor, Comptroller, Dept. of Finance, City of New York, Aug. 31, 1935, Hackworth, Dig., II, 415, where it was added: "Taxes imposed by the Federal Government on cables, telegrams, transportation tickets and similar services are not assessed against official messages of foreign governments and transportation tickets purchased by their diplomatic representatives in the United States." The foregoing discussion had particular reference to the purchase by the Ecuadorean Government of a vessel intended for use as a naval training vessel, and to the request by that Government of exemption from the sales tax imposed upon the transaction by the city of New York, where the sale took place. That city, following the suggestion of the Department of State, announced that the tax would be waived upon request. (*Id.*, 416.)

[12] See Dept. of State to the Polish Legation at Washington, June 12, 1923, Hackworth, Dig., II, 416.

§ 254. [1] See discussion of the subject in Moore, Dig., II, 845–855, and documents there cited; also, Naval War College, Int. Law Situations, 1902, 21–27, *id.* 1904, 26–34.

rections occur and constant instability of government exists, "usage sanctions the granting of asylum." It was said that even in the waters of such countries officers should refuse all applications for asylum, except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob; and it was added that officers must not directly or indirectly invite refugees to accept asylum.[2]

It may be observed that in November, 1913, two members of the family of ex-president Madero of Mexico, who sought asylum in the American Consulate in Veracruz, under conditions when they asserted that their lives were in danger, were with the approval of the Department of State, afforded a refuge on board the U.S.S. *Rhode Island*.[3]

When a fugitive from justice is once received on board of a foreign vessel of war within the territorial waters of a State he is believed to be withdrawn from the local jurisdiction.[4] Although his reception may have amounted to an abuse of the privileges accorded the vessel, the territorial sovereign does not from that circumstance derive a right of jurisdiction over the ship or its occupants.[5] If the individual has been wrongfully taken on board, and so improperly withdrawn from the control of the territorial sovereign, a demand for his surrender should

[2] See Article R–1649, U. S. Navy Regulations and Naval Instructions, 1913; also Wilson, 2 ed., 113.

Concerning the asylum granted certain Chilean refugees on American vessels of war in 1891, see Moore, Dig., II, 851–852, *citing* H. Ex. Doc. 91, 52 Cong., 1 Sess., 71 and 289.

Concerning the asylum granted certain Brazilian refugees on Portuguese vessels of war in 1894, and the consequences thereof, *cf.* For. Rel. 1894, 64–73, and 513, Moore, Dig., II, 853–855. See, also, Mr. Olney, Secy. of State, to Mr. Sill, Minister to Korea, telegram, Dec. 2, 1895, For. Rel. 1895, II, 974, in which strong opposition was expressed to the suggestion of the Minister to permit certain political refugees in his hands to take passage on the U.S.S. *Yorktown* for Shanghai. See correspondence between the United States and Mexico, 1909–1910, For. Rel. 1910, 739–742, respecting the conveyance of Gen. Zelaya out of Nicaraguan territory as a refugee on a Mexican gunboat.

On Oct. 28, 1913, the Department of State declared: "While the rule governing such cases is that it is the duty of American men of war to protect American citizens, it is, as a general rule, against the policy of this Government to grant asylum in its ships to the citizens of foreign countries engaged in political activity, especially when such asylum is for the purpose of furthering their political plans. Temporary shelter to such persons, when they are seeking to leave their country, has sometimes been conceded on grounds of humanity, but even this is done with great circumspection lest advantage be taken of it to further the political fortunes of individuals with the result of involving us in the domestic politics of foreign countries." For. Rel. 1913, 854, 855.

Art. XIX of the Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, appeared to recognize the propriety of offering an asylum to political refugees, as distinct from common offenders against the local criminal law, or deserters from a military or naval service. It was declared, however, that if the commander of the foreign vessel of war should receive political refugees on board, it should be clearly established that they were such, and that their admission should be under conditions such as not to constitute assistance by him to one of the parties in dispute to the prejudice of the other. *Annuaire*, XVII, 278, J. B. Scott, Resolutions, 148. See, also, Art. 21 of Regulations concerning the Régime of Sea-going Vessels and Their Crews in Foreign Ports in Time of Peace, adopted by the Institute at Stockholm, in 1928, *Annuaire*, XXXIV, 743.

[3] See statement in Hackworth, Dig., II, 641, and documents there cited.

[4] See McNair's 4 ed. of Oppenheim, I, § 450.

[5] When, in time of war, a neutral vessel of war attempts to remove from a port under belligerent occupation persons expressly forbidden to depart therefrom, without permission of the military authorities, the belligerent may, as such, justly employ reasonable means to block the attempt by searching the vessel and taking off the individuals. See Moore, Dig., II, 849–850, *citing* Dip. Cor. 1863, II, 915, also Dip. Cor. 1866, II, 611–612, *id.* 1867, II, 705.

be made upon the commander of the vessel,[6] or upon the State to which the vessel belongs, through the diplomatic channel, and following the procedure applicable in extradition cases.[7]

(*d*)

§ 255. **Officers and Crews.** The exemption enjoyed by persons officially connected with and on board of a foreign public vessel does not accompany them after they have left the ship or its tenders and are on shore. If a body of sailors under the command of an officer is permitted to land as an organized force, as for the purpose of taking part in a local parade, the members are doubtless exempt from the local jurisdiction, not, however, on account of their connection with a public vessel, but because they constitute an organized force of a foreign State permitted to enter the national domain.[1]

Officers and crews of foreign vessels of war, who commit offenses while ashore, are generally subject to local prosecution.[2] In dealing with the former, however, it is said to be the duty of police authorities to have regard for the rank of the offenders, and to accord them, while under arrest, treatment that shall not betray disrespect towards the naval service of their country.[3]

Possibly the commander of a vessel of war who goes ashore in order to accomplish an end directly connected with or incidental to the public business which brought his vessel into the port, ought not, while so engaged, to be amenable to local process, provided he does not, in the course of his errand, violate the local law. It is believed that he should not, for example, be arrested for an offense committed during a previous visit, or be served with process in a civil

[6] Mr. Fish, Secy. of State, to Mr. Case, Jan. 27, 1872, MS. Dom. Let. 322, Moore, Dig., II, 851.

[7] See case of the Salvadorean refugees, and relating thereto, President Cleveland, Annual Message, Dec. 3, 1894, For. Rel. 1894, xiv, Moore, Dig., II, 851; also article by J. B. Moore, in *Am. Law Rev.* XXIX, 1.

See Art. XXI of Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire,* XVII, 278, J. B. Scott, Resolutions, 149. See, also, Art. 23 of Regulations concerning the Régime of Seagoing Vessels and Their Crews in Foreign Ports in Time of Peace, adopted by the Institute at Stockholm, in 1928, *Annuaire,* XXXIV, 744.

§ 255. [1] Tucker *v.* Alexandroff, 183 U. S. 424, 433, Moore, Dig., II, 590; Exercise of Jurisdiction within the National Domain, On Land, *supra,* § 220. See The Tampico Incident, 1914, *infra,* § 591.

[2] Mr. Randolph, Secy. of State, to Mr. Hammond, July 23, 1794, 7 MS. Dom. Let. 55, Moore, Dig., II, 585; Mr. Buchanan, Secy. of State, to Mr. Leal, Brazilian Chargé, Aug. 30, 1847, S. Ex. Doc. 35, 30 Cong., 1 Sess., 29, Moore, Dig., II, 586; Mr. Seward, Secy. of State, to Mr. Webb, Jan. 23, 1867, MS. Inst. Brazil, XVI, 162, Moore, Dig., II, 590; Mr. Fish, Secy. of State, to Commodore Case, Jan. 27, 1872, 92 MS. Dom. Let. 322, Moore, Dig., II, 588; Mr. Sherman, Secy. of State, to Mr. McKenzie, Minister to Peru, telegram, April 2, 1897, MS. Inst. Peru, XVIII, 24, Moore, Dig., II, 588.

See also The Owner of the Junk "Tung on Tai" *v.* Gove, 1 Hongkong L.R. 122, 129–131.

"On June 5, 1911, the Ambassador in Japan reported to the Department of State the murder of one United States naval enlisted man by another in a United States naval hospital ashore. The Ambassador stated that he had informally requested of the Japanese Foreign Office that American naval officials be allowed to take jurisdiction, but that the request had been refused. The Department, on June 6, 1911, instructed the Ambassador that 'Unless the practice of other nations is contrary, you should concede jurisdiction to Japan, at the same time indicating that this Government would prefer by courtesy to try the prisoner.'" (Hackworth, Dig., II, 422.)

[3] See Case of the *Forte,* Moore, Arbitrations, V, 4925–4928, *citing* Brit. and For. State Pap., LIII, 150, *id.,* LIV, 579, Moore, Dig., II, 587.

suit charging him with tortious conduct at any prior time.[4] It is not known, however, that such an exemption within the limits stated has been claimed or granted by the United States.

For reasons of courtesy and expediency, a usage has arisen permitting foreign officers to seize and take on board their ships, without obstruction, members of crews who have become intoxicated and whose offenses have not been directed against persons or property ashore; [5] likewise, to exercise the customary authority for the maintenance of discipline over seamen, remaining ostensibly within the foreign naval service, and subject to its *de facto* control.[6] Such officers obviously possess no right, however, to arrest seamen who have deserted and escaped from actual control.[7]

In 1924, the Department of State declared that any interference by the Government of the United States with the officers and crews of foreign naval vessels while in American territorial waters should be reduced to a minimum; that as the crews of those vessels were made up of men trained especially for the performance of duties on board of them it was difficult to find persons qualified to take their places; that it would, therefore, seem that United States Attorneys in the territories and insular possessions and at seaports of the United States might find it desirable to use a *dedimus potestatem* in any cases involving persons attached to foreign naval vessels in order to avoid delay or inconvenience to them.[8]

(5)

§ 256. **Other Vessels in Foreign Public Service.** The reasons which justify and demand the exemption from local jurisdiction of foreign vessels of war are applicable also to other ships devoted to foreign public service. This is fully acknowledged with respect to vessels owned and possessed by a State, and notably when they belong to some department of the government.[1]

A series of cases growing out of uses of vessels chiefly in the course of World War I and thereafter has in recent years presented three distinct problems before American tribunals. In the solution of them the Supreme Court of the United States has expressed definite conclusions. These problems concern, first, the method by which a federal court should be advised of the foreign governmental claim that the relationship between a particular vessel and a foreign State suffices to render the former immune from the local jurisdiction; secondly, whether the character of the use or occupation of a foreign public ship (as for commercial purposes) in behalf of its sovereign, limits or destroys the immunity

[4] Declares Hall: "Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his State." Hall, Higgins' 8 ed., § 55, p. 249.

[5] Mr. Buchanan, Secy. of State, to Mr. Leal, Brazilian Chargé, Aug. 30, 1847, Senate Ex. Doc. 35, 30 Cong., 1 Sess., 28, 32, Moore, Dig., II, 589.

[6] Tucker *v.* Alexandroff, 183 U. S. 424, 433, Moore, Dig., II, 590.

[7] *Id.*

[8] Mr. Hughes, Secy. of State, to Attorney General Stone, Nov. 24, 1924, Hackworth, Dig., II, 421.

§ 256. [1] Thus revenue cutters, or ships belonging to any department of a foreign State, would be doubtless accorded exemption without question.

See generally, documents in Hackworth, Dig., II, § 173; S. A. Riesenfeld, "Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine," XXV, *Minn. Law Rev.*, 1.

to which it might normally be entitled; and thirdly, the elements that must unite in order to establish a connection between a vessel and a State such as to justify the conclusion that it is to be deemed a public ship to which an exemption should be accorded.

In relation to the first of these problems, the Supreme Court of the United States has concluded that an interested foreign government is entitled to appear in a suit "to propound its claim to the vessel and to raise the jurisdictional question"; [2] or that, with its sanction, its accredited and recognized representative may appear and take the same steps in its interest; [3] or that if there be objection on its part to appearing as a suitor in a foreign court, it is open to such government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if the claim is recognized by the Executive Department of the American Government, it may be set forth and supported in an appropriate suggestion to the court by the Attorney General or some law officer acting under his direction.[4] A suggestion on behalf of the embassy of a foreign interested State "presented by private counsel appearing as *amici curiæ*, and not through the usual official channels" is not deemed adequate.[5] Again, a consul general is not regarded as competent, "merely by virtue of his office," to appear on behalf of his government and claim immunity of a vessel from process in admiralty proceedings.[6] Nor is a naval officer, performing no naval or military duty and serving upon a vessel not functioning in

[2] See Ex Parte Muir, 254 U. S. 522, 532, where Mr. Justice Van Devanter, in the opinion of the court, cited The Sapphire, 11 Wall. 164, 167; The Santissima Trinidad, 7 Wheat. 283, 353; Colombia *v.* Cauca Co., 190 U. S. 524.

[3] *Id.*, citing The Anne, 3 Wheat. 435, 445-446.

In the case of Berizzi Bros. Co. *v.* S.S. Pesaro, 271 U. S. 562, it was said that "the Italian Ambassador to the United States appeared and on behalf of the Italian Government, specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States." (*Id.*, 570.)

[4] Ex Parte Muir, 254 U. S. 522, 533, citing, The Cassius, 2 Dall. 365; The Exchange, 7 Cranch, 116; s.c. 16 Fed. Cas. No. 8,786; The Pizarro, 19 Fed. Cas. No. 11,199; The Constitution, L. R. 4 P. D. 39; The Parlement Belge, L. R. 4 P. D. 129; s.c. L. R. 5 P. D. 197.

See also Compania Espanola *v.* Navemar, 303 U. S. 68, 74.

Whether a foreign public vessel is immune from the jurisdiction of the courts of the United States is to be tested by the requirements of international law. If the State to which the vessel belongs concludes that according to those requirements the ship is improperly and unlawfully subjected to the jurisdiction of an American tribunal, and communicates an appropriate protest to the Secretary of State, it is believed to have done its part in safeguarding its legal rights. If it elects not to appear in any way in the local judicial proceedings, as in a case where the ship has been libelled, and if also, the Government of the United States declines through an appropriate agency to take steps to secure the release of the vessel, the latter may find itself in a serious predicament if jurisdiction is retained and penalties are imposed upon the ship, in case the question touching the propriety of jurisdiction subsequently becomes a matter of adjudication in an international forum and the claim to immunity is sustained. It should be observed, however, that the procedure laid down by the Supreme Court of the United States enables a foreign interested government to propound its claim before an American court even in a situation where the Department of State is not disposed to acknowledge its soundness and is far from willing to encourage a suggestion through the Department of Justice that immunity be yielded.

[5] Ex Parte Muir, 254 U. S. 522, 533.

*Cf.*, however, The Athanasios, 228 Fed. 558; The Florence H., 248 Fed. 1012, 1017; The Adriatic, 258 Fed. 902, 904.

[6] The Sao Vicente, 260 U. S. 151. Such an officer may, however, be the agency through which an ambassador challenges the jurisdiction of a court on the ground that a particular ship is a public vessel of his country. See Compania Espanola *v.* Navemar, 303 U. S. 68, 70.

naval or military capacity, but engaged in commerce under charter to a private individual undertaking to carry passengers and goods for hire, regarded as possessed of the requisite authority to represent his sovereign to make appropriate objection to the exercise of jurisdiction over the vessel which he commands.[7] It should be observed that the Supreme Court of the United States does not regard a suggestion from a foreign embassy touching the public character of a vessel as conclusive or sufficient as proof to require a court to relinquish its jurisdiction, and that it declines to give such a suggestion "the status of a like suggestion coming from the executive department of our Government." [8]

Concerning the second problem noted above, whether the character of the use or occupation of a foreign public ship in behalf of its sovereign limits or destroys the immunity demanded for it, the Supreme Court of the United States, in 1926, reached the following conclusion:

> The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.
>
> We think the principles are applicable alike to all ships held and 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 war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.[9]

Again, in 1938, the Supreme Court through an opinion by Mr. Justice Stone declared:

[7] The "Gul Djemal," 264 U. S. 90.

[8] Compania Espanola *v.* Navemar, 303 U. S. 68, 75 and 76.

In the case of Lamont *v.* Travelers Ins. Co., decided by the New York Court of Appeals, Nov. 14, 1939, 281 N. Y. 362, a suggestion presented to the court at the request of the Secretary of State through the Attorney General, and by the United States Attorney for the Southern District of New York, that the Government of Mexico asserted its immunity from the suit involved, claiming title to property to which it related, did not indicate that the executive branch of the United States, in the instant case had "recognized and allowed the claim," and that, accordingly, the Court remained free to give the claim of immunity such consideration as it might deem proper. For a trenchant criticism of the decision, see Francis Deák, "The Plea of Sovereign Immunity and the New York Court of Appeals," *Columbia Law Rev.*, XL, 453, 459.

[9] Berizzi Bros. Co. *v.* S.S. Pesaro, 271 U. S. 562, 574.

"At the hearing it was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process." (*Id.*, 570.)

*Cf.* Sec. 1 of Act of June 6, 1941, to authorize the acquisition by the United States of title to or the use of domestic or foreign merchant vessels for urgent needs of commerce and national defense, and for other purposes, 55 Stat. 242. See in this connection, The Control of Belligerent and Other Foreign Merchantmen in Neutral Ports, *infra*, § 888D.

> Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. *Berizzi Bros. Co. v. The Pesaro,* 271 U. S. 562; cf. *The Exchange,* 7 Cranch, 116. And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.[10]

Obviously, the public aspect of the service of a ship is unaffected by the circumstance that that service is identical with one which is commonly undertaken by private interests through private vessels. What causes the commercial uses of a ship to be public is merely the fact that the State whose flag it flies is itself embarked in commercial enterprise and employs the vessel as an instrumentality thereof.[11] In reaching the conclusion that it did in 1926, the Supreme Court was simply registering its opinion on what logic required and the law appeared to it to ordain; it was not endeavoring to point to useful bases of accord which might, as between contracting parties withhold from public ships engaged in commerce an exemption from the local jurisdiction.[12] That conclusion was in harmony with numerous decisions of the courts of other countries.[13]

[10] Compania Espanola *v.* Navemar, 303 U. S. 68, 74.

[11] The commentators have not infrequently failed to perceive this point, and have sought to draw a distinction between a public service and a commercial service, as though what was commercial should be deemed essentially non-public, and treated as though it were private even when undertaken by a State for its own purposes. The resulting confusion of thought has served to divert attention from the solution of the precise question pertaining to the exemptions to be accorded foreign public ships engaged in essentially public commercial enterprise. Clearer thinking was manifested by Gardiner, J., in De Howorth *v.* The S.S. *India,* April 5, 1921, Union of South Africa Supreme Court, when he said: "In my opinion any use of a vessel for the purpose of obtaining revenue for the State is a public purpose, just as its use for the protection of the State is public." (Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 105.)

"We are not disposed to make our views of government the yardstick by which to measure the character of a foreign sovereignty. If that sovereignty deems it a proper governmental function to engage in trade for the purpose of maintaining its government, we shall not question its decision that the property so employed is owned in a public and not a private capacity." (Clay, J., in French Republic *v.* Board of Sup'rs of Jefferson County, 252 S. W. 124, 125.)

[12] The fact is oftentimes lost sight of that criteria of the condition of the law, as, for example, touching the scope or existence of the exemption from the local jurisdiction of a foreign public ship, are not necessarily to be found in or revealed by the conclusions of learned bodies or of scientific persons who find even solid objection in what the law of nations as interpreted by the courts is deemed to prescribe, and who seek to hasten the coming of a better day.

[13] See, The *Porto Alexandre,* L. R. [1920] P. 30, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 100; The Tervaete, L. R. [1922] P. 259, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 101; The Ice King, Germany, Reichsgericht in Civil Matters, 1921, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 102; Compañía Mercantil Argentina *v.* U. S. Shipping Board, 40 T. L. R. 601; De Howorth *v.* The S.S. *India,* Union of South Africa, Supreme Court, April 5, 1921, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 105; The Ships *Lima* and *Pangim,* Court of Appeals, Brussels, June 27, 1921, *Rev. Droit Int.,* 3 *sér.,* II, 608, also in Bulletin No. 57, International Maritime Committee, 152–153; Brown *v.* S.S. *Indochine,* Canada, Exchequer Court, Quebec, Admiralty Division, Oct. 19, 1922, 21 Exchequer, 406.

*Cf.,* The Pesaro, 277 Fed. 473; also, J. W. Garner, "Legal Status of Government Ships Employed in Commerce," *Am. J.,* XX, 759, 766; Edwin D. Dickinson, "The Immunity of Public Ships Employed in Trade," *id.,* XXI, 108.

It ran counter, however, to the jurisprudence of a few foreign States and to the decisions of their respective courts.[14]

It may be observed that some time before the Supreme Court announced its conclusion as to the law, the Department of State had expressed a differing view,[15] with which the Department of Justice was not in accord, and that Attorney General Gregory in 1918 refused to adopt the suggestion of Secretary Lansing that a case involving the libeling of a government-owned vessel employed in commerce be brought before the Supreme Court of the United States, and that the Department of Justice there present the doctrine of non-immunity.[16]

[14] See, for example, discussion of the condition of the jurisprudence of France, Egypt, and Italy, in Gilbert Gidel, *Le Droit International Public de La Mer,* Paris, 1932, II, 354–357, 361, and 359–360, respectively.

See case of the Ship *Nameaug* (belonging to United States Shipping Board), Court of Appeals, Genoa, April 24, 1925, *Revue de Droit Maritime Comparé,* XII, 350; *Societa riunite di assicurazioni e riassicurazioni v.* United States Shipping Board, *id.,* XIII, 319; Saglietto *v.* Lawill, Egypt, Civil Tribunal of Mansoura, Jan. 15, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 77; Public Prosecutor *v.* United States Shipping Board, Owner of the Ship "Cathelamet," Lisbon Court of Appeal, Feb. 13, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 133.

See also *Cía. Introductora de Buenos Aires* v. *Capitán del Vapor Cokato,* Argentina, Federal Court of Appeal of the Capital, Nov. 19, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 71, where the court adverted to the fact that American tribunals had held that the Shipping Board Emergency Fleet Corporation was subject to the jurisdiction of the courts of the United States, citing Sloan Shipyards Corporation *v.* United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549.

See also Compania Naviera Vascongado and Steamship "Cristina," L. R. [1938] A. C. 485, where Lord Wright (p. 511) made the following statement: "But the most signal development of the principle has been during the Great War, during which the importance to the State of trading vessels became fully realized. This development was most uncompromisingly expressed in a judgment of the Supreme Court of the United States in *Berizzi Brothers Co.* v. *S.S. Pesaro.*"

[15] See Mr. Lansing, Secy. of State, to Mr. Gregory, Atty. Gen., Nov. 8, 1918, Hackworth, Dig., II, 429; same to same, Dec. 2, 1918, *id.,* 430.

See also Mr. Lansing, Secy. of State, to the Ambassador in Argentina, May 3, 1918, For. Rel. 1918, Supp. 2, 831, 833–834.

[16] Mr. Gregory, Atty. Gen., to Mr. Lansing, Secy. of State, Nov. 25, 1918, Hackworth, Dig., II, 430; same to same, Dec. 31, 1918, *id.* Declared the Attorney General in this connection: "The Department of Justice is convinced that as the law now stands, these ships are immune. Its business is to deal with the law as it finds or believes it to be. It can not, in candor, urge upon the Supreme Court a position which it believes to be unsound."

The Department of State continued on occasion to accentuate its view that government owned or operated vessels when engaged in commerce were not entitled to immunity as public vessels. (See For. Rel. 1923, Vol. I, 268; also numerous instances set forth in Hackworth, Dig., II, § 173.) Moreover, it was not disposed to claim that ships operated by or on behalf of the United States Shipping Board, when engaged in commercial pursuits, were entitled to immunity from arrest or to other special advantages generally accorded public vessels of a foreign State. It declared that such ships, when so operated, would be permitted to be subject to the laws of foreign countries which applied under otherwise like conditions to privately owned merchant ships foreign to such countries. It stated, however, that when occasion arose, the United States would continue to ask that foreign courts and tribunals and other government departments and agencies recognize the application of Section 7 of the Suits in Admiralty Act, approved March 9, 1920, 41 Stat. 525. That Act made provision for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions by permitting the Secretary of State under certain conditions to direct the appropriate consular officer to claim immunity from arrest, attachment or other seizure of the vessel or cargo involved, and to execute an agreement, undertaking, bond or stipulation for and on behalf of the United States or the United States Shipping Board (or such corporation as the court might require) for the release of such vessel or cargo and for the prosecution of any appeal. Following appropriate supplementary provisions, the Act announced that "nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case." See, in this connection, Mr. Hughes, Secy. of State, to Mr. Harvey, American Ambassador at London,

In view of the position taken by the Supreme Court, the Department of State has in recent years, on appropriate occasion felt itself warranted in requesting the Department of Justice to instruct a United States attorney to file with the particular court concerned a suggestion of lack of jurisdiction in a case where the "apparently public status" of a foreign vessel was deemed to exist.[17] Again the Department of State has, on occasion, merely sought through the medium of the Department of Justice, to bring to the attention of the court concerned for such action as it might consider necessary and proper, the request of the foreign claimant government for the release of a vessel from the local jurisdiction.[18] When, however, important facts having a direct bearing on the status of a ship have been in dispute, the Department of State has considered itself not to be in a position to make any representations to the court.[19]

In relation to the third problem noted above, concerning the elements that must unite in order to establish a connection between a vessel and a State such as to justify the conclusion that it is to be deemed a public ship to which an exemption should be accorded, it may be noted that according to the trend of a group of American decisions, the requisitioning of a foreign merchant vessel by or in behalf of its own country does not suffice to exempt the ship from the local jurisdiction unless the vessel is within the actual possession of the authorities thus attempting to assert control.[20] This may be attributable to a decision of the Supreme Court of the United States in 1869, in a case not involving

---

No. 701, Oct. 28, 1922; Instruction to American Diplomatic Officers, Diplomatic Serial No. 178, March 5, 1923. See also For. Rel. 1923, Vol. I, 268 and 271.

[17] See statement in Hackworth, Dig., II, 446-447, with documents there cited, concerning the case of the Dominican vessel *Arminda,* 1931-1932.

[18] See, for example, statement in Hackworth, Dig., II, 447, with documents there cited, concerning the case of the Colombian ship *Cucuta,* in 1934.

[19] See, for example, Mr. Moore, Assist. Secy. of State, to Señor de los Ríos, Feb. 26, 1937, Hackworth, Dig., II, 450.

[20] See, for example, The Attualita, 238 Fed. 909 (and in connection with the case, Mr. Lansing, Secy. of State, to the Italian Ambassador at Washington, Oct. 26, 1916, Hackworth, Dig., II, 426); The Tampa, 245 Fed. 137; The Maipo, 252 Fed. 627. See also The Johnson Lighterage Co. No. 24, 231 Fed. 365, 366-367.

In the case of The Carlo Poma, 259 Fed. 369, 370, it was stated by way of *dictum* by Ward, J., in behalf of the Circuit Court of Appeals (Second Circuit): "The law of the United States is the same [as the English], except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time the process is served. The Davis, 10 Wall. 15, 19 L. Ed. 875; Long *v.* The Tampico (D. C.), 16 Fed. 491; The Attualita, 238 Fed. 909, 152 C. C. A. 43." It may be noted that in this case the vessel was owned and operated by the Italian Government, and clearly entitled to the exemption demanded in its behalf. See, in this connection, Fred K. Nielsen, "Lack of Uniformity in the Law and Practice of States with Regard to Merchant Vessels," *Am. J.,* XIII, 1, 12-21.

"In The Jupiter, 1924 P. 236, 241, 244 (*cf.* The Jupiter No. 2, 1925 P. 69; The Jupiter No. 3, 1927 P. 122, 125), and in the recently reported The Cristina, 59 Lloyd's List Law Reports 43, 50, on which respondent relies, the possession taken in behalf of the claimant government was actual. The judgment in The Cristina appears to have proceeded on that ground. In The Jupiter, it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. The report of The Cristina in the Admiralty Division, 59 Lloyd's List Law Reports 1, 3, indicates that the master and crew were in the pay of the Spanish Government." (Note appended to opinion by Mr. Justice Stone in the case of Compania Espanola *v.* Navemar, 303 U. S. 68, 76.)

any question of international law.[21] On principle, however, it would seem that not the ownership or exclusive possession of a ship by a foreign sovereign gives rise to the claim of immunity, but rather the appropriation and devotion of the vessel to the public service under governmental authority. This idea has found some judicial approval in the United States.[22] In January, 1938, in the case of Compania Espanola *v.* Navemar, the Supreme Court of the United States declared:

> The district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the "Navemar" had been in the possession of the Spanish Government. The decree of attachment, without more, did not operate to change the possession which before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum,* actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, *The Davis,* 10 Wall. 15, 21; *Long* v. *The Tampico,* 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma,* 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government. Both were lacking, as was support for any contention that

[21] The case was that of The Davis, 10 Wall. 15, where the question was whether personal property of the United States on board a vessel for transportation, was subject to a lien for salvage services rendered in saving the property; and whether, also, such a lien should be enforced when the property was not in the possession of an officer of the Government, and the process of the Court could be enforced in a proceeding *in rem* without disturbing the possession of the Government. No question of international law was involved. The reason for permitting the enforcement of the lien under the circumstances stated, was because such action did not conflict with the theory on which the Government was exempt from local process without its own consent. That theory was not identical with that on which, under the law of nations, a foreign sovereign claims and enjoys exemption for vessel property. The distinction between the nature of the two claims was thus tersely emphasized by Charles H. Weston in "Actions Against the Property of Sovereigns," *Harv. Law Rev.,* XXXII, 266, 270: "It is said that the principle governing both cases is the same since immunity is granted out of respect for the 'independence of sovereign authority.' In so far as this phrase expresses the policy underlying the decisions, it merely cloaks the difference between them. In cases involving the local sovereign it represents the State's need for executive freedom from harassing litigation. In cases involving the foreign sovereign it indicates the desire to avoid international friction by substituting diplomatic negotiations for the decrees of local tribunals."

See, also, The Roseric, 254 Fed. 154, 161, where Rellstab, J., declared "The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be 'safely accorded,' but on account of its dignity and independence, and because it is necessary, for the well-being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

"In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position."

[22] Rellstab, J., in The Roseric, 254 Fed. 154, 160. See, also, the reasoning in The Parlement Belge (1900), L. R. 5 P. D. 197, 217; The Crimdon, 35 Times L. R. 81; The *Messicano,* 32 Times L. R. 519.

See McNair's 4 ed. of Oppenheim, § 451a.

the vessel was in fact employed in public service. See *Long* v. *The Tampico, supra,* 493, 494; cf. *Berizzi Bros. Co.* v. *The Pesaro, supra.*

The district court rightly declined to treat the suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction.[23]

Here is impressive intimation that proof that the ship's officers recognized that they were controlling a vessel and crew in behalf of their government, might suffice to create such connection between the vessel and that government as to warrant the conclusion that the ship was a public vessel entitled to the immunities of such a craft.[24] The mental attitude of those officers together with their actual control of the ship would unite to establish a dedication of the vessel to the public service, and also reveal a possession which their government might fairly claim as its own.[25]

(*a*)

§ 257. **The Same.** Should the nationalization of merchant vessels, by requisition or any other process, serve to create a large volume of tonnage engaged under governmental control in commercial enterprise, and notably in foreign trade, there would be reason to withhold exemptions not accorded private ships, unless there was definite understanding that the State of the flag would assume full responsibility for the conduct of its vessels, and also place within the reach of the individual claimant a simple and direct means of obtaining justice.[1]

From various quarters has come an impressive demand that the State vessel engaged in commercial service be deprived of exemptions from the local jurisdiction, or to express it differently, that those exemptions be confined to ships engaged exclusively in governmental non-commercial service.[2] Obviously, the

[23] 303 U. S. 68, 76. See also The Navemar, 17 F. Supp. 495; The Navemar, 17 F. Supp. 647; The Navemar, 18 F. Supp. 153; The Navemar, 90 F. (2d) 673; The Navemar, 24 F. Supp. 495; The Navemar, 102 F. (2d) 444.

See, also, in this connection, documents in Hackworth, Dig., II, § 173.

[24] See "Concerning the Navemar," editorial comment by the author, *Am. J.,* XXXIII, 530.

[25] "All that is here for decision is whether the Republic of Mexico may have immunity as to this ship, a Mexican ship owned by a Mexican company, documented in Mexico and flying the Mexican flag, when as here, she has taken peaceable possession of it in our waters through her lawful agents and representatives, and properly presents and presses her claim based upon that possession. We think the question is conclusively answered in the affirmative, both upon reason and authority." [Hutcheson, Circuit Judge, in Ervin *v.* Quintanilla, Nov. 18, 1938, 99 F. (2d) 935, 941.]

§ 257. [1] It is believed that the success with which the principles laid down in the case of The Schooner Exchange *v.* McFaddon, and in that of The *Parlement Belge* have generally been invoked in behalf of foreign public vessels has been due in part to the infrequency of the demand for exemption from local process, and also to the resulting circumstance that the mutual public benefits attributable to respect for the exemption claimed have far outweighed any opposing equities of the libelants. It is not without significance that the number of litigated cases in the United States between 1915 and 1919 far exceeded that of those confronting American tribunals throughout the entire previous life of the nation.

[2] See Louis Franck, President of the International Maritime Committee, "A New Law for the Seas," *Law Quar. Rev.,* XLII, 25 and 308, in which that writer makes brief but authoritative reference to the work of the International Maritime Committee through conferences at London (1922), Gothenburg (1923), Genoa (1925) and the Diplomatic Conference at Brussels of 1926, productive of the Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, of April 10, 1926.

See, also, Report of Sub-Committee (Messrs. de Magalhaes and Brierly) on the Legal Status of Government Ships Employed in Commerce, to Committee of Experts for the Pro-

matter calls for international agreement indicative of the precise scope and character of desired restrictions. It has been found, however, that difficulties stand in the way of accord,[3] and that interested maritime powers evince generally no readiness to agree that in time of war (when the inducement is strongest to cause a State to requisition its merchant fleet for public uses) publicly owned or operated ships of any kind shall be subject to attachment, seizure or detention by a foreign tribunal.[4] In the absence of limitations imposed by treaty, the tribunals of the United States, especially in view of the stand taken by the Supreme Court of the United States, can not regard the matter of the scope of the exemption as one dependent upon judicial discretion.[5] While the individual State may not by legislative enactment lessen the requirements of international law and thereby rid itself of an obligation to accord an exemption which that law prescribes, it may by such process not improperly express its own view concerning either what those requirements are or what they should be. Moreover, it may by refraining from demanding exemptions in behalf of certain classes of its own public vessels when in foreign waters, encourage other maritime States to exhibit like restraint in similar situations. Thus the United States, in endeavoring through the aid of its statutory law to render it feasible to permit certain classes of American public ships to be subjected to the jurisdiction of foreign courts by arranging for the giving of an official bond for their release in the event of seizure,[6] offers a suggestion which if widely followed might serve to remove ultimately from the horizon the opportunity for the contention that a State vessel engaged in commercial service should necessarily enjoy immunity from local jurisdiction.[7] As Secretary Hughes declared in a

---

gressive Codification of International Law, *Am. J.*, XX, *Special Supplement*, July and October, 1926, 261; J. W. Garner, "Legal Status of Government Ships Employed in Commerce," *Am. J.*, XX, 759; N. Matsunami, Immunity of State Ships, London, 1924; A. D. McNair, "Judicial Recognition of States and Governments, and the Immunity of Public Ships," *Brit. Y.B.*, 1921–1922, 57, 68; Art. 19, Harvard Draft Convention on Territorial Waters, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 245; Art. 44, of Rules concerning the Régime of Sea-going Vessels and their Equipment in Foreign Ports in Time of Peace, adopted by the Institute of International Law at Stockholm, in 1928, *Annuaire*, XXXIV, 752; Gilbert Gidel, *Le Droit International Public de La Mer*, Paris, 1932, II, 337–368 (with bibliography).

[3] See Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (which has not been accepted by the United States), signed at Brussels, April 10, 1926, Hudson, Int. Legislation, No. 154, *Rev. Gén.*, XXXIV, 135; also supplementary protocol of May 24, 1934, 176 League of Nations Treaty Series, 215. See, in this connection, G. van Slooten "*La Convention de Bruxelles sur le Statut Juridique des Navires d'État*," *Rev. Droit Int.*, 3 *sér.*, VII, 453.

[4] See Art. 7 of Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, of April 10, 1926; also, in this connection, Louis Franck, in *Law Quar. Rev.*, XLII, 308–312.

[5] See Berizzi Bros. Co. *v.* S.S. Pesaro, 271 U. S. 562.

Declared Hough, J., in the case of The Maipo, Feb. 21, 1919: "I think the bar is entitled to know that I do not think the enormous extension of sovereign privilege demanded by vessels in all kinds of business of late months and years indicates any change or advance in the law at all. The law remains the same. What has changed is the view which the governments of the world assume toward public duties or public enterprises." (259 Fed. 367.)

[6] See § 7 of Act of March 9, 1920, 41 Stat. 525, 527, authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

[7] "By the Act of 1916 (39 Stat. 730) it was provided that every vessel owned by the Shipping Board, or chartered or leased for it, should, while employed solely as a merchant

communication to the President February 1, 1924: "It seems to be generally recognized in international practice, that notwithstanding the immunity of public vessels from the judicial remedies usually obtaining with respect to other vessels, a Government should make reparation for the damages done the nationals of other countries by its public vessels." [8]

(6)

§ 257A. **Foreign State Aircraft.** The aircraft operated by a State as such may be employed for a variety of purposes, each of which must be deemed to be a public one because of the character of the operator. Within this broad category there may be military aircraft, aircraft employed for postal, customs, police, public health and kindred services; and there may be also embraced therein aircraft engaged in commercial enterprise in behalf of the State.[1] The tendency of the conventional law in relation to the matter appears to concede narrow exemptions from jurisdiction to foreign State aircraft as such, and by implication to confine immunities to military aircraft when authorized to fly over and land upon the territory of the State concerned.[2] It may be observed, however, that according to Article 3 of the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft, concluded at Rome, May 29, 1933, "aircraft assigned exclusively to a Government service, the postal service included, commerce excepted," were declared to be exempt from precautionary attachment.[3] While the terms of the relevant treaties are not always clear,[4]

---

vessel, be subject to all the liabilities of privately owned vessels. This statute was reënacted in 1918 (40 Stat. 900), only to be repealed in 1920 by the Suits in Admiralty Act (41 Stat. 525), which provided for the substitution of suits *in personam* against the United States for the suits *in rem* granted under the prior act (Nahmeh *v.* United States, 267 U. S. 122). . . . The last congressional enactment was in 1925 (43 Stat. 1112), by which it was provided that libels *in personam* might be maintained against the United States for injuries caused by public vessels, or for salvage and towage services rendered to them. Consequently at the present time libels *in personam* against the United States constitute the sole remedy in cases involving government-owned vessels, whether the vessel be employed in the merchant marine, or in the public service of the nation." (J. A. Raymond, "Sovereign Immunity in Modern Admiralty Law," *Texas Law Review*, IX, 1930–1931, 519, 535–536.) See also, in this connection, The Lake Munroe, 250 U. S. 246; Sloan Shipyards Corporation *v.* United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549. It may be observed that according to Section 5 of the Act of 1925 (43 Stat. 1112, 1113): "No suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts."

[8] Mr. Hughes, Secy. of State, to President Coolidge, Feb. 21, 1924, Hackworth, Dig., II, 463, where reference was made to the recommendation by the former that Congress be asked to appropriate a sum of money for payment to the Norwegian Government "as an act of grace and without reference to the question of the legal liability of the United States," on account of the damage to the Norwegian vessel *Hassel,* while in a French port in 1918, by the American vessel *Ausable* when operated by the War Department in the Army Transport Service. The recommendation was followed, an appropriation made by Congress, and a proper sum transmitted to the Norwegian Minister at Washington in settlement of the claim.

§ 257A. [1] Art. 3 of the Arrangement between the United States and Germany on Air Navigation, effected by exchange of notes of May 27, 30 and 31, 1932, makes reference to "State aircraft used exclusively for commercial purposes." (U. S. Executive Agreement Series, No. 38.)

[2] See, for example, Art. 32 of the Convention on the Regulation of Aerial Navigation, of Oct. 13, 1919, League of Nations Treaty Series, XI, 173. See, also, Arts. 2 and 3 of the Convention on Commercial Aviation, adopted at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4729, 4730.

[3] Department of State, Treaty Information Bulletin No. 47, August, 1933, p. 22.

they fail to reflect a design to yield to State aircraft as broad exemptions from the local jurisdiction as might be expected to be acknowledged in the case of a foreign public vessel.

(7)

§ 258. **Other Foreign Public Property.** The matter of the exemption from local jurisdiction of property belonging to a foreign State is affected by the principle that a foreign sovereign may not properly be subjected to that jurisdiction without its consent.[1] It is also affected by the circumstance that it always lies within the power of a State to fix the terms on which property of any kind within its territory may be acquired by a foreign country, or on which the latter may bring its property within the domain of the former, or institute proceedings in its courts. It would be difficult to establish that international law as such thwarts the territorial sovereign in the exercise of any of these prerogatives. If that sovereign evinces a readiness to permit a foreign power to institute such proceedings, it is likely to do so by way of response to the requirements of its own fundamental law rather than from a sense of duty to observe an international obligation.[2] Moreover, in the course of so doing, it may, through the agency of its tribunals, exhibit reluctance or unwillingness to permit the foreign public litigant to prosecute a claim of a penal character, as for the enforcement of its revenue or kindred laws,[3] or through the instrumentality of a government that is unrecognized.[4] It is believed that a State may close the doors of its courts to another that is not disposed to become a party litigant on the terms that are offered. Conversely, a foreign State may be prepared to forego itself a claim of immunity from the local jurisdiction as the price of obtaining desired advantages through the aid of the courts in relation to property in which it asserts an interest and to which it may claim title. The balancing of these opposing equities

[4] See Arts. 30–32 of the Convention on the Regulation of Aerial Navigation, of Oct. 13, 1919. Also, *supra*, § 190.

§ 258. [1] See Exemptions from Territorial Jurisdiction, In General, *supra*, § 244.

[2] Thus, in the case of The Sapphire, 11 Wall. 164, the Court adverted to the fact that the Constitution of the United States "expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign* States, citizens, or subjects, without reference to the subject-matter of the controversy." Here was a domestic foundation for the conclusion that "a foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts." The Court added: "To deny him this privilege would manifest a want of comity and friendly feeling." (*Id.*, 167.) See Principality of Monaco *v.* Mississippi, 292 U. S. 313, 323, note 2.

"We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States, no such comity exists." (Andrews, J., in opinion of the court in Russian Socialist Federated Soviet Republic *v.* Cibrario, 235 N. Y. 255, 262.)

*Cf.* Arts. 2–5 of Harvard Draft Convention on the Competence of Courts in Regard to Foreign States, *Am. J.*, XXVI, *Special Supplement*, July, 1932, 455.

See, however, Trade Delegation at Warsaw of U.S.S.R. *v.* Maurycy Fajans (Commercial and Industrial Joint Stock Co.), Supreme Court of Poland, Feb. 10, 1928, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 108.

[3] See, for example, H. M. The Queen of Holland (Married Woman) *v.* Drukker, L.R. [1928] 1 Ch. 877.

[4] Russian Socialist Federated Soviet Republic *v.* Cibrario, 235 N. Y. 255; The Penza, 277 Fed. 91.

See Aspects of Non-Recognition of a Régime Functioning as the Government of a Foreign State, *supra*, § 46B.

possessed, on the one hand, by the territorial sovereign, and on the other by the foreign public claimant, is an intriguing task that makes special appeal to the codifier seeking a basis for multi-partite arrangement.[5]

In the absence of treaty, or of other formal manifestation by a State of its stand in relation to the matter, such as may be reflected in the terms of its statutory law, the question presents itself whether the acts of a foreign State in relation to property within the national domain warrant the implication that that State must be deemed to have waived immunity from the local jurisdiction in respect to the property concerned or to itself. From various acts on the part of such State it may be sought to derive such an implication. Thus the character of transactions in which the foreign public acquirer of title may be involved, the relationship of particular forms of property to the territorial sovereign and its special interest therein, as well as the instituting of judicial proceedings by the foreign State as a means of safeguarding or establishing its rights, are variously deemed to produce and justify particular conclusions.[6]

If a foreign State invokes the aid of a local court of equity in order to acquire possession of property to the title of which it has succeeded, the tribunal may fairly subject the taking of possession to obligations entered into by the predecessor to the title.[7] This result which is hardly attributable to an implication derived from the conduct of the complainant in instituting judicial proceedings, is due to the fact that it lies within the power of the court whose aid is sought to impose such a condition.[8] By starting suit in a local court, a foreign State may be deemed to subject itself, within certain limits, to the obligation to submit to an adjudication upon a counterclaim arising out of the facts or transactions upon which its own claim is based.[9] Concerning the extent of those

[5] The Harvard Draft Convention on the Competence of Courts in Regard to Foreign States, of 1932, marks a careful and elaborate attempt to balance these equities and "is an endeavor to offer a set of rules on this subject which may prove acceptable to the States of the world." (Introduction by P. C. Jessup, Reporter, *Am. J.*, XXVI, *Special Supplement*, July, 1932, 473, 474.) See exhaustive comment by the Reporter, beginning *id.*, 475, and selected bibliography, *id.*, 466.

[6] See, generally, L. J. D. Féraud-Giraud, *États et Souverains devant les tribunaux étrangers*, Paris, 1895; Eleanor W. Allen, The Position of Foreign States Before National Courts, Chiefly in Continental Europe, with bibliography, New York, 1933; Charles De Visscher, "*Les Gouvernements étrangers en Justice*," *Rev. Droit Int.*, 3 *sér.*, III, 143, 300; Draft International Regulations on the Competence of Courts in Suits Against Foreign States, Sovereigns, or Heads of States, adopted by the Institute of International Law in 1891 and revised in 1892, *Tableau général des travaux* (1873–1913), 344, J. B. Scott, Resolutions, 91; Report of Sub-Committee (Messrs. Matsuda, Diena and De Visscher) on Competence of Courts with Regard to Foreign States, to Committee of Experts for the Progressive Codification of International Law, League of Nations Doc. No. C.204.M.78.1927.V, *Am. J.*, XXII, January, 1928, *Special Supplement*, 118. Also, Nathan Wolfman, "Sovereigns as Defendants," *Am. J.*, IV, 373; Charles H. Weston, "Actions against the Property of Sovereigns," *Harvard Law Rev.*, XXXII, 266; Charles Fairman, "Some Disputed Applications of the Principle of State Immunity," *Am. J.*, XXII, 566; A. H. Feller, "Procedure in Cases Involving Immunity of Foreign States in Courts of the United States," *Am. J.*, XXV, 83.

[7] United States of America *v.* Prioleau, 35 L. J. Chancery, N. S. 7. See also The Secundus, 15 F. (2d) 713.

[8] See the reasoning in The Newbattle, 10 Prob. Div. 33; also, in United States of Mexico *v.* Rask, 4 P.(2) 981, 118 Cal. App. 21.

[9] A counterclaim as so limited is well described in Art. 1 of the Harvard Draft Convention on Competence of Courts in Regard to Foreign States as a "direct counterclaim," *Am. J.*, XXVI, *Special Supplement*, July, 1932, 455.

See United States *v.* National City Bank of New York, 1936, 83 F. (2d) 236, 238.

limits, the courts of the United States do not as yet appear to be in accord. There is divergence of opinion whether, in such a situation, there should be imputed to the foreign public litigant a consent to the rendition of an affirmative judgment against itself.[10] The foreign State is not, however, regarded as consenting to an adjudication upon counterclaims arising from facts or transactions other than those on which its own claim is based,[11] or as consenting to execution against its property, even when it pleads to a counterclaim and contests the merits thereof.[12] The imposing of an obligation upon the foreign public litigant to yield to the adjudication of crossclaims of wider scope by the local courts, calls for, and in certain quarters may be regarded as dependent upon, the statutory enactments of the territorial sovereign or agreement between itself and the foreign State concerned.[13]

It may be observed that in 1938 the Supreme Court of the United States in an opinion through Mr. Justice Stone, reached the conclusion that, in the absence of the effort by treaty or other appropriate action to restrict the applica-

---

It is doubtless true that when a State enters litigation with a general appearance, its action serves as a waiver of immunity from the local jurisdiction. See The Sao Vincente, 281 Fed. 111, 114; The Sao Vincente, 295 Fed. 829.

[10] In the course of his opinion in the case of Kingdom of Norway *v.* Federal Sugar Refining Co., 286 Fed. 188, at 200, Judge Mack adverted to the distinction between the rendering of an affirmative judgment or decree and its enforcement or execution. He found occasion to say: "While a court may have no power to enforce an affirmative judgment against a sovereign State, still if, as a defense to a suit instituted by a sovereign State, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plantiff State was indebted to the defendant. A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned. A partial and incomplete adjudication leaves all parties in grave doubt as to their status and rights, and leads to a multiplicity of suits.

"A sovereign State, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. Although, perhaps, the defendant should not be permitted to assert any counterclaim which would not be, in whole or part, a defense to the action brought by the State, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign State was indebted or obligated to the defendant." (*Id.*, 193–194.) See, also, United States of Mexico *v.* Rask, 4 P.(2) 981, 118 Cal. App. 21.

But see, *contra*, French Republic *v.* Inland Nav. Co., 263 Fed. 410; In Re Patterson-MacDonald Shipbuilding Co., 293 Fed. 192; also, dictum in Kingdom of Roumania *v.* Guaranty Trust Co., 250 Fed. 341, 343–344.

[11] See Kingdom of Roumania *v.* Guaranty Trust Co. of New York, 250 Fed. 341; People *v.* Dennison, 84 N. Y. 272.

See, also, South African Republic *v.* La Compagnie Franco-Belge, 1898, 1 Ch. Div. 190, 195, *citing* Duke of Brunswick *v.* King of Hanover, 6 Beav. 38, and Strousberg *v.* Republic of Costa Rica, 29 W. R. 125.

[12] See Dexter & Carpenter *v.* Kunglig Jarnvagsstyrelsen, 43 F.(2) 705. See comment on this case by P. C. Jessup and Francis Deák, in *Am. J.*, XXV, 335; also, by Arthur K. Kuhn, in relation to the settlement by Sweden of the claim presented by the United States in behalf of the American claimant that found itself unable to obtain execution against the property of Sweden in satisfaction of a valid judgment against that State, *id.*, XXVIII, 119.

Also, Von Hellfeld *v.* Russian Government (Anhalt Case), Royal Prussian Court for the Determination of Jurisdictional Conflicts, 1910, *Am. J.*, V, 490.

[13] See, in this connection, Art. 6 of Harvard Draft Convention on Competence of Courts in Regard to Foreign States, *Am. J.*, XXVI, *Special Supplement*, July, 1932, 456; also, Comment, *id.*, 517–526.

tion of local statutes of limitation against foreign governments, "the limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants." [14]

It may be doubted whether in the courts of the United States the existence or extent of the immunity from the local jurisdiction of property belonging to and possessed by a foreign State, or the immunity of such State itself, would be deemed to be destroyed by the bare circumstance that such property was an instrument of commerce or employed for commercial enterprise, revealing the public owner as a possible rival of a private merchant.[15] It must be borne in mind that a State never acts in a private capacity, even when the activity in which it participates is one which is commonly confided to and carried on by the private individual.[16] This is true whether its commercial ventures are designed to produce profit, or simply mark the acquisition of desired articles such, for example, as stationary or military equipment or locomotives for the use of particular governmental departments. Hence, there must be difficulty in concluding that a State when embarking upon any of these transactions is not acting in an essentially sovereign capacity.[17] The thought of the Supreme Court of the United States in relation to the treatment of foreign public vessels would not encourage such a conclusion.[18] If American tribunals are to be convinced that participation in such transactions serves to produce loss of immunity from the local jurisdic-

[14] Guaranty Trust Co. *v.* United States, 304 U. S. 126, 136.

See also case of George W. Cook *v.* Mexico, Opinions of Commissioners, under convention of Sept. 8, 1923, 1927 Vol., 318, 319.

[15] See French Republic *v.* Board of Sup'rs of Jefferson County, 252 S. W. 124, 200 Ky. 18; Kingdom of Roumania *v.* Guaranty Trust Co., 250 Fed. 341, 345.

*Cf.*, however, Mr. Lansing, Secy. of State, to the Secy. of the Treasury, Dec. 9, 1916, Hackworth, Dig., II, 467.

[16] See Mr. Da Gama, Brazilian Ambassador at Washington, to Mr. Knox, Secy. of State, May 30, 1912, For. Rel. 1913, 53.

[17] The distinction between acts *jure imperii* and *jure gestionis* may commend itself to a State by suggesting to it the wisdom of taking affirmative steps to prevent a foreign power that engages in commerce from enjoying immunities from the local jurisdiction for its instruments or articles of trade. The distinction breeds, however, confusion of thought when it is employed to intimate that when a State engages in activities for pecuniary profit it necessarily lays down its public character and assumes that of a private individual. In a well-known dictum in the case of The Schooner Exchange *v.* McFaddon, Chief Justice Marshall declared that "a prince" might do this very thing, and "by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern." (7 Cranch, 116, 145.) In 1812, when he uttered these words, and ever since that time, it has been possible for the head of a State to do in this regard what his country can not do. He may enter into transactions for his own personal and private gain that do not enure to the direct benefit of his State. He may in fact enrich himself when the latter becomes a bankrupt, and he may become impoverished while his country thrives. The State, by reason of what it is, is not in a like position. It can never lay down its statehood. The present magnitude and variety of its activities in fields that were formerly left to development by the private individual does not enable it to do so. The engaging by a State in such activities is a circumstance which is doubtless pregnant with meaning for the economist, and the legislator and the treaty-maker, who may wisely endeavor to protect the private individual against his foreign public rival. It fails in itself, however, to establish that the foreign State embarked upon commercial enterprise for pecuniary profit within the national domain has ceased to be acting in an essentially public capacity.

See Other Vessels in Foreign Public Service, *supra*, § 256.

[18] See Berizzi Bros. Co. *v.* S.S. Pesaro, 271 U. S. 562, 574. Also, Hough, J., in The Maipo, 259 Fed. 367, 368.

tion, the argument in support of that contention must rest upon a firmer foundation than one which relies upon the allegation that a State when so engaged is not acting in a sovereign capacity.[19] That allegation has, however, been invoked with success before numerous foreign tribunals.[20] Nevertheless, the courts of other countries have not been agreed as to the character of the conduct which should cause the foreign public actor to be deemed to be acting in a capacity not regarded as sovereign.[21] The differing inferences derived from the same sets of facts point to the weakness of the distinction sought to be applied.[22]

With respect to property which is not immovable and is owned by a foreign State, exemption is yielded, according to American judicial opinion, when the owner or its agent has possession.[23] When it lacks possession, the property may be attached; [24] but there is a constant requirement that the foreign State be not made a party defendant. It may be urged that the scope of the exemption should be as broad as that demanded for and applicable to vessel property, and that dedication to a public service of a foreign sovereign rather than ownership or

[19] See Advokaat *v.* Schuddinck and the Belgian State, The Netherlands, 1923, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 69. For an English translation of the text, see *Am. J.*, XXVI, *Special Supplement*, July, 1932, 630 (embraced in comment on Art. 11 of Harvard Draft Convention on Competence of Courts in regard to Foreign States).

See, also, Polish Loan Bank Case, Germany, Prussian Tribunal, for Conflicts of Jurisdiction, 1921, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 78; Lakhowsky *v.* Swiss Federal Government and Colonel de Reynier, France, *id.*, 1919–1922, Case No. 83.

[20] See Turkish Purchases Commission Case, Germany, Prussian Tribunal for Conflicts of Jurisdiction, 1920, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 77; Storelli *v.* French Republic (Government of), Italy, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 66; Roumania (State of) *v.* Pascalet, France, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 68; Société Lemoine & Co. *v.* Belgian and British Governments, Belgium, 1925, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 120; Borg *v.* Caisse Nationale D'épargne Française, Egypt, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 122; Société le Gostorg et Union des Républiques Socialistes Sovietiques (appellants) *v.* Association France-Export (respondent), France, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 125; French Government (plaintiff) *v.* Serra & Co. (defendant), Italy, 1925, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 128; Société Monnoyer et Bernard *v.* France, Belgium, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 112; Soviet Republic (Immunity in Greece) Case, Greece, 1928, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 109.

[21] See Comment on Art. II, Harvard Draft Convention on Competence of Courts in Regard to Foreign States, *Am. J.*, XXVI (1932), *Special Supplement*, 609–611; also, Eleanor W. Allen, The Position of Foreign States Before National Courts, New York, 1933, Chap. II; Report of Sub-Committee (Messrs. Matsuda, Diena and De Visscher) on Competence of Courts with Regard to Foreign States, to Committee of Experts for the Progressive Codification of International Law, *Am. J.*, XXII, January, 1928, *Special Supplement*, 118, 126.

[22] The value of a distinction as a means of ascertaining or accentuating the legal effect of a particular act must always depend, in international law as elsewhere, upon its lending itself to expression in terms of fact in contrast to phrases that register complicated and undefined conclusions which themselves await explanation.

[23] In the case of Mason *v.* Intercolonial Ry. Co., 197 Mass. 349, the property was in the possession of trustees in behalf of the defendant company which was the property of a foreign sovereign. The court deemed itself to be without the right to take jurisdiction in an action of trustee process against the trustees. See, also, *dictum* in Tucker *v.* Alexandroff, 183 U. S. 424, 440.

[24] See The Johnson Lighterage Co. No. 24, 231 Fed. 365; Long *v.* The Tampico, 16 Fed. 491; also *dictum* in The Carlo Poma, 259 Fed. 369, 370.

In the case of Vavasseur *v.* Krupp, L.R. 9 Ch. Div. 351, Moore, Dig., II, 591, the Mikado of Japan was permitted to remove from British territory shells brought from Germany to England for the use of Japanese vessels of war there building, notwithstanding the attempt of local patentees claiming infringement of their rights as such, to prevent persons in possession of the shells from delivering them to those vessels.

possession by it should afford the test of immunity.[25] Certain American cases declaring possession to be essential to exemption of foreign public property, do not appear to assert a different rule from what is assumed or declared to be applicable to vessels. It should be noted, however, that Chief Justice Marshall in the case of *The Schooner Exchange* v. *McFaddon,* observed that there was under certain circumstances a distinction between the two classes of property.[26] While it must be constantly borne in mind that the reason for the immunity of a sovereign from the process of its own courts is not that which gives rise to the exemption of a foreign State from local jurisdiction, and that grounds for the restriction of the immunity in the former case are not necessarily decisive in the latter, it is not believed to be arbitrary to require in the case of property other than vessels a somewhat narrower basis of exemption. It is hardly unreasonable to disregard the mere fact of dedication to the public service of a foreign sovereign, if it is neither the owner nor possessor of the property. If, however, a foreign State establishes its ownership, and demands possession and control, it is greatly to be doubted whether absence of possession should destroy the claim of exemption, at least in a case where no adverse lien has attached to the property prior to the acquisition of title.[27]

[25] C. H. Weston, in *Harv. Law Rev.,* XXXII, 266, 270–271.

[26] 7 Cranch, 116, 145.

It must be recalled, however, that the learned Chief Justice was adverting to what a "prince" rather than a State as such might essay to do in relation to the acquisition of property in a foreign country.

[27] See Vavasseur *v.* Krupp, L.R. 9 Ch. Div. 351.

In a note by Dr. Lauterpacht appended to Case No. 55 in his Annual Digest, 1933–1934 (*In re* Russian Bank for Foreign Trade, L.R. [1933] Ch. D. 745) the following statement is made: "The rule of the immunity from jurisdiction of the property of a sovereign State has been enunciated by English courts in numerous cases, and has recently been restated by Lord Atkin in *The Cristina,* 54 T.L.R., 512, 513, as meaning that English courts 'will not by their process, whether the Sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.' What amounts to such property, possession or control is a matter of some obscurity, but it now seems to be accepted that at any rate a mere claim to property is not a sufficient ground for the immunity. The present case was relied upon by the Court of Appeal in *Haile Selassie* v. *Cable and Wireless, Ltd.,* 54 T.L.R. 996, where the plaintiff claimed a sum of money admitted to be due under a contract, the defence being that the money had been claimed by the Italian Government which was recognized by His Majesty as the *de facto* sovereign government of Ethiopia. Bennett, J., in the Court below declined to exercise jurisdiction on the ground that 'the right of the plaintiff to recover judgment cannot be determined without determining whether the claim put forward on behalf of His Majesty the King of Italy is well founded.' The decision was reversed by the Court of Appeal, which held that a mere claim by a foreign sovereign who is not a party to the proceedings, nor a necessary party to the proceedings, cannot prevent the court adjudicating the case as between the parties before it.

"The question arises, What is a mere claim? In *Haile Selassie's Case,* Greene, M. R., said: 'Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign Sovereign, or his agent, the principle of immunity will apply.' It would appear, then, that there is a mere claim, and therefore the principle will not apply, wherever the asserted property or possesesion is not either 'admitted or proved.' It should be noted that the *Haile Selassie Case* goes a good deal further than the present case for here Maugham, J., was dealing not with a 'mere claim,' but with a 'possible claim'; no claim had in fact been made, nor was a claim likely to be made by the Russian Government. This difference between the two cases was not mentioned by Greene, M. R., and it is probable that he did not regard it as a material distinction. There is, of course, no difficulty in a case where the subject matter of the claim is in fact in the possession or control of the sovereign government or its agent. In such case the mere fact of such possession or control is sufficient and there is no need to enquire further into the legality of the claim. Hence the attempt in the present case to establish that the managers and employees of the Bank were to be regarded as agents of the Russian Government."

In general, movable property owned and possessed by a foreign State would seem to be exempt from local taxation.[28] It may be doubted whether the character or uses of such property should be regarded as having a decisive bearing upon the reasonableness of the claims to exemption. The Department of State did, however, in 1919, conclude that there was no rule of international law or comity which would be violated by the imposition in New Jersey of a tax on railway locomotives belonging to the Russian Government and locally held in storage,[29] and in 1916, it reached a like conclusion with regard to an extension of a federal income tax to the income derived from American stocks, bonds and other domestic securities owned by a foreign government.[30]

Although a foreign State may be adversely affected by the treatment locally accorded property in which it is interested and yet to which it does not possess title, the fact of such interest may not suffice to exempt the property concerned from the operation of local measures lawfully taken with respect to it.[31] Again, when a foreign State acquires title to the shares of stock of a domestic corporation, that circumstance does not necessarily serve to exempt the corporation from local taxation under the normal provisions of the domestic law.[32]

[28] See French Republic *v.* Board of Supervisors of Jefferson County, 200 Ky. 18.

See documents in Hackworth, Dig., II, 466 and 468, concerning objections made by the Department of State in 1921, to the assessment by the State of Missouri of a tax against a British army officer on certain horses and mules owned by the British Government and held temporarily in that State, and concerning also objections made by the Department in 1925, to the imposition by the French Government of an income tax charged against interest accruing to the Consulate General at Paris on official funds deposited in a Paris bank.

See also Mr. Grew, Under Secy. of State, to Ambassador Fletcher, June 16 and Sept. 8, 1925, Hackworth, Dig., II, 469.

[29] See Mr. Polk, Acting Secy. of State, to Mr. Ughet, Russian Chargé d'Affaires, March 6, 1919, Hackworth, Dig., II, 467.

See also documents in Hackworth, Dig., IV, § 408.

[30] See Mr. Lansing, Secy. of State, to the Secy. of the Treasury, Dec. 9, 1916, Hackworth, Dig., II, 467.

According to Section 116 of the Revenue Act of 1936 (49 Stat. 1689): "The following items . . . shall be exempt from taxation under this title: . . . (*c*) . . . The income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to such foreign governments, or from any other source within the United States." (See also U. S. Code Current Service, 1939, p. 66.)

[31] Thus, in two instances in 1933, the Government of the United States appeared to be unwilling to cause the release of foreign governmental funds on deposit in closed banks, and by such process to yield a preference to the interested governments over other depositors. See documents in Hackworth, Dig., II, 469.

See, however, the situation in Auer *v.* Costa, 23 F. Supp. 22.

[32] The acquisition by the Republic of Nicaragua of the entire stock of a corporation incorporated in the State of Maine, for the purpose of taking over and operating the national railways and steamship lines of Nicaragua did not, in the opinion of the Department of State, "as a matter of international Law," exempt the corporation from the payment of an income tax or entitle it to a refund of taxes paid. See Mr. Kellogg, Secy. of State, to Mr. Weitzell, June 20, 1925, Hackworth, Dig., II, 475. See other documents *id.*, indicating reasons which led the Department of State in 1930, to recommend the granting of a refund to the corporation, and concerning the conclusion of the Treasury Department that the corporation as an agency of a foreign government was exempt from the operation of the Federal revenue laws and specified regulations thereunder. See especially treaty with Nicaragua of April 14, 1938, for the adjustment of certain accounts and refund of income taxes, U. S. Treaty Series, No. 937.

Declared the Treasury Department in a communication to Secretary Hull, March 5, 1934: "Diplomatic representatives of foreign governments and those of the diplomatic class are the only agencies of foreign governments in the United States which are entitled to exemption from taxation as a matter of right under international law. As is expressly recognized in the ruling referred to, any tax exemption of an agency of a foreign government in the United

The relationship between a State and some forms of property within its territory may, however, be such that a foreign power which acquires that property is to be deemed to do so subject to the condition that the territorial sovereign may subject to adjudication before its tribunals questions pertaining to title or the adverse interests of individual claimants, and for such purpose, if need be, cause such power to submit to the local jurisdiction. In a word, the character of the property concerned may justify the implication of a waiver of immunity by the foreign public owner. This seems to be acknowledged in the case of immovable property by reason of its permanent physical connection with the territory where it is located,[33] except where such property is employed for diplomatic or consular purposes.[34]

There must always be imputed to the territorial sovereign a preponderant interest in property of every kind belonging within its limits. That interest may manifest itself in efforts to acquire title to, or to retain within its limits, certain categories of movable property such, for example, as a particular form of specie, or munitions of war, or food supplies. Accordingly, it would seem to require no legislative enactment on the part of a State to serve notice on any other, that any acquisition by that other of any property within the national domain is subject to the assertion by the former of its preponderant interest therein, and to the establishment of that interest through the aid of the courts even to the extent of causing a foreign public owner to submit to an adjudication as a party defendant. A waiver of its immunity from the local jurisdiction is in such a contingency fairly to be implied.

It may be observed that the increasing tendency of States to acquire property abroad, and thus to participate in foreign commerce, oftentimes in a mode similar to that of a private trader, calls for general agreement establishing the effect of public ownership and of the particular uses of what is acquired, upon the duty of the territorial sovereign to yield exemption from jurisdiction. The problem is

---

States, other than that of a diplomatic character, must, in the absence of treaty provisions granting such exemption, be granted solely as a matter of policy." (Hackworth, Dig., II, 483.)

[33] "To hold or enjoy rights of possession or ownership over immovable property in a country constitutes, on the other hand, a tacit agreement to submit, as defendant, to the jurisdiction of the municipal courts.

"All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals, whether as defendants or as plaintiffs." (Report of Sub-Committee, Messrs. Matsuda, Diena and De Visscher, on the Competence of Courts with Regard to Foreign States, to Committee of Experts for the Progressive Codification of International Law, *Am. J.*, XXII, January, 1928, *Special Supplement*, 117, 122.)

See Republic of France *v.* City of New York, *New York Law Journal*, Dec. 30, 1925, p. 1279; also, Storelli *v.* French Republic (Government of), Italy, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 66.

According to Art. 9 of the Harvard Draft Convention on the Competence of Courts in Regard to Foreign States: "A State may be made a respondent in a proceeding in a court of another State when the proceeding relates to rights or interests in, or to the use of, immovable property which is within the territory of such other State and which the respondent State owns or possesses or in which it has or claims an interest." (*Am. J.*, XXVI, *Special Supplement*, July, 1932, 455, 456.)

[34] See *infra*, § 437.

Also, Eleanor W. Allen, The Position of Foreign States Before National Courts, New York, 1933, 16–18.

closely associated with that arising from the nationalization of vessel property engaged in commercial enterprise. If the law of nations is to remain flexibly responsive to the requirements of international intercourse, definite principles should be enunciated and agreed upon, and these should be designed to safeguard and promote, rather than jeopardize and retard the commercial transactions of private concerns with foreign States. To that end, the commission of particular acts by such States, rather than phrases purporting to be descriptive of the legal aspect of their conduct, should be declared to be productive of such waivers of immunity from the local jurisdiction as are sought to be obtained.[35]

(8)

## Extraterritorial Jurisdiction

(*a*)

§ 259. **In General.** For centuries before the establishment of international law the commercial cities of Europe exercised certain privileges of jurisdiction over their own merchants living in foreign places where trade was enjoyed.[1] The

[35] According to Art. 281 of the Treaty of Peace of Versailles, of June 28, 1919: "If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty." (U. S. Treaty Vol. III, 3450.) See, also, Art. 233 of the Treaty of St. Germain-en-Laye, of Sept. 10, 1919, *id.*, 3233; Art. 216 of the Treaty of Trianon, of June 4, 1920, *id.*, 3624; Art. 161 of the Treaty of Neuilly-sur-Seine of Nov. 27, 1919, Great Britain, Treaty Series (1920), No. 5 [Cmd. 522].

See, also, Art. 5, Temporary Commercial Agreement between His Majesty's Government in the United Kingdom and the Government of the Union of Soviet Socialist Republics, Feb. 16, 1934, British Treaty Series No. 11 (1934), Cmd. 4567.

§ 259. [1] See, in general, with respect to the relation of the United States to the exercise of extraterritorial jurisdiction, Consular Regulations (1896), Sections 612–653; documents in Moore, Dig., II, 693–727; Instructions to American diplomatic officers (1897), Sections 82–93, 200–240; Philip M. Brown, Foreigners in Turkey: Their Juridical Status, Princeton, 1914; The Nature of the Jurisdiction of the United States Courts Established in Foreign Countries, *Harv. Law Rev.*, XXI, 437; E. M. Borchard, Diplomatic Protection, §§ 180 and 202; Frank E. Hinckley, American Consular Jurisdiction in the Orient, Washington, 1906; Report on Citizenship of the United States, Expatriation, and Protection Abroad, by Messrs. J. B. Scott, David J. Hill, and Gaillard Hunt, 59 Cong., 2 Sess., H. Doc. No. 326; James B. Angell, "The Turkish Capitulations," Am. Hist. Assn., *Annual Report*, I, 513; Edward A. Van Dyck, Reports on the Capitulations of the Ottoman Empire, Senate Ex. Doc. No. 3, 46 Cong., Special Session, and Senate Ex. Doc. No. 87, 47 Cong., 1 Sess.

Also, C. M. Bishop, "The American Consular Court System in China," *Am. Bar. Assn. Jour.*, VIII, 223; L. J. Gordon, American Relations with Turkey, 1830–1930, Philadelphia, 1932; H. S. Quigley, "Extraterritoriality in China," *Am. J.*, XX, 46; G. B. Ravndal, The Origin of the Capitulations and of the Consular Institution, Senate Doc. No. 34, 67 Cong., 1 Sess., Washington, 1921; F. B. Sayre, "The Passing of Extraterritoriality in Siam," *Am. J.*, XXII, 70; Nasim Sousa, The Capitulatory Régime of Turkey, Its History, Origin and Nature, with bibliography, Johns Hopkins University Studies in Historical and Political Science, N.S. No. 18, Baltimore, 1933; L. E. Thayer, "The Capitulations of the Ottoman Empire and the Question of Their Abrogation as it Affects the United States," *Am. J.*, XVII, 207; Edgar Turlington, "Treaty Relations with Turkey," *Yale L. J.*, XXXV, 326; same writer, "The Settlement of Lausanne," *Am. J.*, XVIII, 696.

*Cf.*, also, generally, Pierre Arminjon, *Étrangers et protégés dans L'Empire Ottoman*, Paris, 1903; Marcel Baudez, *La Condition Juridique des Étrangers en Chine*, Paris, 1913; E. L. Déligeorges, *Die Kapitulationen der Türkei*, Heidelberg, 1907; J. Hadjilouka, *De la juridiction consulaire en Turquie*, Athens, 1907; W. E. Hall, The Foreign Powers and Jurisdiction of the British Crown, Oxford, 1895; Sir H. Jenkyns, British Rule and Jurisdiction Beyond the Seas, Oxford, 1902; Karl Lippmann, *Die Konsularjurisdiktion im Orient*, Leipzig, 1898; V. K. Wellington Koo, The Status of Aliens in China, New York, 1912; André Mandelstam, *La justice ottomane dans ses rapports avec les puissances étrangères*, Paris, 1911; *Le sort de l'empire ottoman*, Paris, 1917; *La Turquie*, Paris, 1918; Ernest Nys, "*La juridiction con-*

merchants of a particular city or nationality frequently resided in a certain street or area where their consul acted as a judge in controversies between them. This practice was habitual in the Middle Ages. It extended from Byzantium to London, and from Flanders to Northern Africa, and even to Asia Minor.[2] It grew out of the needs of commerce which demanded the administration of justice in behalf of foreign residents; and justice could not be obtained by any other process.

Upon the capture of Constantinople by Mohammed II in 1453, permanent lodgment was secured in Europe by a power or political entity whose law was based upon the Koran, the requirements of which were not and did not purport to be applicable to non-Moslems. Thus from the Ottoman point of view as well as from that of European States, it was unreasonable that such individuals should be subjected to the operation of that law.[3] Immediately, therefore, the Turkish conqueror granted the right to the newly elected Ecumenical Patriarch of the Eastern Christendom, Gennadius II, whose seat was in that City, and imposed upon him likewise the duty, to maintain justice among his co-religionists. Similarly were empowered the remaining Greek Patriarchs of Jerusalem, Antioch and Alexandria, the Armenian Patriarch and the Jewish Rabbi, both of Constan-

---

*sulaire," Rev. Droit Int.* 2 ser., VII, 237; G. Pélissié du Rausas, *Le Régime des Capitulations dans L'Empire Ottoman,* 2 ed., Paris, 1910; Sir Francis Piggott, Exterritoriality, London, 1907; J. Pillaut, *Les consulats du Levant,* Nancy, 1902; Francis Rey, *De la protection diplomatique et consulaire dans les Échelles du Levant et de Barbarie,* Paris, 1899; James Harry Scott, The Law Affecting Foreigners in Egypt, Edinburgh, 1907; Georges Soulié, *Les droits conventionnels des étrangers en Chine,* Paris, 1916; V. Sténio, *La capitulation de 1535,* Paris, 1915; J. Vergé, *Des consuls dans les pays d'Occident,* Paris, 1903.

See, also, Frédéric Abelous, *L'Évolution de la Turquie dan ses Rapports avec les Étrangers,* Toulouse, 1928; H. Abi-Chahla, *L'Extinction des Capitulations en Turquie et dans les Régions Arabes,* Paris, 1924; G. Israel-Meyer, *L'Égypte contemporaine et les Capitulations,* Paris, 1930; Shih Shun Liu, Extraterritoriality: Its Rise and Its Decline, New York, 1925; G. W. Keeton, The Development of Extraterritoriality in China, London, 1928; F. C. Jones, Extraterritoriality in Japan and the Diplomatic Relations Resulting in Its Abolition, 1853–1899, New Haven, 1931; Ahmad Khan Matine-Daftary, *La Suppression des Capitulations en Perse,* Paris, 1930; J. A. Mazard, *Le Régime des Capitulations en Turquie pendant la Guerre de 1914,* Algiers, 1923; Sir Skinner Turner, "Extraterritoriality in China," *Brit. Y.B.,* 1929, 56; M. T. Z. Tyau, "Extraterritoriality in China and the Question of its Abolition," *Brit. Y.B.,* 1921–1922, 133.

[2] E. Nys, *La Juridiction consulaire, Rev. Droit Int., 2 Sér.,* VII, 237, 239–243. "It must be evident that when Constantinople fell to the Ottomans in 1453, the custom of granting immunities of jurisdiction to foreigners was common in Europe and particularly in the Levant; and that when Sultan Mahomet granted privileges to the merchants of Venice and Genoa in 1454, he was merely following the practice of the Christian emperors who had been at the Golden Horn before him, except that the grant was not of a reciprocal character." (L. E. Thayer, in article cited above in *Am. J.,* XVII, 207, 208–209.)

[3] "The mussulman law was not made for the foreigner, because he is a nonmussulman; it was, therefore, necessary that he should be subjected to his own law. The mussulman law could not protect him or judge him or punish him, inasmuch as it only protected or judged or punished mussulmans; it was necessary, therefore, that he should be protected, judged and punished by his own law. The mussulman law, that is, the *Jus quiritium,* is the exclusive right and privilege of mussulmans and it is the *Jus gentium* which governs the foreigner. In other words, and to resume, let us say: the foreigner, traveling or residing in the Ottoman Empire, remains subject to his personal law, because the law of the Ottoman Empire, being a religious law, cannot be applied to him." G. Pélissié du Rausas, *Le régime des capitulations dans L'Empire Ottoman,* 2 ed., I, 21.

See, also, Philip M. Brown, Foreigners in Turkey, Chap. I; F. Rey, *op. cit.,* 5; Field, J., in the case of In re Ross, 140 U. S. 453, 462–463; James B. Angell, "The Turkish Capitulations," Am. Hist. Assn., *Annual Report,* I (1900), 513, 514–515.

tinople (now Istanbul).[4] For the same reason, Moslem authority is said to have yielded new and broader privileges with respect to foreigners than the Greek Christian authorities had conceded. To the French kings was granted the right, not only to exercise jurisdiction over French subjects, but also to accord protection to those of other non-Moslem nationalities who were without representation. Such persons were regarded as assimilated to French nationality and were subjected to French jurisdiction.[5] Under the same jurisdiction were even placed Ottoman Christian subjects engaged solely in the foreign trade.[6] Conversely, it was later agreed that the conversion of a Frank to the Mohammedan religion should result in the loss of his French nationality, and obviously, by implication, subject him to Turkish jurisdiction.[7]

A series of agreements, known as capitulations, from early in the sixteenth to late in the eighteenth centuries, embodied the concessions of jurisdiction from the Ottoman rulers in favor of France and several European countries.[8] The instruments that registered these concessions were bi-partite arrangements and contained various reciprocal provisions.[9] The provisions that were expressive of grants of jurisdiction were, however, unilateral, in the sense that they emanated solely from Ottoman authority and were not yielded conversely, by the European powers, for the benefit of Moslems abroad.[10] The capitulatory agreements did not specify with precision the scope of what was granted, but referred to, and oftentimes purported to confirm, customary privileges already long enjoyed.[11]

[4] For the statement in the text, in the form that it assumes, the author acknowledges his indebtedness to a communication from Mr. Kimon A. Doukas, Feb. 6, 1939.

See also Pierre Arminjon, *Étrangers et protégés dans L'Empire Ottoman,* I, 13–16.

"The privileges contained in the capitulation [of 1535] were inserted therein as a matter of course, in accordance with ancient usage, neither as a favor voluntarily bestowed nor as a concession exacted. No alternative was at hand, because Moslem law could only be applied to Moslems, not to Franks and unbelievers." (G. B. Ravndal, The Origin of the Capitulations and of the Consular Institution, 44–45.)

[5] F. Rey, *Protection diplomatique et consulaire dans les Échelles du Levant et de Barbarie,* 15–17; E. Nys, in *Rev. Droit Int., 2 Sér.,* VII, 237, 243–246.

It may be observed that the right of aliens to enjoy the protection of France became also a duty on their part. Declares Rey, "The western powers themselves, Portugal, Spain, England and Holland, could not trade in Turkey, save under the protection of the [French] King. The banner of France covered their ships, the Consul of France protected their nationals. . . . Other flags appeared in Turkey, but France remained the protector of all Europeans that lacked representation, as it had long been that of innumerable missionaries sent by Rome to the Orient for the purpose of restoring to the obedience of the Pope the schismatic Christians." *Op. cit.,* 15.

[6] See Capitulations of 1604, de Testa, *Rec.,* I, 141, commented on in F. E. Hinckley, American Consular Jurisdiction in the Orient, 10.

[7] F. E. Hinckley, American Consular Jurisdiction in the Orient, 11. See, also, L. E. Thayer, "The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States," *Am. J.,* XVII, 207.

[8] For texts of the capitulations in favor of France of 1535, 1604 and 1740, see de Testa, *Rec.,* I, 15, 141 and 186, respectively. For texts of those of 1569 and 1673, *see* Gabriel Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman,* Paris, 1897, I, 88 and 136, respectively. For texts of capitulations of 1675 in favor of Great Britain, renewing those of 1580, *id.,* I, 146. For texts of those of 1809, see Brit. and For. State Pap., I, 768. For texts of capitulations in favor of the Netherlands, 1680, Austria, 1718, and Russia, 1783, *see* Noradounghian, *op. cit.,* I, 169, 220 and 351, respectively.

[9] See G. B. Ravndal, The Origin of the Capitulations and of the Consular Institution, 35–37.

[10] See Pradier-Fodéré, II, § 1043. Also, Nasim Sousa, The Capitulatory Régime of Turkey, 1933, 160.

[11] F. Rey, *op. cit.,* 16; also statement in Moore, Dig., II, 596. Declares Hinckley: "Whether

Upon the capitulations were based the treaties of the nineteenth century. They likewise referred to the customary law. Thus, the treaty with the United States of May 7, 1830, declared that the exercise of the privileges therein described should follow "the usage observed towards other Franks." [12]

Gradual recognition of the principle that a State should enjoy actual supremacy throughout the territory over which it asserted control, together with the establishment of national local tribunals capable of administering justice for aliens as well as natives, necessarily led to the complete abandonment of extraterritorial jurisdiction throughout Europe generally.[13] In Turkey, however, the old system remained and even developed. While in Western Europe the exercise of jurisdiction became in fact the sole possession of the territorial sovereign, in the Ottoman Empire the Sultan, by reason of the inapplicability of the Mohammedan law to non-Moslems, was unable to regain possession of what had earlier been relinquished.[14]

Events which in consequence of the First World War transformed the Ottoman Empire into a Republic proved, however, to be the means of enabling the latter to free itself from the shackles of the capitulatory system.[15] "The capitulatory rights enjoyed by the United States and other powers in Egypt are derived from treaties with the Ottoman Empire, of which Egypt was formerly a part, and from long-established custom and usage. These rights were restricted in 1876 by the inauguration of the Mixed Courts which assumed some of the jurisdiction formerly exercised by the consular tribunals." [16]

The extraterritorial privileges of western States in oriental countries, such as China and Japan, were not secured until well into the nineteenth century, when the supremacy of the territorial sovereign had long been recognized as a principle of international law. There was no opportunity for the development of a customary law respecting the exemptions of resident aliens. The treaties, therefore, specified clearly what was granted. The western States gained no privileges of protection, whether jurisdictional in character or otherwise, over persons other than their own subjects or citizens.[17] In Siam, extraterritorial privileges, while

---

the ancient usages, so frequently mentioned and confirmed in the Turkish capitulations, included essential rights, not described in the texts of earlier documents, cannot be shown. In fact there is much difference in the provisions of the capitulations and even some divergence upon important points." *Op. cit.*, 16.

[12] Malloy's Treaties, II, 1319.

[13] E. Nys, in *Rev. Droit Int., 2 Sér.*, VII, 237, 243.

[14] See, however, Said Halim, Turkish Minister for Foreign Affairs, to Ambassador Morgenthau, Sept. 9, 1914, For. Rel. 1914, 1092; also, L. E. Thayer, "The Capitulations of the Ottoman Empire and the Question of Their Abrogation as it affects the United States," *Am. J.*, XVII, 207.

[15] See Turkey, *supra*, § 28; also, Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.

[16] Statement in Hackworth, Dig., II, 512, where it is added: "The courts were created by a statute — the *Règlement d'organisation judicaire* (66 Br. & For. St. Paps. 593) — which received the adherence of the principal capitulatory powers and has been regarded as in effect a treaty."

See J. Y. Brinton, The Mixed Courts of Egypt, New Haven, 1930.

[17] See statement in Moore, Dig., II, 596. The same writer declares also, "It may be pointed out, as an historical fact, that the practice of extraterritoriality in China and Japan began with and rested upon the treaties, and did not originate in custom, as it did in the Ottoman dominions. This distinction has important consequences, and should not be lost sight of."

also the product of treaties of the nineteenth century, were, nevertheless, applied by European States so as to embrace all persons born within their Asiatic colonies as well as foreign protegés.[18]

Exemptions from the local jurisdiction, whether enjoyed in Turkey or in Asiatic States, have been regarded as necessarily based upon the consent of the territorial sovereign.[19]

(i)

§ 260. **The Same.** "In countries not inhabited by any civilized people, or recognized by any treaty with the United States," the United States has not been reluctant to exercise jurisdiction through its consular officers with respect to the conduct of American citizens in such places.[1] Such action is not in defiance of the claim of any political power deemed to be entitled to respect as a territorial sovereign. The problems incidental to the exercise of extraterritorial jurisdiction commonly arise, however, in relation to countries where some government exists which the outside world regards as capable of exercising rights of property and control and of possessing titles demanding respect, and with which, therefore, there has been a disposition to conclude agreements.

When a State exercises a certain degree of protection over a region or country within which rights of extraterritorial jurisdiction have been yielded, the protecting State cannot justly demand the suspension or termination of extraterritorial privileges until it itself, by some appropriate process, assumes responsibility for the administration of justice.[2] A treaty with the protecting State may acknowledge such an achievement.[3] Again, such an assumption of responsibility

---

*Id.*, II, 602. See, also, F. E. Hinckley, American Consular Jurisdiction in the Orient, 15–16; V. K. Wellington Koo, The Status of Aliens in China, New York, 1912, Chap. IX; H. S. Quigley, "Extraterritoriality in China," *Am. J.*, XX, 46.

See, particularly, statement by Mr. Hackworth in § 178 of his Digest, II, 477–499.

[18] See F. B. Sayre, "The Passing of Extraterritoriality in Siam," *Am. J.*, XXI, 70, 73.

[19] Papayanni *v.* Russian Steam Navigation Co., 2 Moore's Priv. C. C. N. S. 161; also, Piggott, Extraterritoriality, 1907 ed., 7.

*Cf.*, Exemptions from Territorial Jurisdiction, In General, *supra*, § 244.

"The conventional background of extraterritorial rights of the United States in Morocco is to be found in the treaties of peace and friendship between the United States and Morocco, 1786–87 and September 16, 1836; the convention as to protection between the United States, Germany, Austria, Belgium, Denmark, Spain, France, Great Britain, Italy, Netherlands, Portugal, Sweden and Norway, and Morocco, July 3, 1880; and the General Act of the International Conference at Algeciras of 1906." (Hackworth, Dig., II, 504.) See also in this connection, The Protection of Backward Communities or of Countries of Unique Civilization, *supra*, § 25.

§ 260. [1] 22 U.S.C.A. § 180 (Rev. Stat. § 4088).

See Mr. Justice Holmes, in the course of the opinion of the Court in the case of American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 355–356.

[2] See The Protection of Backward Communities or of Countries of Unique Civilization, *supra*, § 25.

[3] See treaty between the United States and Great Britain, Relinquishing Extraterritorial Rights in Zanzibar, of Feb. 25, 1905, Malloy's Treaties, I, 795; and in this connection, correspondence in For. Rel. 1907, I, 569–577; also, treaty between the United States and France, concerning Relations in Tunis, of March 15, 1904, Malloy's Treaties, I, 554.

By reason of the scope of certain leases by China in 1897 and 1898, to Germany, Russia, and Great Britain, respectively, the United States, as well as other powers, except Japan, believed that the several consular officers within the leased areas lacked authority to exercise jurisdiction under their existing exequaturs. For. Rel. 1900, 382 to 390.

It is not felt that a proclamation of martial law emanating from a country which has

takes place when a State (such as one within whose territory no extraterritorial privileges are exercised) by annexation or otherwise becomes itself the sovereign over the area that constituted the domain of the protected country. While that occurrence may not in itself serve to destroy those privileges, it enables the new sovereign to place itself in a position where it may reasonably urge relinquishment of them by the foreign beneficiary.[4]

It has recently been observed that "the exercise of jurisdiction by the United States over its nationals in foreign countries to the exclusion of the customary jurisdiction of the authorities of those countries — extraterritorial jurisdiction — is, at the present time, confined to China, Morocco, and Egypt." [5] Rights accruing to the United States to exercise such jurisdiction are not regarded by it as susceptible to waiver by its nationals.[6] Nor does the failure of an American citizen to claim an exemption which inures to his benefit serve, in the opinion of the Department of State, to deprive him of his general immunity from the local jurisdiction.[7]

(*b*)

§ 261. **Persons in Whose Behalf Extraterritorial Jurisdiction May Be Claimed.** Notwithstanding their lack of uniformity, the several treaties yielding privileges of extraterritorial jurisdiction to the United States have, with the exception of those with Morocco of 1787 and 1836, and Tripoli of 1805, been alike in that their provisions have specifically purported to be applicable to cases concerning citizens of the United States.[1] In the exercise of rights thereunder, the United States has taken the position that:

> American nationality includes all persons, whatever their civil status, who owe allegiance to the United States either as citizens by birth or by

conceded extraterritorial privileges to a foreign State, operates to suspend the right of the latter to exercise jurisdiction over its own nationals. See Mr. F. W. Seward, Acting Secy. of State, to Mr. Maynard, June 26, 1877, MS. Inst. Turkey, III, 251, Moore, Dig., II, 641. Concerning the effect, however, of such a proclamation from a State acknowledged to be for all purposes a full member of the family of nations, and in actual control of the country, see Mr. Frelinghuysen, Secy. of State, to Mr. Whitney, Consular Officer at Tamatave, Aug. 28, 1883, 108 MS. Inst. Consuls, 185, Moore, Dig., II, 642; also statement, *id.*, 644. *Compare* attitude of Mr. Bayard, Secy. of State, in 1889, relative to a proclamation of martial law by German authorities at Apia, House Ex. Doc. 119, 50 Cong., 2 Sess., 2, 3, Moore, Dig., II, 643.

[4] See correspondence between the United States and Italy, in For. Rel. 1913, 608–611, concerning the relinquishment by the United States of extraterritorial rights in Libya, upon the assumption by Italy of sovereignty thereof.

See Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.

[5] Statement by Mr. Hackworth, in his Digest, II, 493.

[6] See Mr. Shaw, Chief of the Division of Near Eastern Affairs, to Mr. Blake, April 3, 1930, Hackworth, Dig., II, 495; Mr. Stimson, Secy. of State, to Minister Gunther, June 4, 1929, Hackworth, Dig., II, 496.

[7] Mr. Fletcher, Under Secy. of State, to Consul Jackson, Jan. 19, 1922, Hackworth, Dig., II, 496.

§ 261. [1] The treaties with Morocco of 1787 and 1836, and with Tripoli of 1805, referred to "citizens of the United States, or any persons under their protection"; the treaty with Tripoli of 1796, to "the protection to be given to merchants, masters of vessels and seamen"; the treaty with Siam of 1833, to "merchants of the United States trading in the Kingdom of Siam."

Concerning the nature and extent of the interposition of the American Minister to Turkey, in 1894, in the case of the arrest and imprisonment of Turkish subjects employed in American Schools, see For. Rel. 1894, 740–749; also Hinckley, 86 and 115.

naturalization or as native inhabitants of the insular possessions, or as seamen on American ships, or as assistants or guards in legations and consulates, or, to a limited extent, as employees of American citizens in oriental countries.[2]

In former years such claims were productive of controversy with Turkey when, for example, American jurisdiction was demanded in behalf of a naturalized American citizen of Turkish origin who, after having expatriated himself without the consent of the Sultan, returned to Turkish territory, and was there subjected to local criminal prosecution. Although the United States was in such case unwilling to yield its claim, it consented, nevertheless, to the expulsion of the individual when he was charged with participation in a conspiracy to overthrow the Turkish Government.[3] The fact that expatriation and the acquisition of American citizenship had lacked Turkish authorization was not, however, admitted by the United States to afford a just ground for expulsion.[4]

A foreign seaman upon enrollment as a member of the crew of a vessel is said to owe temporary allegiance to the State to which the ship belongs, and in return therefor to be entitled to invoke the power of that State for his own protection. Thus for purposes of extraterritorial jurisdiction, a seaman enrolled on an American vessel is regarded both by the political and judicial departments of the Government of the United States as though he were an American national.[5] Thus, Secretary Kellogg in 1926, in the course of a communication to the British Ambassador at Washington, declared in reference to two cases arising in 1912 and 1913, that the American Government "maintained the view that the masters and the enrolled seamen of an American vessel are assimilated to American nationality and are therefore amenable to American Consular jurisdiction in the Ottoman Empire."[6]

Notwithstanding the occasional extension of good offices of American consular officials in countries where extraterritorial privileges have been accorded, in behalf and for the protection of nationals of so-called non-treaty States, the United States has declined to exercise jurisdiction with respect to such individuals save with the express consent of the territorial sovereign.[7] Turkey appears at times

[2] F. E. Hinckley, American Consular Jurisdiction in the Orient, 78, quoted with approval by Mr. Wilson, Acting Secy. of State, to Mr. Fletcher, American Chargé at Peking, July 30, 1909, For. Rel. 1909, 69.

[3] Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895, For. Rel. 1895, II, 1256, 1259–1262, Moore, Dig., II, 706–709; also Mr. Root, Secy. of State, to Mr. Leishman, American Minister, Oct. 19, 1905, relative to cases of Vartanian and Afarian, For. Rel. 1905, 892–894.

[4] Mr. Gresham, Secy. of State, to Mr. Terrell, Minister to Turkey, March 29, 1894, For. Rel. 1894, 754.

[5] Mr. Blaine, Secy. of State, to Sir E. Thornton, June 3, 1881, MS. Notes, Great Britain, XVIII, 543, Moore, Dig., II, 606; United States Consular Regulations, § 629, p. 268, Moore, Dig., II, 610; In re Ross, 140 U. S. 453.

Despite the protest of the United States, the Turkish Government, in 1912, declined to surrender to the American Government, and undertook itself to prosecute the Greek captain of an American steamer on account of alleged criminal negligence productive of the sinking of the vessel at the entrance to the harbor of Smyrna, with resulting loss of life. See For. Rel. 1913, 1310–1339; especially, Mr. Knox, Secy. of State, to the American Ambassador at Constantinople, May 29, 1912, *id.*, 1317.

[6] Note to Ambassador Howard, June 23, 1926, Hackworth, Dig., II, 561.

[7] Instructions of Mr. Gresham, Secy. of State, to Mr. Denby, Jr., American Chargé, 1894.

to have yielded assent.[8] China has been disposed to withhold it.[9] In response to a Chinese Presidential Mandate of April 28, 1919, concerning nationals of non-treaty countries, the Department of State instructed Mr. Reinsch, the American Minister in China, that he should not undertake to extend protection to the nationals of non-treaty countries, "unless requested by those Governments, consented to by China and authorized by Department." [10] Again, in 1924, the Department of State found occasion to remind the Government of Switzerland that "American consular officers are not permitted to exercise judicial authority in extraterritorial countries on behalf of the nationals of other governments." [11]

The claim of jurisdiction with respect to guards or assistants in legations and consulates, has been based upon the theory that the official duties of such persons in the public service of the United States should not be subject to interference by vexatious suits, save by some process enabling the agency of government to safeguard its own interests.[12]

---

For. Rel. 1894, 106, 117, 119 and 124, in the course of which Mr. Gresham said: "The consuls of the United States in China . . . have never been invested with power to exercise jurisdiction over the citizens or subjects of another nation," *id.*, 119, 121. See also Mr. Adee, Second Assist. Secy. of State, to Mr. Grant, Consular Officer at Cairo, Oct. 22, 1890, 134, MS. Inst. Consuls, 598, Moore, Dig., II, 754.

The exercise of protection by a State over its own nationals, citizens or persons of foreign nationality resident in a foreign country, does not necessarily call for the exercise of jurisdiction. In so far as it does not, the problems incidental to protection arising in Oriental countries, where certain extraterritorial privileges are enjoyed, do not differ in kind from those arising in western States of European civilization. Hall, Jurisdiction, 134, quoted in Report on Citizenship of the United States, by Messrs. Scott, Hill and Hunt, 203. It has long been the policy of the United States not to endeavor to become the protector, for purposes of jurisdiction or otherwise, of aliens resident in countries where extraterritorial privileges are secured, save under circumstances observed in the text. See documents contained in Moore, Dig., II, 727–755.

[8] Notwithstanding any willingness on the part of Turkey to permit the protection of an alien by a country of his choice, the Department of State has adverted to the fact that such concession "cannot constrain us to treat an alien on the footing of our treaties as a citizen, nor constrain the Government of the individual to respect his voluntary choice of another protection than that flowing from his natural allegiance." (Mr. Adee, Second-Assist. Secy. of State, to Mr. Grant, American Consular Officer, No. 56, Oct. 22, 1890, MS. Inst. Consuls, 595, Moore, Dig., II, 753.)

[9] See Report on Citizenship, by Messrs. Scott, Hill and Hunt, 208; Hinckley, American Consular Jurisdiction in the Orient, 89, *citing* For. Rel. 1873, II, 139.

In 1909, the Department of State made the following significant statement in the course of an instruction to Mr. Fletcher, American Chargé at Peking: "The contention of the Chinese Government that treaty powers have no jurisdiction over citizens of non-treaty nations, judged by the well-established rules of international law, would seem to be valid, and the contention put forth by some of the treaty powers that 'extraterritoriality is a natural right' would seem to be groundless and supported by no recognized authority on international law, at least in so far as can be ascertained." (For. Rel. 1909, 69.)

See, also, Aide-mémoire to the Russian Embassy at Washington, Oct. 11, 1910, in which the Department of State declared that the Government had uniformly taken the position that "by consenting to lend its good offices in behalf of subjects of other nations, it could not assume to assimilate such subjects to citizens of the United States and to invest them with extraterritorial rights which they did not enjoy as subjects of the country of their allegiance." (For. Rel. 1910, 838.)

[10] Mr. Phillips, Acting Secy. of State, to Minister Reinsch, June 16, 1919, For. Rel. 1919, Vol. I, 685.

[11] Mr. Harrison, for the Secy. of State, to the Minister in Switzerland, Sept. 10, 1924, For. Rel. 1924, Vol. II, 707, 708.

[12] Mr. Angell, American Minister, to the Turkish Minister of Foreign Affairs, April 23, 1898, For. Rel. 1898, 1110, 1111; also case of arrest in 1899, of Cavass of the American Consulate at Smyrna, For. Rel. 1900, 920–934, especially Mr. Griscom, American Minister, to Mr. Hay, Secy. of State, Jan. 13, 1900, *id.*, 928, Moore, Dig., II, 744.

There seems to be less reason to assert jurisdiction with respect to the native servant employed by a merchant or citizen of a State enjoying extraterritorial privileges. The former lacks that peculiar relationship to the State of his employer which exists in the case of a seaman on one of its merchant vessels, or of an assistant attached to a consulate. Nevertheless, the practice has arisen, especially in China, of yielding certain exemptions with respect to native servants.[13]

The Department of State has properly concluded that "there is no obligation on the part of the United States to give its protection to activities of its nationals in extraterritorial countries when there is reasonable ground for apprehension that such activities would be prejudicial to the interests of the United States and its relations with other governments." [14]

The question concerning the jurisdictional status of an American citizen in a country in which the United States exercises extraterritorial jurisdiction is said to be "quite distinct from the question whether or not that citizen should be accorded diplomatic protection." [15] Accordingly, the Department of State has declared that "the withholding of diplomatic protection from an American citizen in a country where the United States exercises extraterritorial jurisdiction does not affect the jurisdictional status of the person concerned," and that "so long as he retains the legal status of a citizen of the United States he is subject exclusively to the jurisdiction of the competent American extraterritorial court." [16]

(*c*)

§ 262. **Classes of Actions.** The several treaties of the United States with countries yielding extraterritorial jurisdiction have manifested a resemblance in the concession of jurisdiction over American citizens charged with the commission of offenses commonly regarded as criminal.[1] Ordinarily no distinction has

[13] Mr. Hay, Secy. of State, to Mr. Conger, Minister to China, Jan. 8, Feb. 10, and Feb. 26, 1900, For. Rel. 1900, 396, 399 and 401, Moore, Dig., II, 599. *Compare* Mr. Rives, Asst. Secy. of State, to Mr. Ropes, April 28, 1888, 168 MS. Dom. Let. 239, Moore, Dig., II, 600.

Concerning the American protection of native Moors in Morocco under existing treaties to which the United States is a party, and the issuance of American semsar and mohalat certificates, see documents in Hackworth, Dig., II, 556–559.

[14] Statement in Hackworth, Dig., II, 551, citing memorandum of the Office of the Legal Adviser, May 8, 1936.

[15] Mr. Carr, Assist. Secy. of State, to Consul Hopper, Dec. 17, 1936, Hackworth, Dig., II, 565, where it was said: "While the Department may properly refuse to accord diplomatic protection to any citizen of the United States in a foreign country for any of the reasons which have been or may be found sufficient for that purpose it clearly has no authority to deny the American citizenship of such persons so long as they have the status of American citizens or to acquiesce in the denial of any right to which they may be entitled by law or treaty."

[16] Mr. Moore, Assist. Secy. of State, to Consul Hopper, Aug. 14, 1934, Hackworth, Dig., II, 563.

On Dec. 19, 1936, Mr. Moore, Acting Secy. of State, in a communication to Consul Hopper (Hackworth, Dig., II, 567) declared that in the absence of an authoritative judicial opinion contrary to the position taken by the United States Court for China in two particular cases, "it would appear to be within the judicial discretion of American consular courts to determine whether they should assume jurisdiction of any corporation known to be predominately owned and controlled by aliens and therefore lacking in substantial American interest."

§ 262. [1] Arts. XX and XXI of treaty with Morocco of January, 1787, Malloy's Treaties, I, 1210; Arts. XX and XXI of treaty with Morocco of Sept. 16, 1836, *id.*, 1215–1216; Art. CXXIII of Algeciras Convention of April 7, 1906, *id.*, II, 2180; Art. IX of treaty with

been raised with respect to the nationality of the individual who is the victim of criminal violence. The treaties have been silent with reference to offenses committed by foreigners against Americans. Agreements concluded by the territorial sovereign with other powers have commonly served, however, to lodge jurisdiction in the authorities of the State to which the offender owes allegiance. With respect to crimes committed by nationals of the territorial sovereign and directed against American citizens, the treaties have indicated no disposition to grant jurisdiction.[2] Early agreements with Morocco and with Tripoli provided, however, for the assistance of the American consular officer at the trial of such an offender.[3]

In civil matters, the treaties appear generally to have yielded jurisdiction when the controversy was between American citizens. In cases involving disputes between such individuals and the nationals of other powers (enjoying extraterritorial privileges) there has usually been no disposition on the part of the territorial sovereign to withhold jurisdiction.[4] China, for example, agreed that the exercise of that privilege in such cases should be regulated by treaty between the United States and the outside power.[5] Persia has permitted adjudication before the "respective consuls or agents" of the United States and the foreign power.[6] In the absence of express provision, the territorial sovereign has commonly acquiesced in the exercise of jurisdiction by the proper officials of the State to which the defendant belongs.[7] In controversies between American

---

Tripoli of 1796, *id.*, 1786; Arts. XVIII and XIX of treaty with Tripoli of June 4, 1805, *id.*, 1792; Art. IV of treaty with the Ottoman Empire of May 7, 1830, *id.*, 1319; protocol with the Ottoman Empire of Aug. 11, 1874, with respect to the right to hold real estate in Turkey, *id.*, 1344; Art. IX of convention with Siam of March 20, 1833, *id.*, 1628; Art. II of treaty with Siam of May 29, 1856, *id.*, 1630; Art. IX of treaty with Muscat of Sept. 21, 1833, *id.*, I, 1230; Arts. XXI, XXIV, XXV and XXIX of treaty with China of July 3, 1844, *id.*, 202–204; Arts. XI, XXVII and XXVIII of treaty with China of June 18, 1858, *id.*, 215 and 220; Art. IV of treaty with China of Nov. 17, 1880, *id.*, 240; Art. XVII of treaty with China of Oct. 8, 1903, *id.*, 269; Art. IX of convention with Borneo of June 23, 1850, *id.*, 132; Arts. V and VI of treaty with Persia of Dec. 13, 1856, *id.*, II, 1372–1373; Art. IV of treaty with Corea of May 22, 1882, *id.*, I, 336; Art. VI of treaty with Japan of July 29, 1858, *id.*, 1003; Art. IV of convention with Japan of July 25, 1878, *id.*, 1022; Art. XVIII of treaty with Japan of Nov. 22, 1894 (providing for the cessation of extraterritorial jurisdiction), *id.*, 1035; Art. II of treaty with Zanzibar of July 3, 1886, *id.*, II, 1900; treaty with Great Britain of Feb. 25, 1905, providing for relinquishment of extraterritorial rights in Zanzibar, *id.*, I, 795.

EXTRADITION. The United States does not at the present time assert the right to recover by its own authorities American citizens, fugitive from its territory, where they have been charged with crimes and have sought refuge in countries where the United States enjoys extraterritorial jurisdiction. The surrender of such offenders is either demanded of the territorial sovereign in pursuance of extradition treaties, or, in the absence thereof, was formerly requested as a matter of courtesy. See statement in Moore, Dig., II, 633, *citing* Moore on Extradition, I, 100; also case of Paul Stensland in Morocco, 1906, For. Rel. 1906, II, 1161–1164. *Compare* Case of Surratt, Dip. Cor. 1866, II, 275, 277; *id.*, 1867, II, 82; also relative to Case of Myers and Tunstall, *id.*, 1862, 873.

[2] See, for example, treaties with China of 1844 and 1858. That of 1858 permitted arrests to be made by American as well as native authorities.

[3] See treaties with Morocco of 1787 and 1836; with Tripoli of 1805.

[4] Mr. Strobel, Third Asst. Secy. of State, to Messrs. Butler, Stillman and Hubbard, Jan. 16, 1894, 195 MS. Dom. Let. 166, Moore, Dig., II, 602; also statement in Moore, Dig., II, 600.

[5] Treaties of 1844, and 1858. See, generally, V. K. Wellington Koo, The Status of Aliens in China, 1912, 166–228; Marcel Baudez, *La condition juridique des étrangers en Chine*, 1913, 60–201; Georges Soulié, *Les droits conventionnels des étrangers en Chine*, 1916, Chap. III.

[6] Treaty of 1856.

[7] Papayanni *v.* Russian Steam Navigation Co., 2 Moore's Priv. C. C., N. S. 161, Moore, Dig. II, 667.

citizens and nationals of the country where extraterritorial privileges are enjoyed, the treaties have indicated unwillingness on the part of the territorial sovereign to give up jurisdiction, although provision has frequently been made for a limited participation by the foreign State at trials conducted by local judicial officers. Ordinarily no distinction has been made in the treaties of the United States, between cases in which an American citizen is plaintiff, and those in which he is defendant. Turkey, for example, according to the treaty of 1830, agreed to permit the American dragoman to be present at the trial; and causes in which the amount in controversy exceeded five hundred piasters were to be submitted to the Sublime Porte.[8] Siam agreed that disputes arising between American citizens and Siamese subjects should be heard by the consul in conjunction with the proper Siamese officials.[9] China permitted the case to be tried by the proper official of the nationality of the defendant, agreeing, however, that the properly authorized official of the plaintiff's nationality be permitted to attend the trial, enjoy facilities for watching the proceedings in the interest of justice, have the right to examine and cross-examine witnesses, and if dissatisfied with the proceedings, to protest against them in detail.[10] Persia permitted the presence at the trial of an agent of the United States, but appeared to lodge jurisdiction of all disputes between Persian subjects and citizens of the United States in Persian tribunals.[11]

*(d)*

§ 263. **Difficulties with Turkey. Article IV of Treaty of 1830.** There long existed a controversy between the United States and Turkey respecting the precise contents of the text of Article IV of the treaty of 1830, providing for extraterritorial privileges, and concerning the interpretation of that portion thereof declaring that the exercise of jurisdiction by American authority should follow "the usage observed towards other Franks." [1] The Turkish Government

---

See Wulfsohn *v.* Russo-Asiatic Bank, 11 F. (2) 715, where it was held that the United States Court for China, despite the absence of a treaty between the United States and Russia, could properly exercise jurisdiction in an action by a Russian banking corporation against American citizens on contracts made in China and there to be performed.

[8] With respect to the practice which prevailed generally in Turkey, see Philip M. Brown, Foreigners in Turkey, Their Juridical Status, Chaps. III and IV, and documents there cited.

Mr. Cushing, Attorney-General, in an opinion, October 23, 1855, announced the following outline of the system of extraterritorial jurisdiction then prevailing in Turkey:

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians at length substituted by common consent in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution also, at length, of mixed tribunals in place of the separate consular courts, this arrangement introduced at first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christians." 7 Ops. Attys.-Gen., 565, 569.

The foregoing statement was incorporated in Instructions to the Diplomatic Officers of the United States (1897), 84–85, and is given in Moore, Dig., II, 662. See, also, Dainese *v.* Hale, 91 U. S. 13; Dainese *v.* United States, 15 Ct. Cl. 64; Hinckley, 151–153.

[9] Treaty of 1856.

[10] Treaty of 1880.

[11] Treaty of 1856.

§ 263. [1] The English text of the last sentence of the Article as contained in Malloy's Treaties, II, 1319, is as follows: "Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offence, shall not be molested;

denied that the English text was a correct translation of the original Turkish version, contending that the latter did not in fact contain provision for the trial or punishment of an American citizen by his minister or consul.[2] That Government did, however, in 1888, submit what it stated to be a correct French translation of the Turkish text.[3] In 1890, Mr. Blaine, Secretary of State, offered to yield the right of trial, and to accept the treatment accorded to certain European Powers, by providing for trial by local authorities, in the presence of the dragoman of the American Legation, retaining, however, the right to punish the offender.[4] The Turkish Government declined to yield that right, renewing in substance the contention that the reference to the usage to be observed towards other Franks was a limitation of the right granted, the scope of which was to be determined by the practice of the several Powers in 1830, and that they did not then claim the right to punish an offender.[5] Mr. Blaine was unwilling to admit that the treaty of 1830 gave more than was at that time claimed by European States. He declared, however, that if, as had been suggested, the treaty had inadvertently granted the right to punish, and had thus given more than had been contemplated by the grantor, it was futile to deny the existence of the specific grant. He was likewise unwilling to depart from the stand taken by his predeces-

---

and even when they may have committed some offence they shall not be arrested and put in prison, by the local authorities, but they shall be tried by their Minister or Consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks."

[2] The original texts of the treaty were in the French and Turkish languages. An agreement was signed by the American Chargé d'Affaires prior to the exchange of ratifications, to the effect that the Turkish text should be held the correct one in case differences should arise between the contracting parties.

"A careful examination of the State Department archives has disclosed the following facts as to the text which was finally ratified. President Jackson's ratification of February 2, 1831 is to be found, along with a Turkish text of the treaty, inscribed on large paper to which the Turkish seal is affixed, the whole being bound by an official green ribbon. The ratification speaks of 'the original in the Turkish language and a translation of the same in English' as 'hereunto annexed.' Following this is a copy of the Senate resolution in longhand, attested by the Secretary of State but not referring to the exact text to which the Senate had given its consent. Then follows a document in English which is headed 'Translation from the original Turkish of the Treaty.' At the end of this document appears: '(signed) Mohammed Hamid' and immediately below 'Reis-ul-Kutab.'

"The archives of the State Department also reveal two other documents which purport to be copies of the Turkish text. Other translations in French and English are also to be found, none of which can be identified as a verified copy of or translation from the French text which was signed at Constantinople and handed to the Turks." (L. E. Thayer, "The Capitulations of the Ottoman Empire and the Question of Their Abrogation as it Affects the United States," *Am. J.*, XVII, 207, 219.)

Concerning the negotiation of the treaty and the dispute relative to Article IV, see documents in Moore, Dig., II, 668–714; correspondence in For. Rel. 1905, 885–898, with respect to the cases of Charles Vartanian and H. Afarian, especially Mr. Root, Secy. of State, to Mr. Leishman, Oct. 19, 1905; also F. E. Hinckley, 21–27.

See, also, in this connection, André Mandelstam, *La justice ottomane,* 1911, 154–174; Philip M. Brown, Foreigners in Turkey, 75–81.

[3] The following is an English translation thereof: "American citizens peaceably attending to matters of commerce shall not be molested without cause so long as they shall not have committed any offense or fault. Even in case of culpability they shall not be imprisoned by the judges and police agents, but they shall be punished through the agency of their ministers and consuls, according to the practice observed in regard to other Franks." Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 22, 1890, and contained in For. Rel. 1900, 915, 917, Moore, Dig., II, 697, 701.

[4] *Id.*

[5] *Id.*

sors, that the reference to the usage observed towards other Franks was explanatory of, rather than a limitation upon, what had been yielded. The position of Mr. Blaine was reaffirmed by Mr. Hay, Secretary of State, in 1901. The latter adverted to the fact that the extraterritorial right in question belonged to the United States by virtue of the most-favored-nation clause of the treaty, and that that right was given by the Ottoman Porte to Belgium by treaties of 1838 and 1862, and to Portugal by treaties of 1843 and 1868.[6]

(*e*)

§ 264. **The Legislative Function. Legislation of the United States.** The yielding of extraterritorial privileges confers upon the grantee more than the right to exercise the judicial function with respect to nationals. The concession embraces also the right broadly to pass upon the propriety of the acts of nationals within the domain of the grantor, and incidentally by legislative action howsoever expressed, to lay down tests of the lawfulness of conduct. The very scope of the concession suggests abuses to which the grantee may have recourse. The grantor may, for example, with much reason, seek to forbid or thwart the commission within its domain of particular acts which it regards as highly detrimental to its welfare; yet it may encounter difficulty in securing the acquiescence of the grantee of extraterritorial privileges in the application of local prohibitions to nationals of the latter even though the matter of enforcement is to be applied through consular or other officials of the grantee. Implications from acknowledgment that approval by the grantee is essential to the lawful applicability to its nationals of legislative or administrative prohibitions emanating from the grantor are vast. They reveal, moreover, the practical importance of coöperative endeavor by the grantee to withhold objection to reasonable measures on the part of the grantor, and to encourage nationals to respect them. The United States has at times pursued such a course. In so doing it has been careful to consider whether in the particular case the action of the grantor could be fairly regarded as at variance with any conventional obligation towards itself.[1]

The exercise by American authority in extraterritorial countries of the jurisdiction conferred by treaty has been in pursuance of the legislative will of the United States which has sought to avail itself of the privileges so accruing to it. In the course of the exercise of that jurisdiction there has grown up a body of judicial and executive opinion interpretative of the applicable domestic laws

[6] Note to Mr. Griscom, American Chargé, March 16, 1901, For. Rel. 1900, 914, Moore, Dig., II, 713. The texts of the treaties to which Mr. Hay referred are published in Noradounghian, those with Belgium of 1838 and 1862, respectively, in II, 243, and III, 160; those with Portugal of 1843 and 1868, respectively, in II, 354, and III, 263. Concerning the practice of certain European States relative to the trial and punishment of their subjects or citizens in Turkey, see communications received by Department of State in 1891, published in Moore, Dig., II, 714–722; also F. E. Hinckley, 26–27.

Adjustment of differences with Turkey may have been retarded by reason of the scope of demands made in former years upon its Government. In 1895 Mr. Olney, Secy. of State, went so far as to assert that the United States was entitled to be represented by its dragoman at every stage of the criminal proceedings against a Turkish subject charged with the commission of an offense against an American citizen. See report to the President, Dec. 19, 1895, For. Rel. 1895, II, 1256, 1259, Moore, Dig., II, 666–667.

§ 264. [1] See generally a series of illuminating documents in Hackworth, Dig., II, § 184.

and regulations.[2] With the gradual relinquishment of extraterritorial privileges, the matter has become one of diminishing importance, and at the present time pertains solely to the small group of States within whose domain those privileges are asserted and exercised in behalf of the United States.[3] Brief attention may, nevertheless, be called to certain aspects of its statutory law.[4] The provisions thereof purport to be applicable to the several countries with which treaties have been or may be concluded, and also, as has been noted, to countries not inhabited by civilized peoples or recognized by any treaties with the United States.[5] Specified officers are clothed with power to exercise rights of jurisdiction. Those specified are the ministers and consuls of the United States, and with respect to China, the United States Court for that country.[6] Jurisdic-

[2] Concerning various aspects of the exercise of judicial functions by American officials, see documents in Hackworth, Dig., II, § 186 (Judicial Institutions and Officers); § 187 (Parties); § 188 (Applicable Law); § 189 (Appeals).

See also Extraterritorial Cases compiled and edited by C. S. Lobingier, Vol. I, Manila, 1920, and Vol. II, Shanghai, 1928.

[3] See Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.

[4] The statutory law of the United States with respect to the jurisdiction of American ministers and consuls, and consular courts, is embraced in 22 U.S.C.A., Chap. 2, entitled "Consular Courts," §§ 141–183. These sections embody and mark an enlargement of Rev. Stat. §§ 4083–4091, 4097–4122, and 4125–4130.

Provision for the United States Court for China was made by the Act of June 30, 1906, 34 Stat. 814, 22 U.S.C.A., Chap. 3, §§ 191–202. According to an Act of June 24, 1936, 49 Stat. 1909, 22 U.S.C.A. § 191, the United States Court for China was clothed with "concurrent jurisdiction of all offenses committed on the high seas in cases in which the person or persons charged with such offenses shall be found in or be brought first into China."

See Act of Aug. 7, 1935, 49 Stat. 539, 22 U.S.C.A. § 197*b*, enabling the President to appoint a special judge of the United States Court for China to act temporarily, under specified conditions; also provisions of the same Act, 22 U.S.C.A. § 198*a*, authorizing the judge of the United States Court for China to appoint a United States Commissioner to be clothed also with authority to be judge of the consular court for the district of Shanghai. See also, Act of June 4, 1920, 41 Stat. 746.

Concerning the jurisdiction of the Court, see, especially, Biddle *v.* United States, 156 Fed. 759; also Swayne & Hoyt *v.* Everett, 255 Fed. 71, and Husar *v.* United States, 26 F. (2) 847.

By an Act of March 2, 1909, 35 Stat. 679, the judicial authority of the Consul-General of the United States at Shanghai was vested in and to be exercised by a vice-consul-general of the United States. By an Act of March 4, 1915, 38 Stat. 1122, the judicial authority formerly vested in the Consul-General at Shanghai and transferred to the vice-consul-general was vested in and to be exercised by a vice-consul at Shanghai. By an Act of June 4, 1920, 41 Stat. 746, the judge of the United States Court for China was authorized to appoint a United States commissioner who should be an attorney regularly admitted to practice before that Court and who, when appointed, should be an attorney regularly admitted to practice before "the said District of Shanghai," with all of the authority and jurisdiction exercised by the vice-consul acting in pursuance of the Act of March 4, 1915. See 22 U.S.C.A. § 198, and editorial comment.

[5] See *supra*, § 260.

[6] See 22 U.S.C.A. § 142, Rev. Stat. § 4084, respecting the jurisdiction to arraign and try "all citizens of the United States charged with offenses against law."

22 U.S.C.A. § 143, Rev. Stat. § 4085 invests the officers "with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person."

According to Rev. Stat. § 4128, 22 U.S.C.A. § 176, judicial duties may devolve upon the Secretary of State, who is authorized and required to discharge the same if at any time there be no minister in any of the countries previously mentioned in the title of the statute. The judicial function was exercised by the Secretary of State in 1921 "when, in the absence of a Minister to Turkey, the American Consul General in Constantinople forwarded a case which, under the rules in force in that jurisdiction, would have gone on appeal to the Minister. The Secretary of State handed down a decision remanding the case for further proceedings before the consular tribunal." (Statement in Hackworth, Dig., II, 610.)

According to Rev. Stat. § 4109, 22 U.S.C.A. § 164: "The jurisdiction of such ministers

tion is to be exercised according to the laws of the United States, in so far as they are adapted to carrying the treaties into effect. When those laws are not so adapted, or are deficient in their provisions, the common law and the law of equity and of admiralty are declared to be applicable; and if none of the foregoing laws appear to furnish appropriate remedies, the ministers are empowered to make regulations which, it is said, shall have the force of law to supply such defects.[7] With respect to China, the statutory law has been construed by the Department of State "as effecting a transfer of the authority to modify and supplement existing rules of procedure from the Minister to the United States Court for China." [8] The statutes provide that a consular officer acting as a judge may be assisted by American citizens of good repute who shall be summoned to act as associate judges in the more important criminal and civil cases.[9] This provision is restricted so as not to be applicable to the United States Court for China.[10] Elaborate provision is made for appeals.[11] The duty is imposed on American ministers and consuls to encourage the settlement of civil controversies by mutual agreement, or by the submission of them to the decision of referees according to a specified procedure.[12]

(*f*)

**§ 265. Steps towards the Relinquishment of Extraterritorial Jurisdiction.** The compelling or encouraging of a country by any process to consent to the exercise within its territory of judicial functions by foreign judges and pursuant to the requirements of a foreign code necessarily signifies that the territorial sovereign is regarded, at least for the time being, as incapable of performing itself those duties of jurisdiction which are required of every independent State, and, therefore, that it has not reached the stage where it is to be treated for all purposes as a full-fledged member of the family of nations. Coun-

---

in all matters of civil redress, or of crimes, except in capital cases for murder or insurrection against the governments of such countries, respectively, or for offenses against the public peace amounting to felony under the laws of the United States, shall be appellate only: Provided, that in cases where a consular officer is interested, either as party or witness, such minister shall have original jurisdiction."

[7] 22 U.S.C.A. § 145, Rev. Stat. § 4086.

Concerning the scope of the power to make regulations, see documents in Moore, Dig., II, 617–622.

See also Mr. Adee, Acting Secy. of State, to Chargé Tarler, Nov. 9, 1910, For. Rel. 1910, 849.

[8] Counselor Polk to Minister Reinsch, March 2, 1917, Hackworth, Dig., II, 592, where it was added: "You are further informed that the Department considers that the power conferred upon the Minister by Section 4086 of the Revised Statutes, to make regulations concerning remedial rights, is not revoked or transferred by the provisions of the Act creating the United States Court or by other legislation."

See United States *v.* Charles A. Engelbracht, 1 Extraterritorial Cases, 169.

[9] Apparently the summoning of associate judges depends upon the opinion of the consular officer as to the legal difficulties involved in the particular case.

See Rev. Stat. §§ 4106–4107, 22 U.S.C.A. §§ 152–153.

[10] See § 5 of Act of June 30, 1906, 34 Stat. 816, 22 U.S.C.A. § 196. This section provides also that the procedure of the Court for China shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States: "Provided, however, that the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure."

[11] See documents in Hackworth, Dig., II, § 189.

[12] Rev. Stat. § 4098, 22 U.S.C.A. § 161.

tries yielding such jurisdiction have been alert to perceive this, and to endeavor to rid themselves of such a mark of inequality; and this has been true, whether or not their existing judicial systems were essentially inapplicable to aliens and their affairs, or otherwise insufficient to render justice with respect to them. Accordingly, the progress of civilization manifested in the development of political communities into entities entitled to claim the full benefits of statehood has witnessed the gradual emancipation of certain countries from the burdens and inequalities necessarily associated with the yielding of jurisdictional privileges within their territorial limits to foreign States.[1] The United States has long understood and encouraged the aspirations of other peoples from which it has acquired such privileges, to fit themselves to exercise jurisdiction in relation to foreign life and property through the establishment and application of judicial systems calculated to assure the administration of justice for all concerned.[2] Such an achievement has been wrought in various ways. In some cases the sheer development of the judicial system of a State bent on harmonizing its institutions and laws with the requirements of the international society has sufficed to produce agreement providing for the relinquishment of extraterritorial jurisdiction by the possessors of that privilege. This was true with respect to Japan,[3] as well as to Siam. Treaties between the United States and the latter, concluded on December 16, 1920,[4] and November 13, 1937, registered the termination of

§ 265. [1] See Countries not familiar with Accepted Standards of Civilization, *supra*, § 33.

[2] See provisions of Act of March 23, 1874, 18 Stat. 23, 22 U.S.C.A. § 182, contemplating the suspension of the exercise of judicial functions in certain countries upon the receipt by the President of satisfactory information that there were organized therein local tribunals on a basis likely to secure to citizens of the United States the same impartial justice which they then enjoyed by virtue of the exercise of judicial functions by American officers.

Art. XV of the treaty between the United States and China of Oct. 3, 1903, declares: "The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extra-territorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing." Malloy's Treaties, I, 269.

See, also, V. K. Wellington Koo, The Status of Aliens in China, 354–356.

[3] Concerning the full recognition of the right of Japan to be rid of every obligation to permit extraterritorial jurisdiction to be exercised within its domain, see President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, XXIV–XXV; documents in Moore, Dig., II, 654–661; Art. VI, treaty of 1858, and Art. XVIII, treaty of 1894, Malloy's Treaties, II, 1003 and 1035, respectively. The treaty of 1894 was superseded by that of Feb. 21, 1911, U. S. Treaty Vol. III, 2712.

See F. C. Jones, Extraterritoriality in Japan, New Haven, 1931, Chap. IX.

[4] See Siam: Treaties with Foreign Powers, 1920–1927, edited by Phya Kalyan Maitri (Francis Bowes Sayre), published by order of the Royal Siamese Government, 1928. See, especially, treaty between the United States and Siam, of Dec. 16, 1920, U. S. Treaty Vol. III, 2829, and in this connection, F. B. Sayre, "The Passing of Extraterritoriality in Siam," *Am. J.*, XXII, 70. Declares that writer: "The result of President Wilson's action was the Siamese-American Treaty of 1920, a treaty of epoch-making importance for Siam. It began by abolishing the right of extraterritoriality set up under the old treaty of 1856. All Americans were to be henceforth subject to the jurisdiction of the ordinary Siamese courts. To insure against possible injustice, however, the treaty provided that until five years after the promulgation of all the Siamese codes of law, America was to have the right to evoke any case in which an American was defendant, or accused, from any Siamese court, except the Supreme Court, and proceed to try the case in its own consular court. If the case were so evoked and tried in an American consular court, however, Siamese law was to prevail as to all matters coming within the scope of Siamese laws regularly promulgated. The treaty contained no mention of foreign legal advisers. In the British treaty of 1909 Great Britain had placed its reliance upon two different rights, each somewhat contradictory in its nature to the other, the

American extraterritorial rights of jurisdiction in the territory of Siam, of which the actual exercise is said to have ceased with the consummation of the earlier arrangement.[5]

In relation to Turkey, the matter of relinquishment, in so far as it concerned the United States, was complicated by various considerations. The American Government declared in 1915 that

> a convention by which one country gives the rights of sovereignty within its territory to another country is absolute in its nature, and the grantor, having parted with the rights unconditionally, cannot resume their exercise except by a reconveyance or a formal consent on the part of the grantee who is entitled to exercise them. Extraterritoriality holds much the same relation to sovereignty over persons that international servitudes hold to sovereignty over territory. In both cases the unconditional grant of sovereign rights cannot be abrogated without the assent of the grantee, the owner." [6]

Thus, a declaration of the Turkish Government announcing its abrogation of the capitulatory arrangements as of October 1, 1914,[7] was, according to American opinion, legally inadequate to terminate jurisdictional privileges, partly by reason of the character of the thing which had been conferred.[8] The concessions granted to the United States through its treaty with Turkey of 1830 were applicable to and enjoyed within broad areas belonging and appurtenant to the Ottoman Empire. These embraced areas in both Asia and northern Africa over which Turkey was obliged ultimately to relinquish rights of sovereignty in consequence of events of World War I. In the case of the former, Turkey, through the Treaty of Peace of Lausanne, of July 24, 1923, may be deemed to have ac-

---

right of evocation and the right of imposing European legal advisers upon Siamese courts. America refrained from demanding the latter right, which could not but prove a constant cause of irritation, and placed its reliance instead upon the right of evocation, enlarged in its scope but strictly limited in its duration so as to cease altogether five years after the promulgation of the Siamese codes of law. Because of Siam's confidence in the competency of her own courts and because of the time-limit set upon the right, Siam could willingly give to America such an enlarged right of evocation; as a matter of fact no case has ever been evoked under the American treaty." (*Id.*, 81–82.)

[5] U. S. Treaty Series No. 940. In reference to this treaty Mr. Hackworth has declared: "It contains no provision as to extraterritoriality and thus puts an end to the right of evocation, which was still in force and was the only extraterritorial privilege retained by the United States under the earlier treaty. However, inasmuch as this right was never exercised by the United States, the treaty of 1920 may be said to have marked the cessation of the exercise of American extraterritorial jurisdiction in Siam." (Hackworth, Dig., II, 533.)

In relation to the relinquishment of extraterritorial jurisdictional privileges in Persia, see Provisional Agreement between the United States and Persia, effected by exchange of notes, May 14, 1928, U. S. Executive Agreement Series, No. 19; also, Provisional Agreement concerning Personal Status and Family Law Jurisdiction of American Nationals in Persia and of Persian Nationals in the United States of America, effected by exchange of notes, July 11, 1928, U. S. Executive Agreement Series, No. 20.

See, also, Ahmad Khan Matine-Daftary, *La Suppression des Capitulations en Perse*, Paris, 1930.

[6] Mr. Lansing, Secy. of State, to Mr. Morgenthau, American Ambassador at Constantinople, Nov. 4, 1915, For. Rel. 1915, 1305; also, Mr. Lansing, Secy. of State, to the French Ambassador at Washington, Jan. 18, 1916, For. Rel. 1916, 800.

[7] See communication from the Turkish Ambassador at Washington, to the Secretary of State, Sept. 10, 1914, For. Rel. 1914, 1090.

[8] See correspondence in For. Rel. 1915, 1301–1306, and in For. Rel. 1916, 963–974.

quiesced in the existing establishment of the mandates system,[9] and in the case of the latter, in relation to Egypt, it renounced all rights and titles as of November 5, 1914.[10] The United States did not admit that its jurisdictional rights in the mandated areas of Asia were impaired by the series of events which removed them from Turkish control.[11] With both France and Great Britain, as mandatory powers, it did, however, conclude agreements providing for the relinquishment of American jurisdictional privileges.[12]

With respect to Egypt, the renunciatory conduct of Turkey was not deemed to impair such privileges.[13] Nor were they, in the opinion of the Department of State, deemed to be affected "by changes in Egypt's political status such as the establishment of the British protectorate in 1914 and the achievement of Egyptian independence in 1929."[14] Through Article 1 of the multi-partite convention concluded at Montreux, May 8, 1937 (and to which the United States is a party), "The High Contracting Parties declare that they agree, each in so far as he is concerned, to the complete abolition in all respects of Capitulations in Egypt."[15] The Mixed Court of Appeal and the Mixed Tribunals, then existing, were, however, to be maintained until October 14th, 1949.[16]

In relation to Turkish territory which had been and remained under the sovereignty of that State, the United States encountered difficulties. Prior to its entry into the World War as a belligerent in 1917, and the severance of diplomatic relations with the Porte,[17] American consular tribunals did not cease to function. Again, as has been authoritatively stated, "after the Armistice concluded at

[9] See Art. 16, *Am. J.*, XVIII, *Official Documents*, 9.

[10] Art. 17, *id.*, 10.

[11] See Mr. Hughes, Secy. of State, to Lord Balfour, Jan. 27, 1922, For. Rel. 1922, Vol. II, 269; same to the Chargé in Great Britain, Oct. 4, 1923, For. Rel. 1923, Vol. II, 222, 224.

See The Relation of the United States to the Mandatory System, *supra*, § 26A.

[12] See treaty with France Relating to Rights in Syria and the Lebanon, of April 4, 1924, U. S. Treaty Vol. IV, 4169, also treaty with Great Britain Relating to Palestine, of Dec. 3, 1924, *id.*, No. 728.

See, also, in this connection, documents in Hackworth, Dig., II, § 181.

[13] It may be noted that the diminishing of American extraterritorial privileges in Egypt was attributable to participation by the United States in the system productive of the Mixed Courts in that country. That participation did not, however, serve to oust American consular officials of all jurisdiction. In 1906, the Solicitor for the Department of State declared that "it would seem clear that jurisdiction over criminal libel committed by American citizens in Egypt still vests in the American consular courts and has not been transferred to the mixed tribunals." (For. Rel. 1907, II, 1080–1081.) See, also, documents in Moore, Dig., II, 722–727; Jasper Y. Brinton, The Mixed Courts of Egypt, New Haven, 1930, 97–118, 288–293, and Appendix H, concerning the United States and the Mixed Courts.

See also documents in Hackworth, Dig., II, § 180.

[14] Statement in Hackworth, Dig., II, 515.

[15] U. S. Treaty Series No. 939.

[16] Art. 3.

"Prior to the entry of the convention into force as to the United States, the President in fulfilment of an undertaking given to the Egyptian Government pursuant to authority conferred on him by the act approved March 23, 1874 (18 Stat. 23) issued a proclamation on October 9, 1937 suspending, effective from October 15, 1937 and during the pleasure of the President, 'the judicial functions now exercised by the minister, consuls, or other functionaries of the United States in Egypt, except as to cases actually commenced before October 15, 1937, and except as to matters involving the personal status of citizens of the United States as defined in article 28 of the *Règlement d'organisation judiciaire* annexed to the said convention of May 8, 1937' (51 Stat. 397)." (Hackworth, Dig., II, 516.)

[17] The severing of those relations was effected by the action of the Turkish Government. See Ahmed Nessimi, Turkish Minister of Foreign Affairs to the American Ambassador at Constantinople, April 20, 1917, For. Rel. 1917, Supp. 1, 603.

Mudros on October 30, 1918, the Allied Powers and the United States notified the Turkish Government of the re-application of the Capitulatory privileges as they had been applied before the War. Consular courts were reopened and the fiscal restrictions were restored." [18] Through the abortive treaty of Sèvres of August 10, 1920, the Principal Allied Powers, although contemplating a scheme of judicial reform to replace the capitulatory system in judicial matters in Turkey, reserved to themselves the date on which the new system might come into force.[19] When, however, the Turkish Nationalist forces came to their own and brought into being a Republic determined to exercise the fullest attainable measure of political independence, nothing short of force could procure Turkish assent to a continuance of the exercise of jurisdiction by foreign powers on Turkish soil. Thus, the final treaty of peace concluded at Lausanne July 24, 1923, announced the acceptance by the several contracting parties of "the complete abolition of the Capitulations in Turkey in every respect." [20] In a treaty with Turkey also signed at Lausanne on the same date, the United States likewise "consented to the abrogation of the capitulations, that is, of the exercise of the ex-territorial rights in Turkey which the Turks regarded as in derogation of their sovereignty." [21] The consummation of the treaty between the Allied Powers and Turkey served in reality to remove from the horizon the question whether the new Turkish Republic could in point of law by its own action free itself from the capitulatory system.[22] Inasmuch as the Senate of the United States failed to advise and consent to the ratification of the American treaty of Lausanne, there was left in abeyance the issue whether the United States continued to be entitled to exercise the extraterritorial privileges conferred by the treaty of 1830. In view, however, of the readiness of the American Government to follow in the wake of the Principal Allied Powers and to accept through the unratified treaty

[18] Edgar Turlington, "Treaty Relations with Turkey," *Yale L.J.*, XXXV, 326, 335, where he adds: "The American High Commissioner, Rear-Admiral Bristol, commanding a naval detachment and representing the President of the United States, took occasion to inform the Sublime Porte of his dissent from the view expressed in its announcement of April, 1917, concerning the status of the treaties between the United States and Turkey." See also documents in For. Rel. 1919, Vol. II, 814–817.

[19] See Art. 136.

[20] Art. 28.

[21] Charles E. Hughes, "Recent Questions and Negotiations," address before the Council on Foreign Relations, New York, Jan. 23, 1924, *Am. J.*, XVIII, 229, 240. He added: "In making this important decision the American representatives were obliged to take account of the following considerations. It was quite apparent that the only basis upon which negotiations could be conducted was that of most-favored-nation treatment and reciprocity. Either the Turks were to be dealt with on this footing or not at all. In these circumstances three courses were open to us: (1) To compel the Turks by force to give us better terms than the Allies; (2) not to negotiate at all; or (3) to negotiate with the Turks on equal terms as with a State enjoying an unqualified sovereignty.

"The first course was out of the question. However desirable the maintenance of ex-territorial rights hitherto enjoyed might be, it was obvious that the public opinion of this country would not countenance a war for the purpose of maintaining them. Neither did it appear to be practicable to forego negotiations, in an attempt to maintain the *status quo*."

[22] The position of that Republic was set forth in a memorandum read by the Turkish delegate at a meeting at Lausanne, Dec. 2, 1922, of the Commission on the Régime of Foreigners, Lausanne Conference on Near Eastern Affairs, 1922–1923, Turkey No. 1 (1923), Cmd. 1814, 471.

See, also, Chesney Hill, The Doctrine of "Rebus Sic Stantibus" in International Law, University of Missouri Studies, IX, No. 3, July, 1934, 27–30.

of Lausanne the new judicial régime for which provision was made,[23] it was not thereafter in a position to assert that the Turkish Republic was failing to offer an administration of justice such as should supplant the extraterritorial system. Consequently, the United States became indisposed to press for the continued enjoyment of what it had conceived to be the full measure of its rights.

"Termination of the capitulatory rights of the United States in Turkey was indicated in the treaty of establishment and sojourn concluded between the two countries on October 28, 1931. The preamble states that the two parties desired to prescribe, 'in accordance with modern international law,' the conditions under which the nationals and corporations of either party might settle and carry on business in the territory of the other, and the treaty provides for mutual most-favored-nation treatment in this respect." [24]

Notwithstanding its conclusions as to the irrevocable character of rights of jurisdiction attributable to capitulatory concessions, the United States has been generally disposed to relinquish them by appropriate agreement whenever the entity or State in control of the area concerned, whether in consequence of a change of government or of sovereignty or otherwise, has given reasonable assurance of competence to administer justice through the agency of its own courts, in harmony with the requirements of international law in relation to alien life and property.[25]

In relation to China, it may be observed that at the Washington Conference on the Limitation of Armament a resolution was adopted on December 10, 1921, for the establishment of a commission to enquire into the existing "practice of extraterritorial jurisdiction" in that country, and into the laws and the judicial system and methods of judicial administration of China, with a view to reporting to the Governments of the several interested Powers findings of fact, and recommendations as to such means as might be found suitable "to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality." [26] In pursuance of the resolution, such a commission was duly created, and under date

[23] In relation to the system designed to supplant that of the capitulations, see Convention Respecting Conditions of Residence and Business and Jurisdiction, and Declaration Relating to the Administration of Justice, both of July 24, 1923, constituting subsidiary documents forming part of the Turkish Peace Settlement, British Treaty Series, No. 16 (1923), Cmd. 1929, 139 and 201, respectively. Concerning these instruments, see Edgar Turlington, "The Settlement of Lausanne," *Am. J.*, XVIII, 696; same writer, "The American Treaty of Lausanne," World Peace Foundation Pamphlets, No. 10, 1924; "Treaty Relations with Turkey," *Yale L.J.*, XXXV, 326.

See, Mr. Rogers, Assist. Secy. of State, to Messrs. Davis, Wagner, and Heater, July 9, 1932, Hackworth, Dig., I, 312.

[24] Statement in Hackworth, Dig., II, 529, in reference to Treaty of Establishment and Sojourn, concluded with Turkey, Oct. 28, 1931, U. S. Treaty Vol. IV, 4670.

[25] It may be doubted whether Secretary Knox was of opinion that Italy, upon its assumption of sovereignty over Lybia in 1912, did not have the right to demand that American capitulatory privileges therein should cease. See Mr. Knox, Secy. of State, to the Italian Chargé d'Affaires at Washington, of Feb. 28, 1913, For. Rel. 1913, 609.

See Termination of Treaties, Loss of State Life through Absorption by Another State, *infra*, § 543.

[26] U. S. Treaty Vol. III, 3131.

of September 16, 1926, made its report.[27] This report contained an account of the conditions then prevailing in the judicial system of China, as well as a number of recommendations suggesting the changes and improvements which would be necessary before there would be adequately developed a system of known law and an independent judiciary capable of justly controlling and protecting the lives and property of the citizens of foreign countries doing business in China.[28] In response to a communication from the Chinese Government of April 27, 1929, expressing "the desire of China to have the restrictions on her jurisdictional sovereignty removed at the earliest possible date," [29] the American Minister to China, on August 10, 1929, said in part:

> The safety of life and property, the development and continuance of legitimate and beneficial business depend in the last resort, in China as elsewhere, upon the certainty of protection from injury or confiscation, by a system of known law consistently interpreted and faithfully enforced by an independent judiciary. Where such protection fails, the life and liberty of the individual become subject to the constant threat of unlawful attack while his property suffers the ever-present danger of confiscation in whole or in part through arbitrary administrative action. To exchange an assured and tried system of administration of justice, under which it is acknowledged that life and property have been protected and commerce has grown and prospered, for uncertainties in the absence of an adequate body of law and of an experienced and independent judiciary would be fraught with danger in both of the foregoing respects. . . . My Government bids me add that it is therefore persuaded that the Government of China will concur in its belief, based as it is upon the facts set forth in succeeding paragraphs, that the sudden abolition of the system of protection by its extraterritorial courts in the face of conditions prevailing in China today would in effect expose the property of American citizens to danger of unlawful seizure and place in jeopardy the liberty of the persons of American citizens. . . . [The American Government] fully appreciates the efforts which are being made in China to assimilate those western juridical principles to which your Government has referred in its note. But it would be lacking in sincerity and candor,

[27] See Report of the Commission on Extraterritoriality in China, Dept. of State, Washington, Government Printing Office, 1926.

Concerning the International Mixed Court at Shanghai and the creation of the Shanghai Provisional Court designed to replace it, see excellent article by Manley O. Hudson, entitled "The Rendition of the International Mixed Court at Shanghai," *Am. J.*, XXI, 451; also, Provisional Agreement for the Rendition of the Shanghai Mixed Court, Aug. 31, 1926, *id.*, *Official Documents*, XXI, 113. On February 17, 1930, the American Consul at Nanking, in the name of the American Minister to China, signed an agreement between the United States, Brazil, France, Great Britain, The Netherlands, Norway, and China, for the creation of a new court in Shanghai to take the place of the Provisional Court. See U. S. Executive Agreement Series, No. 37, embracing attached notes and a unilateral declaration; also, agreement effected by exchange of notes, signed Feb. 8, 11 and 12, 1933, extending the duration of the agreement of Feb. 17, 1930, for a period of three years from April 1, 1933, and unilateral declaration renewing the unilateral declaration of Feb. 17, 1930, U. S. Executive Agreement Series, No. 45.

See also documents in Hackworth, Dig., II, § 178.

[28] The sentence in the text is a quotation from a communication from the American Minister to China to the Minister for Foreign Affairs of the Republic of China, Aug. 10, 1929, Dept. of State Press Release, Sept. 4, 1929.

[29] Dept. of State Press Release, Sept. 4, 1929.

> as well as disregardful of its obligations towards its own nationals, if it did not frankly point out that the recommendations aforesaid [of 1926] have not been substantially carried out, and that there does not exist in China today a system of independent Chinese courts free from extraneous influence which is capable of adequately doing justice between Chinese and foreign litigants. My Government believes that not until these recommendations are fulfilled in far greater measure than is the case today will it be possible for American citizens safely to live and do business in China and for their property adequately to be protected without the intervention of the Consular Courts.[30]

On September 5, 1929, the Chinese Government requested that immediate discussions be opened with it by that of the United States for making the necessary arrangements whereby extraterritoriality in China would be abolished to the mutual satisfaction of both Governments.[31] On November 1, 1929, the American Government declared in response that it was prepared to enter into such negotiations which should have as their object "the devising of a method for the gradual relinquishment of extraterritorial rights either as to designated territorial areas or as to particular kinds of jurisdiction, or as to both, provided that such gradual relinquishment proceeds at the same time as steps are taken and the improvements are achieved by the Chinese Government in the enactment and effective enforcement of laws based on modern concepts of jurisprudence." [32] Negotiations to that end were had in 1930, and specific proposals were duly offered by the American Government.[33] Final accord was not, however, reached and American extraterritorial privileges remained unabridged.[34]

On December 31, 1938, in a communication from the Department of State to the Japanese Government, reference was made to the progress towards the relinquishment of certain rights of a special character which the United States together with other countries had long possessed in China.[35] In 1931, discussions of the subject between China and each of several other countries, including the United States, were suspended because of the occurrence of the Mukden incident and subsequent disrupting developments in 1932 and 1935, in the relations between China and Japan. In 1937, the American Government was giving renewed favorable consideration to the question, when there broke out the Sino-Japanese hostilities, as a result of which the usual processes of Government in large areas of China were widely disrupted.[36] In an announcement of July 19, 1940, the Acting Secretary of State declared that it had been the traditional and

[30] Dept. of State Press Release, Sept. 4, 1929.

[31] Dept. of State Press Release, Sept. 12, 1929.

[32] Dept. of State Press Releases, Nov. 16, 1929, 61. The language quoted had been set forth in the final paragraph of the communication of August 10, 1929.

[33] See Dept. of State Press Releases, Sept. 20, 1930, 191, and Nov. 15, 1930, 327. See also documents in Hackworth, Dig., II, § 178.

[34] By a mandate of December 29, 1931, the National Government of China postponed indefinitely the date set for the enforcement of regulations governing the exercise of jurisdiction of foreign nationals in China that had been promulgated earlier in that year. See The China Year Book, 1932, 264.

[35] Dept. of State Press Releases, Dec. 31, 1938, 490, 493.

[36] Statement by Mr. Welles, Acting Secy. of State, July 19, 1940, Dept. of State Bulletin, July 20, 1940, 36.

declared policy and desire of the American Government "to move rapidly by process of orderly negotiation and agreement with the Chinese Government, whenever conditions warrant, toward the relinquishment of extraterritorial rights and of all other so-called 'special rights' " possessed by the United States as by other countries in China by virtue of international agreements; and also that that policy remained unchanged.[37]

(*g*)

§ 265A. **Effect of Military or Kindred Occupation upon Extraterritorial Privileges within the Same Territory.** The exercise by the territorial sovereign of military authority, reflected in the assertion of martial law within its domain, would not, in American opinion, serve to impair extraterritorial privileges previously conferred upon a foreign State.[1] A different situation would seemingly present itself should a third power, as the military occupant of a particular area within which extraterritorial privileges were enjoyed by a foreign State, endeavor to exercise therein a jurisdiction over nationals of the latter. The Government of the United States, without denying that such occupant may under certain circumstances, as a means of safeguarding itself from destruction or grave interference, enjoy a special preference that may serve to oust the beneficiary of extraterritorial privileges of its normal rights,[2] is not disposed to admit that in the absence of such an exigency, American extraterritorial privileges may be lawfully curtailed by the occupant.[3] Moreover, it emphasizes the point that normally such privileges may only be divested by the provisions of an appropriate agreement.[4]

2

## DUTIES OF JURISDICTION

a

§ 266. **Maintenance of a Judicial System. An International Standard.** As the territorial sovereign is in legal contemplation supreme within its own domain, and supposedly capable of enforcing obedience to its will therein, as well as the sole possessor of the right to deal with foreign affairs,[1] there is im-

[37] *Id.*

[The signature and submission to the Senate of a treaty contemplating the relinquishment of American extraterritorial privileges in China was to await the entry of the United States as a belligerent in World War II.]

§ 265A. [1] See Mr. Phillips, Under Secy. of State, to the Minister in China, Aug. 18, 1922, For. Rel. 1923, Vol. I, 738.

[2] Mr. Fletcher, Under Secy. of State, to Consul Jackson, Jan. 19, 1922, Hackworth, Dig., II, 616; also same, to Consul Knabenshue, Jan. 18, 1922, Hackworth, Dig., II, 617.

[3] See Mr. Hughes, Secy. of State, to Ambassador Herrick, Dec. 29, 1921, For. Rel. 1922, Vol. II, 741.

See also award of May 22, 1909, in the Casablanca Case, between France and Germany, J. B. Scott, Hague Court Reports, 110, 115.

[4] See Mr. Davis, Acting Secy. of State, to Ambassador Wallace, Jan. 3, 1921, For. Rel. 1922, Vol. II, 736.

§ 266.[1] Obviously, there may be cases where the territorial sovereign, by reason of the character of its relationship to a foreign State as a dependent thereof, may not independ-

posed upon it the corresponding obligation to do justice, or to exercise what may be called a duty of jurisdiction with respect to matters pertaining to the outside world.

In a broad sense, the obligation to do justice refers to the duty resting upon the territorial sovereign within areas under its control to respond to each contact with foreign life and property in full harmony with the requirements of international law.[2] The acknowledgment of that obligation presses the individual State to possess itself of and duly employ certain governmental instrumentalities which experience has shown to be indispensable for such an achievement. In a narrow sense, the doing of justice has reference to the obligation incidental to the conduct of a State in endeavoring to perform its duties towards the outside world, through the agency of its courts. The exercise of jurisdiction through the judicial channel serves a two-fold purpose: first, to enable the territorial sovereign to fulfill its obligations towards others, and thus to safeguard itself against the charge of violating some rule of international law; and secondly, to enable it to fulfill those special obligations which may have already accrued in consequence of its having previously violated such a rule through its conduct towards a foreign State or its nationals. The accomplishment of the former of these ends is primarily a domestic matter in the sense that it indicates an endeavor to prevent an international issue from coming into being. The accomplishment of the latter marks an attempt to respond to an international obligation that has already come into being, safeguarding, at the same time, the State from reclamations through the diplomatic channel on the part of a foreign public claimant. In its contacts with alien life and property through the judicial branch of its government, a State may, of course, deny as well as afford such full measure of justice as the law of nations may prescribe. Hence, the very possession and use of judicial tribunals as agencies of government call for the exercise of care in relation to their employment as instruments of prosecution, to the scope and conditions of access to them that may be accorded foreign interests, and to their competency to enable the territorial sovereign to respond to those special obligations that grow out of the fact of adjudication.

Approaching the matter from a different angle, there is apparent a universal demand that the national of a State receive protection in whatsoever country he is permitted to enter or hold property, and that the territorial sovereign establish such governmental organization as will afford, at least under normal circumstances, what may fairly be called a local administration of justice in his behalf.[3] In his own right, he doubtless possesses no claim to special considera-

---

ently conduct its foreign affairs or be the entity through which relations are had with the outside world. See Requisites of a State of International Law, *supra*, § 7.

[2] See Home Insurance Company, American-Mexican General Claims Commission, Convention of Sept. 8, 1923, Opinions of Commissioners, 1927 Vol., 51.

[3] See Art. 5 of Resolutions of the Institute of International Law adopted at Lausanne in 1927, on the International Responsibility of States by Reason of Damage Caused on Their Territories to the Persons and Property of Foreigners, *Annuaire*, XXXIII, Vol. III, 331.

See also, Janusis *v.* Long, 284 Mass. 403.

See Art. 4 of Harvard Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 133.

tion. His relation to the territorial sovereign as a resident within its domain does not appear to differ from that of the national; it is essentially domestic. Through his connection, however, with the State of his allegiance, he finds himself in a different position. That State will generally assert that there is due to it an obligation on the part of the territorial sovereign to accord him a certain measure of justice. As that obligation is of an international character, its existence and scope may be said to depend upon the law of nations; and the resident alien so becomes the beneficiary of what that law prescribes.[4] There is also a demand that the public agencies or representatives of a State, as well as its nationals, be accorded protection by the foreign territorial sovereign,[5] and that even the territory of such State be protected from the operation of injurious forces set in motion against it within the domain of another.[6]

The mode by which a State endeavors to respond to these demands is doubtless internationally unimportant, so long as the effort is successful. As a practical means of making adequate response, the territorial sovereign is, however, likely to find itself in need of a judicial system operated through the instrumentality of an independent and permanent judiciary which it is prepared valiantly to maintain. Experience has shown that by no other process will a State be able under normal circumstances, so easily or effectively to respond to its international obligation. Even the military arm of the government appears to offer no satisfactory substitute in seasons of peace for what may be described as civil tribunals.[7]

[4] See D. Anzilotti in *Rev. Gén.*, XIII, 5, and 285; also, same author, *Teoria generale della responsabilità dello stato nel diritto internazionale*, Florence, 1902.

Declared the Permanent Court of International Justice, August 30, 1924, in the course of the judgment in the Mavrommatis Palestine Concessions Case: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law." (Publications, Permanent Court of International Justice, Series A, No. 2, 12.) See, also, Case concerning the Payment of Various Serbian Loans Issued in France, Judgment No. 14, Publications, Permanent Court of International Justice, Series A, Nos. 20/21, 17.

[5] It will be seen that officers of a foreign State, such as consular representatives and other agents thereof, in their official capacity, frequently have recourse to the courts in the country to which they are accredited. Oftentimes, moreover, a foreign State itself finds it necessary and desirable, through an appropriate agency, to become itself a litigant before a domestic tribunal. In such case its rights are unaffected by changes in its form of government. The Sapphire, 11 Wall. 164. See Other Foreign Public Property, *supra*, § 258.

[6] The criminal or hostile acts which a State may be called upon to suppress are varied. Indians or other marauders may attempt predatory incursions into adjacent foreign territory; revolutionists may similarly force their contest for the reins of government beyond the limits of the national domain; the territory of a neutral State may be used as a strategic base of operations against a belligerent; the money and seals of a friendly power may be counterfeited. The territorial sovereign in its work of suppression may find that the exercise of power for purposes of control is to be adequately and conveniently effected through the civil rather than the military arm of the government. Not infrequently, however, the use of military and naval force is necessitated.

See correspondence between the United States and Mexico, in relation to border troubles between the two States, contained in For. Rel. 1911, 348, and following; also President Taft, Annual Message, Dec. 7, 1911, *id.*, XI–XVI. *Cf.* also communication of Mr. Lansing, Secy. of State, to the Secy. of Foreign Relations of the *de facto* Government of Mexico, June 20, 1916, with respect to conditions calling for the pursuit of Villa, For. Rel. 1916, 581.

[7] At least such is the profound conviction in States such as the United States where Anglo-

The value of a judicial system in relation to foreign States depends, in their eyes, upon the sufficiency of the means which it affords them and their nationals to obtain justice in a local forum. It will be found that in practice those means oftentimes prove to be inadequate, and that their inadequacy is, accordingly, productive of diplomatic interposition, especially when the territorial sovereign is itself charged with failure to perform an international obligation.[8] Again, as an operative instrumentality in the administration of justice, the local courts must, like international tribunals, in cases involving the interests of foreign States or their nationals, endeavor to test the propriety of State conduct howsoever manifested, according to the standard which the family of nations may be said at the time to have fixed. The evidence thereof is to be found in the practice of States and is significantly revealed in the conclusions of international tribunals.[9]

§ 267. **The Same.** The international standard must be deemed to respond flexibly to the exigencies of the time when it is invoked as the test of the propriety of conduct. It is not, however, to be regarded as subject to alteration by the individual State. Its freedom in adopting a form of government of its own choice, or in framing a constitution of its own devising, is always subject to the

---

American theories prevail, and where trial by jury is firmly planted in the fundamental law.

[8] In such case, the inadequacy is frequently attributable to the hesitation or unwillingness of the State of the forum to permit its tribunals to pass upon the propriety of its own conduct and to award damages against it.

[9] Declared Mr. Root, President of the American Society of International Law, April 28, 1910: "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territories the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

"There is a standard of justice very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content and compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." *Proceedings,* Am. Soc. Int. Law, IV, 16, 20–21.

"Aliens within the jurisdiction of a State are entitled, generally speaking, to the protection of person and property assured by local law to nationals of the country. Equal protection of the law in this sense presupposes the maintenance by the State of a standard of law and order conformable to the requirements of international law, i.e. to the standard generally observed by well-organized and administered States and governments." (Hackworth, Dig., III, 630.)

See also George W. Hopkins Case, American-Mexican Claims Commission, convention of Sept. 8, 1923, Opinions of Commissioners, 42, 50–51, Hackworth, Dig., III, 636. See especially, dissenting opinion of Nielsen, Commissioner, in International Fisheries Company Case, American-Mexican Claims Commission, Convention of Sept. 8, 1923, Opinions of Commissioners, 1931 Vol., 207, 234–237.

"The inter-American convention on the rights and duties of States signed at Montevideo on December 26, 1933, provides in the second paragraph of article 9: 'Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.' [Citing U. S. Treaty Vol. IV, 4809.] Secretary Hull, Chairman of the American Delegation, in signing the convention, made a reservation with respect to 'the law of nations as generally recognized and accepted.' [Citing *id.*, 4810.]" (Hackworth, Dig., III, 640.)

requirement that the territorial sovereign shall not thereby render itself impotent to fulfill acknowledged duties of doing justice with respect to foreign powers.[1] If a State, acting designedly, renders itself deficient in this regard, it not only fails to escape responsibility, but also, by reason of its conduct, invites the intervention of aggrieved States.

The United States, in which the power to deal with the outside world is lodged exclusively in the Federal Government, could not avoid responsibility for the neglect of a duty of jurisdiction towards a foreign power, occurring within the bounds of one of the States of the Union, by showing, if such were the fact, that by the Constitution, the right and power to do justice in the particular matter were vested wholly in the government of the commonwealth within whose domain there had been a violation of international law.[2] Nor could the United States fairly deny responsibility for the consequences of neglect in the performance of duties of jurisdiction with respect to aliens resident in a State of the Union by reason of the failure of Congress to enact laws necessary to insure performance.[3] Lack of legislation which may be requisite to enable a State to fulfill its international obligations, howsoever arising, never affords a defense in public law for the consequences of such inaction.[4]

It cannot be admitted that a State may by local enactment lessen the scope of its duty of jurisdiction, inasmuch as it is always fixed by international law.[5]

§ 267.[1] Robert Lansing, *Proceedings,* Am. Soc. Int. Law, II, 44, 45. See Modifications of the Law, *supra,* § 2B.

[2] Art. IV of a Resolution adopted by the Institute of International Law September 10, 1900, declares:

"The government of a federal state composed of several small states represented by it from an international point of view, can not invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations." *Annuaire,* XVIII, 255, Moore, Dig., VI, 954; also J. B. Scott, Resolutions, 160. Also, Art. 9 of Resolutions adopted in 1927, *Annuaire,* XXXIII, 332.

See, in this connection, Art. 3 of Harvard Draft Convention on Responsibility of States, *Am. J.,* XXIII, *Special Supplement,* April, 1929, 133.

*Compare* Mr. Evarts, Secy. of State, to the Chinese Minister, Dec. 30, 1880, For. Rel. 1881, 319, Moore, Dig., VI, 820.

[3] See President Harrison, Annual Message, Dec. 9, 1891, For. Rel. 1891, v, Moore, Dig., VI, 840.

Concerning the need of legislation by Congress to enable the Federal Government to perform international obligations with respect to aliens, see also President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxii–xxiv, Moore, Dig., VI, 846; President Roosevelt, Annual Message, Dec. 3, 1906, For. Rel. 1906, I, xliii; President Taft, remarks before Am. Soc. Int. Law, April 29, 1910, *Proceedings,* Am. Soc., IV, 44–45; Charles H. Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens," *Yale Law J.,* XXV, 561.

[4] Mr. Root, *Proceedings,* Am. Soc., IV, 16, 25. Also, Claims Arising from Mob Violence, *infra,* §§ 290–292.

"A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations." (Basis of Discussion No. 2, Conference for the Codification of International Law, Bases of Discussion, III, on Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V, 30.)

*Compare* Mr. Evarts, Secy. of State, to Sir E. Thornton, British Minister, March 7, 1881, MS. Notes to Great Britain, XVIII, 461, Moore, Dig., VI, 663; see, also, distinction made by Mr. Fish, Secy. of State, to Mr. Partridge, Minister to Brazil, No. 141, March 5, 1875, MS. Inst. Brazil, XVI, 455, Moore, Dig., VI, 815.

[5] "A State cannot escape its responsibility under international law by invoking the pro-

Thus the effort to restrict by local legislation the measure of justice to be accorded the resident alien,[6] or the right of his State to interpose in his behalf,[7] is commonly protested against by the country whose national is thus adversely affected. The United States will not, for example, admit that the failure of an American citizen to be matriculated in accordance with the provisions of a statute of a foreign State where he may reside, deprives him of the protection of his own government, or lessens its right to interpose in his behalf.[8]

It is frequently asserted that the alien is entitled, with respect to the protection of his life and property, to no greater safeguards, and to no better means of redress by judicial process, than are accorded nationals of the State within whose territory he or his property may be.[9] This contention may be due to the circumstance that within the territories of numerous States, such individuals, when parties to civil or criminal cases, commonly find justice within their reach.[10] It may be partly attributable also to the habit of States in declaring through treaty that their respective nationals shall be placed upon an equal footing with those of the country of residence in what relates to the protection of life and property within its borders. Thus it happens that the true test of the extent of the obligation of the territorial sovereign oftentimes disappears from view. Whenever, on the other hand, the local judicial system serves to work injustice to the national of a foreign State by failing to accord him that protection which States generally place within the reach of their own nationals or within that of the occupants of their territories, and which, therefore, it is believed that he should enjoy, it becomes apparent that the duty of jurisdiction is to be tested by a

---

visions of its municipal law." (Basis of Discussion No. 1, Conference for the Codification of International Law, Bases of Discussion, III, on Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V, 19.)

[6] See, for example, Venezuelan decrees of 1873, For. Rel. 1883, 917–918, Moore, Dig., VI, 318; also concerning these decrees, Mr. Fish, Secy. of State, to Mr. Pile, Minister to Venezuela, No. 63, May 29, 1873, United States and Venezuelan Claims Commission (1895), 451, Moore, Dig., VI, 319; Mr. Frelinghuysen, Secy. of State, to Mr. Baker, Minister to Venezuela, No. 292, April 18, 1884, Senate Ex. Doc. 143, 50 Cong., 1 Sess., 81, 85, Moore, Dig., VI, 320.

[7] Mr. Frelinghuysen, Secy. of State, to Mr. Soteldo, Venezuelan Minister, April 4, 1884, For. Rel. 1884, 599, Moore, Dig., VI, 321; Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, No. 732, Feb. 17, 1885, For. Rel. 1885, 575, Moore, Dig., VI, 312.

[8] See, for example, Mr. Bayard, Secy. of State, to Mr. Morgan, Minister to Mexico, May 26, 1885, MS. Inst. Mexico, XXI, 297, Moore, Dig., VI, 313; Mr. Bayard, Secy. of State, to Mr. Howe, May 8, 1885, 155 MS. Dom. Let. 323, Moore, Dig., VI, 313; also, generally, documents in Moore, Dig., VI, 309–324.

[9] See Mr. Butler, Atty.-Gen., 3 Ops. Attys.-Gen., 254, Moore, Dig., IV, 2; Mr. Cushing, Atty.-Gen., 7 Ops. Attys.-Gen., 229, Moore, Dig., IV, 7; Mr. Webster, Secy. of State, to Mr. Calderon de la Barca, Spanish Minister, Nov. 13, 1851, 6 Webster's Works, 509, 511, Moore, Dig., VI, 812; Mr. Evarts, Secy. of State, to the Chinese Minister, Dec. 30, 1880, For. Rel. 1881, 319, Moore, Dig., VI, 820, 822; Mr. Hay, Secy. of State, to Baron Riedl, Austro-Hungarian Chargé d'Affaires *ad interim*, Feb. 4, 1899, For. Rel. 1898, 152, 155, Moore, Dig., VI, 874, 879.

See, also, Wadsworth, Commissioner, in case of Salvador Prats, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2886, 2888; Opinion of Palacio, Commissioner, in same case, *id.*, 2892, 2893.

[10] It must be constantly borne in mind, however, that the limits of the jurisdiction of local tribunals in a variety of situations where it is sought to make the territorial sovereign a party defendant oftentimes serve to leave the aggrieved alien without a judicial remedy, and to that extent to withhold from him any means of redress through the agency of a local court.

different standard.[11] Thus if the alien suffers absolute wrong through the operation of local laws or procedure, although applied without discrimination, the State of his allegiance will raise its voice in protest.[12] Whenever it does so, the insufficiency of the domestic standard is emphasized.

This was impressively emphasized by Secretary Hull in correspondence with the Mexican Government in 1938, concerning the conditions under which, as tested by international law, the expropriation of agrarian properties belonging to American nationals might properly be effected. He said in this connection:

> It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape. In the instant case it is contended that confiscation is so justified. The proposition scarcely requires answer. . . . The statement in your Government's note to the effect that foreigners who voluntarily move to a country not their own assume, along with the advantages which they may seek to enjoy, the risks to which they may be exposed and are not entitled to better treatment than nationals of the country, presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations.[13]

The absence of an international obligation resting upon a State when embarking upon a variety of courses, such as a policy of social reform, not to deal with its nationals as it may see fit,[14] may account for the confusion of thought which is likely to manifest itself when the doctrine of equality of treatment as between nationals and aliens projects itself in international discussions concerning the duties of a State in relation to aliens within its territory. If the conduct of the

[11] See Art. IV of Resolutions adopted by the Institute of International Law at Lausanne in 1927, *Annuaire,* XXXIII, 331.

[12] See, for example, Baron von Riedenau of the Austro-Hungarian Legation, to Mr. Hay, Secy. of State, For. Rel. 1899, 31, 35; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 85, Aug. 24, 1886, MS. Inst. Peru, XVII, 231, Moore, Dig., VI, 252; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to England, April 25, 1882, For. Rel. 1882, 230–233, Moore, Dig., VI, 275; Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802, 803.

"On the other hand, the treatment of foreigners in the same way as nationals does not suffice . . . if the internal laws of the State do not, from the point of view of life, liberty and property, afford the protection generally accorded to the individual under the principles recognised by the laws of all States bound by a common system of international law." (Communication from Hungarian Government, Oct. 29, 1928, to the Preparatory Committee for the Codification Conference of 1930, Bases of Discussion, III, Conference for the Codification of International Law, League of Nations Doc. No. C.75.M.69.1929.V, 207.)

[13] Communication to the Mexican Ambassador at Washington, Aug. 22, 1938, contained in Compensation for American-Owned Lands Expropriated in Mexico (Full text of Official Notes, July 21, 1938, to November 12, 1938), Dept. of State Publication 1288, Inter-American Series 16, pp. 26–27.

*Cf.* communication of Mr. Hay, Mexican Minister for Foreign Affairs, to the American Ambassador at Mexico City, Aug. 3, 1938, *id.,* 8.

[14] Declared Secretary Hull in a communication to the Mexican Ambassador at Washington, July 21, 1938: "We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law." (*Id.,* 1, 5.)

State is to be tested by an international standard it becomes irrelevant whether its national is dealt with according to a domestic standard that is less exacting. If, therefore, the doctrine of equality of treatment be invoked or referred to, its limitations need to be explained and accentuated. By itself it offers no helpful guidance.[15]

The alien may no doubt be the object of some discrimination without necessarily imputing to the country of his residence a violation of international law. This is true when it appears that, notwithstanding the discrimination, he is able to secure such a measure of justice as States commonly require and obtain for their nationals resident abroad. The provision in the French law that an alien shall give security for costs in a suit brought against a citizen is typical.[16] So long as foreign powers acquiesce, the discrimination cannot be regarded as internationally illegal.

The alien may, however, by reason of his foreign nationality, need and actually receive a means of redress other than that accorded the national of the territorial sovereign. The tribunals and processes found adequate for the exercise of jurisdiction with respect to the latter may notoriously fail when the complainant is an alien and local prejudice is aroused against him. This has found recognition both in provisions of the Constitution,[17] and in legislation of the United States conferring upon aliens under certain circumstances the right to invoke the jurisdiction of the Federal Courts.[18] The reason for the distinction,

[15] See "Confiscatory Expropriation," by this author, *Am. J.*, XXXII, 759.

[16] Art. 16 of the Code Civil, as amended by the law of March 5, 1895, Dalloz, *Codes Annotés*, I, 199.

See, also, J. Brissaud, History of French Private Law, translated by Rapelje Howell, Continental Legal History Series, § 582; James Barclay, *Proceedings*, Am. Soc., V, 57; Joseph H. Beale, *Harv. Law Rev.*, XXVI, 193 and 283; Mr. Adee, Acting Secy. of State, to Signor Carignani, Italian Chargé, Oct. 10, 1901, For. Rel. 1901, 310.

"We find in continental Europe a good deal of diversity in regard to the furnishing of indemnity *judicatum solvi*. Some nations, among which we find Italy, Portugal, Denmark and a few smaller ones, have abolished it entirely. The Italian Civil Code of 1865, Article 8, provides that: 'the alien is admitted to the enjoyment of the civil rights accorded to citizens.' Italy in this respect, as in many other matters relating to private law, is in the forefront of civilization. Countries like Belgium and Luxemburg follow the French rule, as does Holland. Russia exacts indemnity *judicatum solvi* except in the case where the plaintiff is solvent. Switzerland, like England and the United States, does not discriminate between its citizens and aliens, but requires all non-residents to furnish security. Germany bases its law entirely upon the system of legislative reciprocity. The German judge must ascertain the law regarding security prevailing in the country to which the plaintiff belongs. Austria, since 1898, has adopted the same system, as has been done by Spain and Hungary. All these countries, however, have also numerous treaties of exemption, and it is necessary in each case to ascertain whether the country of the forum does not have a treaty with the nation to which the plaintiff in the particular case belongs." Frederic R. Coudert, in *Proceedings*, Am. Soc., V, 192, 206.

"A non-resident plaintiff is required to deposit security to insure payment of a judgment for costs in favor of defendant. In most of the States security for costs is required only upon application of defendant, but some of the States require deposit of security without such application. So far as the Department is aware, however, none of the States makes any distinction between aliens and citizens in the matter of requiring security for costs, so that citizens of Jugoslavia appear to be subject in this regard to the same rules which are applicable to citizens of the United States." (Mr. Hull, Secy. of State to the Jugoslav Legation, May 28, 1934, Hackworth, Dig., III, 569.)

[17] The Constitution, Art. III, Section 2.

[18] According to the Federal Judicial Code, section 24, amended, the District Courts are given original jurisdiction of all suits of a civil nature, at common law or in equity, between citizens of a State and foreign States, citizens, or subjects, where the matter in controversy

which is manifested also in the frequent efforts made to encourage the Congress to enact a law causing certain offenses in derogation of rights conferred by treaty upon foreigners residing in American territory to be cognizable in the Federal courts,[19] is not for the purpose of affording the alien more favorable treatment than is accorded the national, but rather to give to the former by a different process, an equal opportunity to secure such measure of justice as should be within the reach of every resident of the national domain.

## b

## Operation of the Judicial System

### (1)

§ 268. **When the Alien Invokes the Aid of the Courts.** The alien must be given access to the courts whether as a complainant in a civil action or as an instigator of criminal proceedings to be undertaken by the State.[1] This is true in the sense that if such access be denied, the territorial sovereign is likely to encounter great difficulty in fulfilling its obligations towards him through other governmental agencies. It may, however, in a particular case, find it possible to do so. Accordingly, it should be understood that the duty to give access to the courts is based upon the assumption that the territorial sovereign has no other available instrumentality which, in the circumstances, is capable of rendering in behalf of the alien that peculiar service which the law of nations demands. Thus, the absence of appropriate tribunals, or the barring of access thereto, affords in practice significant tokens of failure on the part of the territorial sovereign to perform duties of jurisdiction.[2] It should be borne in mind,

---

exceeds, exclusive of interest and costs the sum or value of $3,000 (36 Stat. 1091, 28 U.S.C.A. § 41(1).)

According to paragraph 17, those courts are given original jurisdiction "of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States." (36 Stat. 1093, 28 U.S.C.A. § 41(17).)

According to section 233, the Supreme Court shall have original, but not exclusive, jurisdiction of all controversies of a civil nature between a State and citizens of other States or aliens. (36 Stat. 1156, 28 U.S.C.A. § 341.)

Through section 34, conditions are announced when a personal action brought in any State Court by an alien against a citizen of a State who is, or was at the time the alleged action accrued, a civil officer of the United States, may be removed to the United States District Court. (36 Stat. 1098, 28 U.S.C.A. § 77.)

See also documents in Hackworth, Dig., III, 566–569.

[19] See, for example, President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxii–xxiv, Moore, Dig., VI, 846.

§ 268. [1] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 104, Nov. 1, 1886, MS. Inst. Peru, XVII, 252, Moore, Dig., VI, 267.

See Art. 5 of Resolution of the Institute of International Law adopted at Lausanne in 1927, on the International Responsibility of States by Reason of Damage Caused on Their Territories to the Persons and Property of Foreigners, *Annuaire,* XXXIII, Vol. III, 331; also, Basis of Discussion No. 5, Conference for the Codification of International Law, Bases of Discussion, III, on Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V, 48.

[2] Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mexico, XIX, 18, Moore, Dig., VI, 678.

Declared Mr. Bayard, Secy. of State, in a communication to Mr. Jackson, Minister to Mexico, Sept. 7, 1886: "In the present case, for instance, it was the duty of the claimant, if

however, that in the absence of agreement a State is rarely if ever burdened with an international duty to confer appropriate jurisdiction upon a particular domestic tribunal, and that it is not obliged to accord aliens the privilege of adjudication on questions growing out of acts or events that are unassociated with its own conduct or that of its nationals.[3] It may be added that except for the possible burden to furnish security for costs in a civil action, the alien litigant should not be subjected to adverse discrimination on account of his foreign nationality.[4]

As has recently been observed, "mutual freedom of access to the courts on a basis of equality with nationals is generally assured to the nationals of the contracting parties in the treaties between the United States and other countries." [5] The privilege of maintaining an action against a State depends upon its willingness to be sued. Under the statutory law of the United States "the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction" is accorded to "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts." [6]

When the alien is a complainant, he should be enabled to invoke the aid of a tribunal free to disregard the political importance of his adversaries, even though they are the agents or officers of the State.[7] If in anticipation of injury to his person or property the alien invokes the aid of the judicial department, the

---

possible, to exhaust his remedy in the Mexican courts before he came to this Department for its intervention. But when he was precluded from so doing by the adverse proceedings instituted against him by the Mexican authorities, by which he was prevented from making out his case, we must hold that justice was not only denied him, but denied in violation of settled principles of international law." MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680.

See opinion of Dr. Wharton, Solicitor for State Dept., in case of W. A. Davis *v.* Great Britain, 1885, cited in letter of Mr. Day, Acting Secy. of State, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699.

[3] See Charter Shipping Co. *v.* Bowring, 281 U. S. 515; also, The *Gloria De Larrinaga*, 196 Fed. 590.

[4] Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI, 699; Mr. Porter, Acting Secy. of State, to Mr. Phelps, Minister to Peru, No. 131, June 4, 1885, MS. Inst. Peru, XVII, 154, Moore, Dig., VI, 253, quoted in communication of Government of the United States of May 22, 1929, to the Preparatory Committee for the Codification Conference of 1930, Bases of Discussion, III, Supplement, Conference for the Codification of International Law, League of Nations Doc. No. C.75(a).M.69(a). 1929.V, 9.

[5] Statement in Hackworth, Dig., III, 562, where attention is called, for example, to Art. 1 of the treaty between the United States and Honduras of Dec. 7, 1927, where it is declared: "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." (U. S. Treaty Vol. IV, 4307.)

See also Janusis *v.* Long, 284 Mass. 403; Cunard S.S. Co., Ltd. *v.* Smith, 255 Fed. 846. These cases are cited in Hackworth, Dig., III, 562.

Declared Mr. Hughes, Secy. of State, to Representative Cable, Feb. 5, 1923: "It is my understanding that as a general rule aliens not enemies of the United States are permitted to sue in the courts of this country." (Hackworth, Dig., III, 563, footnote.)

[6] Statement in Hackworth, Dig., III, 565, citing section 155 of the Judicial Code of the United States, 28 U.S.C.A. § 261.

[7] Lord Palmerston, in the House of Commons, June 25, 1850, in case of Don Pacifico, Moore, Dig., VI, 681. See, also, Promemoria of the German Embassy at Washington, Dec. 11, 1901, concerning claims against Venezuela, For. Rel. 1901, 192, Moore, Dig., VI, 692.

agencies thereof must be diligently employed according to the means available and commensurate with the circumstances arising, to prevent the perpetration of wrongful or criminal acts; and the requisite force must be set in motion to prosecute criminally wrongdoers who succeed in accomplishing their will. Thus the failure of the local authorities, when duly warned, to invoke judicial aid either to prevent the commission of acts of mob violence, or to ascertain the identity of and institute proceedings against the actors, would indicate a distinct neglect of a duty of jurisdiction.[8] Such remissness would be the more reprehensible should the judicial or other authorities of the territorial sovereign connive at the acts of violence, or abet the actors.[9]

Finally, the courts should be clothed with power not only to denounce the illegality of acts that are proven to be wrongful, but also to decree that a guilty defendant make restitution. It is believed that this is true even when the wrongdoer is an agency of the State itself. Whether the alien suffers wrong at the hands of a private individual or through the laches of the State, the victim should be given a means of redress by judicial process against the wrongdoer. Whenever such means are lacking the territorial sovereign fails, at least in principle, to fulfill a duty of jurisdiction.[10]

(2)

§ 269. **When the Aid of the Courts Is Invoked against the Alien.** When an alien is the object of criminal prosecution or is made a defendant in a suit instituted by the territorial sovereign, the duty of jurisdiction with reference to him is equally apparent.[1] Obviously the judicial system designed for the protection of life and property must not be employed as an instrument of oppression.[2]

The alien when prosecuted criminally must be given opportunity to summon witnesses in his own behalf and to interrogate them.[3] He must be informed of the nature of the charges preferred against him and be enabled to defend himself with the aid of counsel.[4]

[8] Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802, 803.

[9] Mr. Fish, Secy. of State, to Mr. Partridge, Minister to Brazil, No. 141, March 5, 1875, MS. Inst. Brazil, XVI, 455, Moore, Dig., VI, 815, 816.

[10] "How Far is the Position of Resident Aliens Recognized and Protected by International Law," *Proceedings*, Am. Soc. Int. Law, V, 32.

See Claims Arising from Acts Primarily Attributable to the Authorities of a State, *infra*, §§ 286–288.

§ 269. [1] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680. See Rights of Jurisdiction, The Establishment of a Judicial System, *supra*, § 219.

[2] Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, Oct. 15, 1880, For. Rel. 1880, 1041, 1043, Moore, Dig., VI, 768; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 30, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 659; Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 423, Dec. 29, 1890, MS. Inst. Mexico, XXII, 687, Moore, Dig., VI, 773; Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Feb. 1, 1907, For. Rel. 1907, II, 744.

[3] Mr. Conrad, Acting Secy. of State, to Mr. Peyton, Chargé to Chile, Oct. 12, 1852, MS. Inst. Chile, XV, 93, Moore, Dig., VI, 274.

[4] Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to England, April 25, 1882, For. Rel. 1882, 230–233, Moore, Dig., VI, 275; Mr. Bayard, Secy. of State, to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 453–454, Moore, Dig., VI, 277–279.

"The State is likewise responsible if the procedure or the judgment is manifestly unjust,

3

## CLAIMS

a

§ 269A. **Aspects of the Responsibility of States.** For its breach of any duty imposed by international law a State must, on principle, be deemed to be obliged to make reparation to such other State as may have suffered injury in consequence thereof. The acts in which that breach manifests itself may take place in any season and in any quarter, within or without the territory of the actor. The sufferer may be a foreign State in its sovereign capacity, or more directly a national of such State. Redress may or may not be capable of measurement or satisfaction through pecuniary means.

As a State must act through human agencies, its internationally illegal conduct necessarily expresses itself through the acts of its officials. The variety and number of those through whom governmental functions are exercised and by whom contacts with foreign life and property are had, serve in fact to permit a State to violate its international obligations in many ways and by an army of officials of contrasting grades and services. The circumstance that a State sees fit to have such contacts through an individual authorized to act for it, and to place him in a position where he may in fact officially do in behalf of his sovereign what international law commands his country to endeavor not to do, robs of merit the contention that the character or rank of the official is decisive of whether his conduct constitutes a breach of an international obligation on the part of his sovereign.

Upon its violation of international law by any process or instrumentality, a State oftentimes enjoys latitude in its choice of means whereby it may undertake to satisfy the obligation that immediately arises to do justice in the premises. That obligation, as has been suggested above, is a necessary consequence of what the State has done, and is essentially international in character. The methods of requisite response greatly vary; and recourse to one of them — that of yielding to reclamations through the diplomatic channel — may not become obligatory until certain conditions have been satisfied by the aggrieved foreign State or its nationals, or until, conversely, the delinquent State has failed on its part to offer an appropriate and adequate local remedy. This latitude has bred confusion of thought concerning the nature of conduct to be regarded as productive of delinquency, and also touching the obligations of a State growing

---

especially if they have been inspired by ill-will towards foreigners as such, or as citizens of a particular State." (Art. 6 of Resolution of the Institute of International Law adopted at Lausanne in 1927, on the International Responsibility of States by Reason of Damage Caused on Their Territories to the Persons and Property of Foreigners, *Annuaire,* XXXIII, 332.)

"International law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charge against him; and he must be given opportunity to defend himself." (Opinion of Nielsen, Commissioner, in B. E. Chattin Case, Opinions of Commissioners under Convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 422, 447.)

out of the fact of delinquency. These are distinct matters. From its freedom in numerous situations to delay the making of redress through the diplomatic channel until after the exhaustion of available local remedies, it has at times been suggested that the initial act of a State constituting a breach of an international obligation manifests itself in the failure to afford a remedy, and is not apparent in the conduct giving rise to complaint. Whether this is true depends, in the particular case, upon how the law of nations regards the acts that are attributable to the State charged with wrong-doing. If, according to the precepts of that law, they are, as is oftentimes the case, illegal, no latitude that may be accorded the actor in the choice of a mode of doing justice can affect their illegal quality, or delay the accruing of an obligation to make redress in some reasonable way.

The solution of problems touching the responsibility of States has been complicated by the fact that in the course of the development of international law, States have not been disposed to attach the same significance to contractual delinquencies as to those arising from tortious conduct. There is evidence of reluctance to acknowledge that the mere breach by a State of its contract with an alien constitutes internationally illegal conduct or that the occurrence of such an event is to be deemed to produce an effect similar to that resulting from an admitted violation of international law. On the other hand, there sometimes manifests itself a significant readiness on the part of States charged with delinquency to accept, through the instrumentality of claims conventions, an obligation to adjudicate contractual as well as tortious claims, and to permit arbitrators to award damages for breaches of contract on a contractual rather than a delictual basis. This circumstance points to a trend of opinion at least prophetic of an ultimate change in the law which has not, however, as yet been wrought. Again, the solution of kindred problems derives complexity from the fact that the law of nations is as yet far from causing a territorial sovereign to be the guarantor of the safety of foreign life or property within its limits, and oftentimes subjects that sovereign merely to a contingent liability when the injuries sustained are primarily attributable to the acts of private individuals. In cases such as those, for example, growing out of injuries to aliens through mob violence, it will be found that usually no breach of an international obligation is seen until the State within whose territory such events take place appears as a tardy actor in the series of events which the drama may unfold. For the foregoing reasons, it must be apparent that in any case, howsoever arising, it is necessary to determine first, what acts, if any, on the part of the State charged with wrong-doing are to be regarded as constituting a breach of an obligation imposed by international law; secondly, by what process that State has elected to make redress; and thirdly, whether the procedure being followed promises an effective mode of doing justice.

In some situations great difficulty may be encountered in determining whether a State charged with wrong-doing has violated any international obligation towards another or its nationals. The conclusions of the foreign office of the former as well as of its courts may prove to be at variance in that regard with

those of an aggrieved foreign power. The final solution of the controversy may have to await an adjudication in an international forum. If such an adjudication establishes that the respondent State was guilty of internationally illegal acts, it establishes also that it was encumbent upon that State upon the commission of those acts immediately to take steps to right the wrong. The form of this obligation may depend upon the facts of the particular case. When, however, on the record of any case, the facts suffice to indict a State on account of acts which international law proscribes, and in consequence of which another State or its nationals have suffered injury, the former is subject to an international obligation towards the latter to offer an effective remedy, if it is not prepared to admit the charge preferred against it and make appropriate redress through the diplomatic channel. If it fails to offer such a remedy, as, for example, one through an appropriate judicial agency, that State is not in a position to deny responsibility for the consequences of its initial acts. Nor does it gain freedom therefrom by reason of the latitude which it enjoys in electing to follow a congenial procedure. It should be obvious, however, that neither the denial of impropriety of conduct, nor difficulties that may baffle accord concerning the legal quality of acts complained of, is necessarily decisive of the question whether a respondent State has violated international law, or whether, on a sufficient showing a State charged with wrong-doing may not be obliged to submit to an appropriate enquiry or adjudication touching the propriety of its conduct.

It will be found that permitted modes of response to such obligations vary according to the nature of the acts of which complaint is made, the public or private character of the claimant, the form of reparation that is demanded, as well as the facilities for redress that are locally available. Thus, where no treaty affords a deterrent, a State may be disposed sternly and quickly to indict when its grievance is of a public character; and it may brook no interference with its freedom either to act through the diplomatic channel or to have recourse to forcible means of self-help for the purpose of obtaining redress. As yet, practice fails to point to common acknowledgment of a sense of obligation on the part of aggrieved States to refrain from acting upon their own indictment of others charged with violating international law productive of essentially public injuries. The significant feature of such cases is the readiness of complainant States to denounce particular acts of others as internationally illegal, to await or seek no adjudication in support of such conclusions, and to employ whatever available means may most effectively inspire the making of desired redress.

Although response to reclamations through the diplomatic channel is but a single mode whereby a State may satisfy its duty to do justice after the commission of internationally illegal acts, that procedure is a highly important one. Moreover, there has developed a practice indicating when recourse may reasonably be had thereto by a State in behalf of its nationals, and when, conversely, a State charged with wrong-doing may fairly decline to yield to such procedure. Examination of the law pertaining to diplomatic reclamations involves in one sense a study of procedure — that is to say, of the conditions when States charged with wrong-doing towards others or their nationals may be

properly called upon to make response through direct negotiations with the complainant State, and also of the technique to be observed when recourse is had to such action. The practice revealed by those reclamations and which manifests itself in the treatment of what may be described as international claims, shows much more. It indicates what opposing States as well as international tribunals regard as internationally illegal conduct for which redress should be made in a variety of situations. It illustrates the extent to which the international society endeavors to hold the several members thereof to responsibility on account of occurrences within places under their control. It points to the ceaseless tendency to fashion responsibilities according to the requirements of the international life, both by exacting full use by a State of means at its disposal to respond to the exigencies of particular situations, and also by endeavoring to obliterate the distinction between the consequences of tortious and contractual delinquencies. Again, it shows the increasing readiness of interested States, by means of claims conventions and commissions resulting therefrom, to waive procedural barriers and to build up a body of law illustrative in special degree of the character of the relationship that should exist and develop between a State and foreign life and property within places under its control. Such a study illustrates also the slowness with which delinquent States have seized the opportunity to do justice in relation to such life and property through local instrumentalities clothed with jurisdiction to pass upon the propriety of State conduct and to afford adequate means of redress when occasion so demanded. It may be fairly maintained that the very preferring of a claim through the diplomatic channel points in many instances to the failure of the State charged with delinquency to possess itself of, and duly operate, a governmental system capable of removing from the international horizon the solution of differences growing out of such an allegation. It is through the efficacy and use of local rather than international instrumentalities that issues growing out of contacts between a State and numerous interests pertaining to the outside world may be given a domestic aspect and prevented from projecting themselves within the international field. Perception of this fact may be expected ultimately to produce the obvious result, as by gradually removing from that field issues that now flourish therein and are the tares which choke and obstruct the normal growth of friendly relationships. The hastening of such a day must depend, however, upon a widening perception also of the internationally illegal aspect of acts which too frequently mar contacts between a State and alien life and property, and of the inevitable and immediate obligation to do justice whenever such acts are perpetrated in the name of a State.

In the following sections in relation to the matter of claims it is sought to scrutinize the practice of international reclamations, and in the course of so doing to profit by the light shed by international tribunals, especially in cases in which the United States has been a party litigant, concerning the legal quality of acts committed in behalf of a State and on account of which complaint has been made, and pertaining also to the nature of obligations produced by, and resulting from, failure to respect the requirements of international law.

b

§ 270. **Claims. In General.** A claim in international law may be defined as a demand for redress made by one State upon another by reason of the alleged wrongful conduct of that other.[1] Declared Commissioner Nielsen, in 1927: "I

§ 270. [1] "A claim 'is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.' [Prigg *v.* Penna., 16 Pet. 539, U. S. Sup. Ct.]

"In my judgment a claim upon the United States is something in the nature of a demand for damages arising out of some alleged act or omission of the *Government* not yet provided for or acknowledged. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other. [Moore's Int. Arb., 3623, *citing* Dowell *v.* Cordwell, 4 Saw., U. S. Cir. Ct., 228, and quoting from Deady, J.]

"On a claim against a foreign government for spoliation the demand is founded upon the law of nations and the obligation of the offending government is perfect. [Emerson *v.* Hall, 13 Pet. 409, U. S. Sup. Ct.]

"Claim: 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due. 'Doth he lay *claim* to thine inheritance?' — Shak. 2. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another. 'A bar to all *claims* upon land.' — Hallam. 3. The thing claimed or demanded; that to which any one has a right, as a settler's claim [U. S. and Australia]. [Webster.]

"Claim: 1. A demand of anything as due. 2. A title to any privilege or possession in the hands of another. [Johnson.]

"In the Spanish language the word of corresponding meaning is *reclamación*.

" 'The opposition or contradiction which is made to anything as unjust.' This is *reclamatio, oppositio*. [Salvá.]

" 'The demand made for anything by him who has the right of property in it against him who possesses or *denies* it.' This is *reclamatio*. [Salvá.]

"*Reclamación* [claim]: The opposition or contradiction that is made in words or in writing against anything as *unjust*, or by showing that it contradicts itself; and the claim or demand for anything by him who has the right of property in it against him who possesses it. [Escriche, Dict. of Legis.]" Authorities cited by Plumley, Umpire, in the Aroa Mines Case, British-Venezuelan Commission, 1903, Ralston's Report, 354-355.

See, also, Paúl, Commissioner, in the Boulton, Bliss & Dallett Case, American-Venezuelan Commission, 1903, Ralston's Report, 26; Bruce, Arbitrator, in the Bond Cases, United States-Colombian Commission, Convention of Feb. 10, 1864, Moore, Arbitrations, IV, 3615. All of the foregoing definitions are contained in Ralston, revised ed., 226–228.

Concerning claims generally, see Am. Soc. Int. Law, *Proceedings*, II, 44–67; *id.*, IV, 16–27, 46–193; *id.*, V, 32–43, 192–212; D. Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale*, Florence, 1902; same, in *Rev. Gén.*, XIII, 5–29, 285–309; Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad, New York, 1915; same writer, "Theoretical Aspects of the International Responsibility of States," *Zeit. für ausländisches öffentliches Recht und Völkerrecht*, I, *Teil* 1, 223; David J. Brewer and Charles Henry Butler, in "*Cyc.*," XXII, 1734–1756; Frederick S. Dunn, The Protection of Nationals, Baltimore, 1932; same writer, The Diplomatic Protection of Americans in Mexico, New York, 1933; Jacques Dumas, *De la Responsabilité internationale des États à raison de Crimes ou de Délits commis sur leur Territoire au préjudice d'Étrangers*, Paris, 1930; Clyde Eagleton, "The Responsibility of the State for the Protection of Foreign Officials," *Am. J.*, XIX, 293; same writer The Responsibility of States in International Law, New York, 1928; same writer, "*Une Théorie au Sujet du Commencement de la Responsabilité de l'État*," *Rev. Droit Int.*, 3 *sér.*, XI, 643; A. H. Feller, "The German-Mexican Claims Commission," *Am. J.*, XXVII, 62; G. G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice,' " *Brit. Y.B.*, XIII, 1932, 93; Alwyn V. Freeman, The International Responsibility of States for Denial of Justice, London, 1938; Hershey, Essentials, revised ed., 253–265, with bibliography; W. van Hille, "*Étude sur la Responsabilité internationale de l'État*," *Rev. Droit Int.*, 3 *sér.*, X, 531; Olof Hoijer, *La Responsabilité internationale des États*, Paris, 1930; Bert L. Hunt, "The United States-Panama General Claims Commission," *Am. J.*, XXVIII, 61; Sir Cecil J. B. Hurst, "Nationality of Claims," *Brit. Y.B.*, VII, 1926, 163; International Law Association, *Proceedings*, 24th Conference (1907), 196–210; H. Lauterpacht, Private Law Sources and Analogies of International Law, London, 1927, §§ 58–62; William Lawrence, The Law of Claims against Governments, H. Rep. No. 134, 43 Cong., 2 Sess., Washington, 1875; Gaston de Leval, *De la protection diplomatique des nationaux à l'étranger*, Brussels, 1907; Fred K. Nielsen, International Law Applied to Reclamations, Washington, 1933; McNair's 4 ed. of Oppenheim, I, §§ 148–167, with bibliography; J. H. Ralston, The Law and Procedure of International Tribunals, re-

may briefly define a claim of the nature of those within the jurisdiction of the Commission to be a demand of one Government upon another Government for pecuniary redress of wrongful action for which it is contended the respondent Government is responsible under international law." [2] The same term is also commonly used to signify the ground of complaint which is the basis of the demand.[3] From an international point of view a claim does not arise until the demand for redress has been presented to the State charged with having been at fault. The bare right to demand redress, however much it may justify complaint, is not the equivalent of a claim, and does not always ripen into one. The making of the demand is the significant fact. This act implies that in the judgment of the complainant State, the foreign power to which the demand is addressed has itself, through some agency of its own, violated a duty imposed by international law or by treaty, and that it offers no adequate means of obtaining redress through any domestic channel. It will be found that the adequacy of such means may depend upon the nature of the claim.

The demand for redress may be made by diplomacy; it may also be urged by

---

vised ed., Stanford University, 1926; W. G. Rice, Jr., "State Responsibility for Failure to Vindicate the Public Peace," *Am. J.*, XXVIII, 246; Anton Roth, *Das Völkerrechtliche Delikt, Frankfurter Abhandlungen zum modernen Völkerrecht,* Heft 36, Leipzig, 1932; George Winfield Scott, in *Annals,* Am. Acad. Pol. & Social Science (1903), p. 74; Karl Strupp, *Das Völkerrechtliche Delikt, Handbuch des Völkerrechts,* III, part 3, Stuttgart, 1920; J. Tchernoff, *Le droit de protection, exercé par un État à l'égard de ses nationaux résidant à l'étranger,* Paris, 1908; Heinrich Triepel, *Völkerrecht und Landesrecht,* Leipzig, 1899; Charles de Visscher, *"La Responsabilité des États," Bibliotheca Visseriana,* II, 87; Carlos Wiesse, *Le droit international appliqué aux guerres civiles,* Lausanne, 1898; J. C. Wise, "Tort at International Law," *Am. J.*, XVII, 245.

Concerning the discussions at the Codification Conference of 1930 at The Hague, which were not productive of a treaty concerning the responsibility of States, see Conference for the Codification of International Law, Bases of Discussion, III, League of Nations Doc. No. C.75.M.69.1929.V; also, C.75(a).M.69(a).1929.V; and Acts of the Conference for the Codification of International Law, Vol. IV, Minutes of the Third Committee, Responsibility of States, League of Nations Doc. No. C.351(c).M.145(c).1930.V. See, in this connection, Green H. Hackworth, "Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners," *Am. J.*, XXIV, 500; Edwin M. Borchard, " 'Responsibility of States' at the Hague Codification Conference," *id.*, 517.

See Emilio Brusa, Report to the Institute of International Law, in Behalf of the Ninth Commission, on the Responsibility of States by Reason of Damages Sustained by Foreigners in cases of Riots and Civil Wars, *Annuaire,* XVII, 96–137; *id.*, XVIII, 47–49; Resolution of the Institute, *id.*, 254–256; Resolutions of the Institute adopted at Lausanne in 1927, on the International Responsibility of States by Reason of Damage Caused on Their Territories to the Persons and Property of Foreigners, *Annuaire,* XXXIII, Vol. III, 330–337; discussion of the Institute at Oslo, in 1932, *Annuaire,* XXXVII, 479–529.

See report of Messrs. Guerrero and Hui on the Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners, to the League of Nations Committee of Experts for the Progressive Codification of International Law, *Am. J.*, XX, *Special Supplement,* July and October, 1926, 177.

See Harvard Draft Convention on The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, and Comment by the Reporter, Edwin M. Borchard, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 131.

See Seventh International Conference of American States, Resolution on the International Responsibility of the State, Report of the Delegates of the United States of America to the Seventh International Conference of American States, Appendix 98, Department of State, Conference Series No. 19, Washington, 1934, 270.

[2] Jennie L. Corrie Case, Opinions of Commissioners under convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 213, 216.

[3] Little, Commissioner, in the Alexander Scott Case, United States-Venezuelan Commission Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 4393–4394.

force. Thus Germany, Great Britain and Italy in 1902 united in blockading certain ports of Venezuela as a means of securing redress for wrongs charged against that State.[4] In 1923, Italy bombarded and occupied Corfu as a means of obtaining desired reparation from Greece on account of the killing on its territory of the Italian General Tellini and other members of the international commission for the delimitation of the Albanian frontier.[5]

The redress sought may assume a variety of forms. The relinquishment of control over territory, or the payment of an indemnity, or the salute to a national flag may, for example, be demanded.

Claims may be divided into two broad classes: first, those which are based upon private complaints of individuals whose government acts as their representative in espousing their cause; secondly, those which "concern the State itself considered as a whole." [6] Pecuniary claims are usually, although not necessarily, of the former class. It will be found that pecuniary claims of a public character have rarely been adjusted by arbitration.

The act of demanding reparation from a foreign State in behalf of an individual is commonly known as interposition. In so far as it does not purport to interfere with the political independence of the country whose conduct is the source of complaint, such action does not resemble intervention. The preferring of a claim by interposition may, however, lead to intervention if the demands of the aggrieved State are ignored or treated with contempt.[7]

The study of claims involves a fourfold inquiry concerning, first, the relation of the aggrieved individual (if the claim be a private rather than a public one) to the State called upon to espouse his cause; secondly, the relationship of the actors whose conduct is the source of complaint to the State against which a demand for redress is contemplated; thirdly, the responsibility of that State for the consequences of the acts committed; and fourthly, the procedure to be followed in order to obtain redress. Thus it will be found that a State, such as the United States, may refrain from interposition because the aggrieved individual is not one of its own nationals, or because the acts giving rise to complaint have not been committed by any authority of the territorial sovereign, or be-

[4] For. Rel. 1903, 417–439.

[5] See A. Lawrence Lowell and Manley O. Hudson on "The Corfu Crisis," World Peace Foundation Pamphlets, VI, 1923, No. 3, 169 and 176, respectively; Eagleton, Responsibility of States, 187–188.

[6] Lord Salisbury to Sir Julian Pauncefote, No. 65, March 5, 1896, For. Rel. 1896, 222, where Lord Salisbury also declared: "A claim for an indemnity or for damages belongs generally to the first class; a claim to territory or sovereign rights belongs to the second." The proposed general arbitration treaty of Jan. 11, 1897, between the United States and Great Britain (which failed to receive the approval of the Senate) made provision for the adjustment of "pecuniary claims" referred to in Art. II, and "territorial claims" referred to in Art. VI. A sharp distinction was drawn in respect to the means to be employed for the solution of controversies of the latter kind. Furthermore it was also declared that when a pecuniary claim was believed by either party to involve "the decision of a disputed question of principle of grave general importance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative," the claim should be dealt with by the procedure to be followed with respect to territorial claims. *Id.*, 238–240.

[7] Intervention, *supra*, § 69. See J. R. Clark, Jr., Solicitor, Dept. of State, Memorandum on Right to Protect Citizens in Foreign Countries by Landing Forces, 3rd revised ed. to 1933, p. 33.

cause the acts, although committed by an official within the scope of his duty, have not been internationally illegal, or because notwithstanding a violation of international law through the agencies of a State, the individual claimant has failed to exhaust the local remedies available to him. When the propriety of interposition is questioned, it becomes important to observe upon which of the foregoing reasons reliance is placed.[8]

In any case productive of a claim there is also involved a question concerning the character of reparation calculated to redress the injury sustained, as well as the method of computing the amount of such reparation.

## c

## Mode of Presentation of Private Claims

### (1)

§ 271. **Claims against the United States.** International claims against the United States must be presented through the diplomatic channel. The claim of an alien must be preferred by the regular accredited representative of his government.[1] It is not suggested, however, that there is need of direct negotiation

[8] "Claims presented by the Government of the United States against a foreign Government are based fundamentally, among other things, upon loss or injury (1) which was suffered by the United States or by its citizens or those entitled to its protection, and (2) for which a foreign Government, including its officials, branches, or agencies, was responsible. If either of these elements is lacking, the validity of the claim is doubtful, and, as a rule, the Government of the United States is not in a position to be of any assistance in obtaining reparation." Department of State, Circular respecting the application for the support of claims against foreign governments, 1919, Senate Doc. No. 67, 66 Cong., 1 Sess., p. 7, and contained in edition of Oct. 1, 1924 (Revised). It should be observed that the use of this form was discontinued by the Department of State about 1930. Since that time four memoranda concerning the preparation of claims have been used. They are the following:

Memorandum A — "Memorandum in Relation to Evidence Necessary to Establish American Nationality of Individuals."

Memorandum A-1 — "Memorandum in Relation to Evidence Necessary to Establish the American Nationality of Corporations, Joint Stock Companies and Partnerships."

Memorandum B — "Memorandum on Documentary Evidence to be Filed in Support of a Claim."

Memorandum C — "Memorandum on Measure of Damages."

It may be added that special statements have been issued by the Department for persons having special claims against China, Japan, Spain and Mexico (agrarian claims).

§ 271. [1] Mr. Fish, Secy. of State to Mr. Lawrence, M. C., April 22, 1874, Magoon's Reports, 338, Moore, Dig., VI, 607; Mr. Frelinghuysen, Secy. of State, to Baron de Fava, June 21, 1884, MS. Notes to Italy, VIII, 83, Moore, Dig., VI, 608.

Declared Chief Justice Waite, in United States *v.* Diekelman: "A citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." 92 U. S. 520, 524.

According to the Act of March 3, 1911, Chap. 231 (Judicial Code, § 155), 36 Stat. 1139, 28 U.S.C.A. § 261: "Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction." As interpretative of the Act, see Rossia Insurance Company *v.* United States, 58 Ct. Cl. 180; John L. Brodie *v.* United States, 62 Ct. Cl. 29; Choremi *v.* United States, 28 F. (2) 913.

through that channel when judicial remedies, such as the statutory law may make available, are sought to be exhausted.

(2)

§ 272. **Claims against Foreign Governments.** The presentation of claims against a foreign State in behalf of the United States or citizens thereof must be made through the Department of State.[1]

If the claim is founded upon the complaint of an individual, and based upon contract, a diplomatic representative of the United States is not permitted to interfere without specific instructions. Where it is founded in tort, he is required likewise to await instructions, unless the person of the claimant be assailed or there be pressing necessity for action before the Department of State can be consulted; in which event he "will communicate in full the reasons for his interference." [2] The Department of State may, in a matter of large importance, itself prepare and transmit by telegraph or otherwise to the appropriate American diplomatic representative the exact text of a complaint which it is sought to have him convey to the foreign office of the State charged with impropriety of conduct.[3]

## d

## The Prosecution of Private Claims

(1)

§ 273. **Discretion as to Presentation.** As a matter of domestic law, a State exercises a broad discretion with respect to the preferment of demands for redress in behalf of its own nationals.[1] Over such claims the prosecuting State has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants.[2] It may decide for itself the time and manner of pressure.[3] As Judge Moore

---

See, also, Act of June 15, 1917, 40 Stat. 183, providing for war-time expropriation of ships and for recourse under certain conditions to the United States Court of Claims. As interpretative thereof see Russian Volunteer Fleet *v.* United States, 282 U. S. 481.

§ 272. [1] Mr. Marcy, Secy. of State, to Mr. Crain, Feb. 24, 1854, 42 MS. Dom. Let. 244, Moore, Dig., VI, 609.

[2] Instructions to Diplomatic Officers (1897), § 174, p. 68, Moore, Dig., VI, 609; see, also, Mr. Olney, Secy. of State, to Mr. Smythe, Minister to Haiti, No. 136, March 20, 1896, MS. Inst. Haiti, III, 479, Moore, Dig., VI, 609; also other documents cited in Moore, Dig., VI, 609–610; Mr. Bayard, Secy. of State, to Mr. Denby, Feb. 5, 1886, MS. Inst. China, IV, 118, Moore, Dig., VI, 614, where it was declared that the Department of State requires as a condition precedent to the presentation of a claim to a foreign government "simply a *prima facie* case such as would authorize a chancellor to issue *ex parte* process."

[3] See Diplomatic Intercourse with States, Support of Private Interests, *infra*, § 447.

§ 273. [1] Mr. Frelinghuysen, Secy. of State, to Mr. Suydam, Sept. 25, 1882, cited in Report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, For. Rel. 1887, 606, Moore, Dig., VI, 616.

[2] The language in the text is that of Mr. Frelinghuysen, Secy. of State, to Messrs. Mullan and King, Feb. 11, 1884, quoted in report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, For. Rel. 1887, 607, Moore, Dig., VI, 616.

"The presentation of a claim does not bind the government presenting it to insist upon it; nor does reception amount to a recognition of its validity." Ralston, revised ed., 232, *citing* Bruce, Arbitrator, in the case of *La Constancia,* American-Colombian Commission, Convention of Feb. 10, 1864, Moore, Arbitrations, 2742.

[3] "Where a government takes up the claim of one of its citizens against another govern-

has well said: "It is an elementary principle that, when a government officially intervenes on behalf of its citizen, it makes his claim its own, and may settle the claim on such terms as it may conceive to be proper." [4] Thus the Department of State is disposed to suspend the prosecution of a claim when either House of Congress has called for the papers with a view to consideration of the subject.[5] The Secretary of State may withhold interposition in a single case if it is one belonging to a large number which it is sought to prefer together at a particular time or in a special way. Moreover, he may hold in leash the American agent before an international tribunal such as a claims commission, to the extent of restraining him from presenting or supporting claims based upon contentions which are deemed to be untenable,[6] or which if preferred against the United States might in the converse situation prove to be embarrassing.

(2)

§ 274. **Obstacles to Presentation.** "Diplomatic aid will not be rendered to press on a foreign government a claim which is based on an act against public policy." [1] Thus the Department of State has declined to recognize as worthy of support, a contract alleged to have been concluded by a citizen of the United States with the executive or agent of another government, for the purpose of setting aside a treaty between the United States and that government.[2]

A national, in consequence of the character of his own acts, may, according to the judgment of the government of his country, lose what may be described in a domestic sense as a right of protection,[3] and thus inspire it to withold the preferment of a claim in his behalf against a foreign State. The censurable conduct of the national may produce such a result. Thus fraudulent acts on his part for the purpose of enhancing the value of his claim, or of influencing proceedings in support of it should, and are likely to deprive him of affirmative aid which he might otherwise reasonably expect.[4] Doubtless a State should refrain from lending its aid to one who builds his cause upon an illegal or immoral

---

ment it necessarily possesses and exercises the power to decide for itself when and to what extent it will press the claim, as well as the means which it will employ for that purpose." Moore, Dig., VI, 627.

See, also, William A. Parker Case, Opinions of Commissioners, under convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 35, 36.

[4] Dissenting opinion in The Mavrommatis Palestine Concessions Case, Publications, Permanent Court of International Justice, Series A, No. 2, 54, 63.

[5] Mr. J. C. B. Davis, Acting Secy. of State, to Messrs. Bartley et al., Sept. 26, 1871, For. Rel. 1887, 594, Moore, Dig., VI, 627.

[6] See Mr. Hughes, Secy. of State, to Mr. Morris, United States Agency, Mixed Claims Commission, United States and Germany, April 4, 1923.

§ 274. [1] The language of the text is that used in Moore, Dig., VI, 617, *citing* Mr. Seward, Secy. of State, to Mr. Whitney, July 24, 1868, 79 MS. Dom. Let. 119.

[2] Mr. Blaine, Secy. of State, to Mr. Matchett, March 19, 1891, 181 MS. Dom. Let. 273, Moore, Dig., VI, 620; also other documents cited in Moore, Dig., VI, 617–620.

[3] See Loss of Privilege of National Protection, *infra*, §§ 388–393; also, documents in Moore, Dig., III, 757–795; *id.*, VI, 621–622; Moore, Arbitrations, III, 2729–2857; Hackworth, Dig., III, §§ 251–253.

[4] Mr. Seward, Secy. of State, to Lord Lyons, British Minister, May 30, 1862, MS. Notes to Great Britain, IX, 187; Moore, Dig., VI, 622.

"The assistance of the Department of State with respect to claims has been withdrawn or refused in particular cases on account of the speculative, exaggerated, or exorbitant amount of the claim, the discovery of fraud, collusion, misrepresentation, or illegal transactions, the

foundation.[5] The Department of State has had frequent occasion to decline to support the claims of nationals who yielded to the temptation to resort to bribery of foreign officials, and whose excuse for so doing was the allegation that recourse to such methods was customary and essential in order to obtain redress through local agencies of the foreign State concerned. It should be observed, however, that it is the judgment of the State whose aid is invoked by the aggrieved national that must be decisive of whether his acts have been such as preclude interposition.[6] Even his attempt to mislead his country is not decisive of its right to espouse his cause.[7] Nevertheless, a State charged with wrong-doing may express indignation or surprise when a foreign power lends its aid to one whose conduct in relation to events productive of a particular claim is reprehensible,[8] or where the individual claimant acquired no valid interest in the entity or thing alleged to have been subjected to improper treatment.[9]

Unneutral conduct on the part of an individual is deemed to be internationally illegal, even though in the particular case the circumstances are such as to impose no duty of prevention upon his own State itself not a belligerent.[10]

---

refusal to produce proper evidence, and generally when the claim is contrary to public policy or international law.

"False Oaths. — In order to avoid being put in the position of presenting to foreign Governments claims which are unfounded in fact or law, the Department of State desires to emphasize the solemnity attached to the full and frank execution of this Application in accordance with the requirements set forth herein, and to announce that the making of false statements in this Application or in connection therewith, pertaining, as they may, to the diplomatic relations of the United States with foreign countries, may result in the institution of legal proceedings, or in the withdrawal of the Government's assistance and support in connection with the settlement of the claim." (Department of State, Claims Circular, Oct. 1, 1924, Revised, §§ 21 and 22.)

[5] Such was the emphatic opinion of Mr. Bayard, Secy. of State, in a Report to the President, Jan. 20, 1887, For. Rel. 1887, 592, 607, Moore, Dig., VI, 622–623. See, also, Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, May 4, 1906, For. Rel. 1906, II, 871.

[6] Theodore S. Woolsey, *Proceedings*, Am. Soc., IV, 99; Arthur K. Kuhn, *id.*, 110.

[7] See Nielsen, Commissioner, in Francisco Mallén Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 254, 272–273.

[8] "In view of this decision, and of the tenor of your communication, my Government hopes that it may be advised that His Majesty's Government does not consider, even in the case of a vessel admittedly of valid British registry, that such a vessel pursuing the course of conduct followed by the schooner *Henry L. Marshall* is making proper use of the British flag and that His Majesty's Government would not be disposed to espouse the cause of a British merchant vessel in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall,* or in such a case to oppose the enforcement of the laws of the United States by means of the procedure taken in the case of that vessel and judicially approved." (Mr. Hughes, Secy. of State, to the British Chargé d'Affaires ad interim at Washington, July 16, 1923, For. Rel. 1923, Vol. I, 165, 167.)

[9] See Rio Grande Irrigation and Land Company Case, American and British Claims Arbitration, under special agreement, Aug. 18, 1910, Nielsen's Report, 332, 336–346.

[10] "Acts which have in the past been regarded as sufficient grounds for the Government to decline protection to Americans in particular cases are, among others, maintaining extended domicile in a foreign country, unneutral conduct, acceptance of office under a foreign Government, active participation in foreign politics, participation in filibustering or insurrectionary movements against a friendly foreign Government, seeking refuge from justice, and, generally, acts inconsistent with allegiance to the United States." (Department of State, Claims Circular, Oct. 1, 1924, Section 7.)

See Neutrality, *infra,* §§ 871–872. Report of War Department Commission of 1912, to investigate claims against Mexico, with respect to Case of Converse and Blatt, For. Rel. 1912, 971.

Hence the person engaged in such transactions may be fairly regarded as forfeiting the right to demand and secure the protection by his own country from the consequences of his misconduct.[11] Obviously a State should always refrain from presenting a claim arising from or incidental to a breach of international law on the part of a national.[12] In 1931 the Department of State declared that in certain previous instances which had arisen it had advised that it could not countenance an attempt of American citizens to foment disorders in foreign territory, and that it would not be disposed to intervene to prevent their just punishment by the appropriate authorities.[13]

e

## Conditions of Interposition in Behalf of a Private Claimant

(1)

§ 275. **Nationality of Claimant.** A State should not undertake to press a claim for redress in behalf of an individual against a foreign government, unless he was one of its own nationals both at the time when the claim arose and continuously thereafter until its preferment.[1] As the Permanent Court of Inter-

[11] Mr. Fish, Secy. of State, to Mr. Murray, Dec. 7, 1869, 82 MS. Dom. Let. 453, Moore, Dig., VI, 623; Mr. Bayard, Secy. of State, to Messrs. Morris and Fillette, July 28, 1888, 169 MS. Dom. Let. 263, Moore, Dig., VI, 623.

See, also, Ralston, revised ed., 279, *citing* Thornton, Umpire in the Fitch Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3476. See *infra*, § 393.

Membership by an American citizen in a so-called "Urban Guard," a temporary committee of safety confining its efforts to safeguarding life and property, and avoiding taking either side in a civil strife dividing the Republic of Peru in 1885, was not regarded by the Department of State as conduct such as to preclude the presentation of a claim for the forcible taking from a member of the guard of live stock by the Peruvian Government. Mr. Olney, Secy. of State, to Mr. Neill, Chargé, No. 209, Dec. 22, 1896, MS. Inst. Peru, XVIII, 11, Moore, Dig., VI, 626.

[12] Mr. Sherman, Secy. of State, to Mr. Coxe, Minister to Guatemala and Honduras, No. 71, April 21, 1897, For. Rel. 1897, 332, Moore, Dig., VI, 624. See, also, Young *v.* United States, 97 U. S. 39, 62.

[13] Mr. Castle, Under Secy. of State, to the Consul at Sidney, May 15, 1931, Hackworth, Dig., III, 554. See also communication to the Legation at Athens, March 11, 1935, Hackworth, Dig., III, 554, footnote.

§ 275. [1] According to Section 6 of the Department of State's Claims Circular revised to Oct. 1, 1924: "The Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes from the date the claim arose to the date of its settlement. Consequently, claims of foreigners who, after the claims accrued, became Americans or became entitled to American protection, or claims of Americans or persons entitled to American protection who, after the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or vice versa, cannot be espoused by the United States. For example, a claim for a loss or injury which occurred before the claimant obtained final naturalization as a citizen of the United States (except in case of an American seaman who has made a declaration of intention) will not, by reason of his subsequent naturalization, be supported by the United States."

See, also, Mr. Moore, Assist. Secy. of State, to Mr. Eustis, July 26, 1898, 230 MS. Dom. Let. 378, Moore, Dig., VI, 631, where it was also declared that "the acquisition of a title to a government's protection does not operate retroactively." *Cf.*, also, Mr. Forsyth, Secy. of State, to Mr. Champly, April 15, 1837, 29 MS. Dom. Let. 71, Moore, Dig., VI, 628; Mr. Gresham, Secy. of State, to Mr. Lodge, April 17, 1895, 201 MS. Dom. Let. 534, Moore, Dig., VI, 630; Burthe *v.* Denis, 133 U. S. 514, 520–522, Moore, Dig., VI, 628.

"With extremely rare exceptions, and such exceptions based upon the particular language of treaties having exceptional circumstances in view, the language of commissions has been

national Justice found occasion to declare in the course of its judgment in the Panevezys-Saldutiskis Railway Case on February 28, 1939:

> In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.[2]

It may be doubted whether an arbitral tribunal, unless clothed with specific authority, should proceed to grant redress where the individual claimant ceased to be a national of the complainant State prior to the time for the rendition of a final award.[3] The requirement touching the continuity of nationality is not

---

that the claim must be founded upon an injury or wrong to a citizen of the claimant government, and that the title to such claim must have remained continuously in the hands of citizens of such government until the time of its presentation for filing before the commission." Ralston, revised ed., 162, *citing* the Abbiatti Case before United States and Venezuelan Claims Commission, Moore, Arbitrations, III, 2347. See, also, Ralston, revised ed., 162–164, and other cases there cited, especially the Corvaïa Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 782, 802.

See, also, award of the Permanent Court of Arbitration, at the Hague, May 3, 1912, in the Canevaro Case between Italy and Peru, especially in denying compensation to Raphael Canevaro, as an Italian claimant by reason of his Peruvian nationality, *Am. J.*, VI, 746, 747; also editorial comment, *id.*, 709; J. B. Scott, Hague Court Reports, 522.

While in the opinion of the Department of State, an American citizen is not entitled to invoke the assistance of the United States in respect to a claim against another government acquired from a foreigner by marriage and assignment (by a partnership arrangement or otherwise), it has declared "that where such claim comes to the wife by succession, upon the death of her husband . . . the offices of this Government should be extended to her." Mr. Hill, Assist. Secy. of State, to Messrs. Coudert Brothers, June 9, 1900, 245 MS. Dom. Let. 484, Moore, Dig., VI, 630.

[2] Publications, Permanent Court of International Justice, Series A/B, No. 76, 16. See, however, dissenting opinion by Jonkheer van Eysinga, *id.*, 30, 33–35.

[3] "Whether the claim must retain its national character until it is brought before the arbitral tribunal or until judgment is given by the tribunal are questions not uniformly decided the same way. Arbitral tribunals have been guided in such cases largely by the terms of the arbitral agreement or the treaty creating the tribunal." (Communication from the Government of the United States, of May 22, 1929, to the Preparatory Committee for the Codification Conference at The Hague of 1930, Bases of Discussion, III, Supplement, League of Nations Doc. No. C.75(a).M.69(a).1929.V, 24.)

"A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided." (Basis of Discussion No. 28, Conference for the Codification of International Law, Bases of Discussion, III, League of Nations Doc. No. C.75.M.69.1929.V, 145.)

See Sir Cecil J. B. Hurst, "Nationality of Claims," *Brit. Y.B.*, VII, 1926, 163, 180.

*Cf.* Art. 15 of Harvard Draft Convention on the Responsibility of States and comment thereon by the Reporter, Prof. Borchard, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 198.

believed to be arbitrary even though it may work hardship in respect to the individual concerned. It is attributable to the usual absence of a relationship between a State and an alien that suffices in point of intimacy to justify the espousal by the former of the cause of the latter, or the interposition in behalf of a national on account of treatment to which he was subjected when he was an alien. Should, however, the international society be prepared to acquiesce in the doctrine that the law of nations clothes private individuals with rights in relation to foreign States that are not deemed to be attributable to the connection between those individuals and the States to which they owe allegiance, it might be possible to fortify the contention that a private claimant who has been the victim of international delinquency at the hands of a foreign State is possessed of a claim in his own right against it, which is not destroyed or impaired by his transfer of nationality, and which he may at his convenience authorize any country whose nationality he may elect to assume, to prefer in his behalf. Such a theory does not, however, as yet prevail.[4]

The requirement as to continuity of nationality oftentimes works harshly, as where by operation of law or by the action of a claimant, his interest in a demand for redress passes wholly or in part to an alien, or where he himself through such process acquires a new national character. Instances are varied and numerous. A claimant may, for example, lose his nationality in consequence of a change of sovereignty over the territory within which he resides, as an incident of what may be called collective naturalization.[5] Marriage by the claimant, if a woman, to an alien may produce expatriation.[6] The death of the claimant may serve to transfer the beneficial interest in a portion of the claim to a foreigner. An involuntary assignment by the claimant may have a like result. Accordingly, it may not be unreasonable to mollify the effect of certain of these events by appropriate agreement between interested States.[7] In the ab-

"Claims to fall within the Treaty must have possessed the status of American nationality both in origin and at the time the Treaty became effective." (Parker, Umpire, in opinion on jurisdiction of the Mixed Claims Commission, United States and Germany, under agreement of Aug. 10, 1922, as determined by the nationality of claims, Consolidated Edition of Decisions and Opinions, 1925, 175, 187.)

[4] Declared Dr. Östen Undén, March 29, 1933, as Umpire in a dispute between Greece and Bulgaria concerning the application of Article 181 of the Treaty of Neuilly to certain forests in central Rhodopia: "Greece cannot base a claim on the fact that a Bulgarian national was injured by confiscatory measures on the part of the Bulgarian Government, even though he later became a Greek subject. Neither is there ground for interpreting Article 181 of the Treaty of Neuilly and the provisions of the Treaty of Constantinople to which that article refers, as extending to such a degree the right of the Greek Government to undertake the diplomatic and legal protection of persons acquiring Greek nationality as a result of various recent peace treaties." (*Am. J.*, XXVIII, 773, 790.)

*Cf.* discussion of the Institute of International Law at Oslo in 1932, *Annuaire*, XXXVII, 516–525.

[5] See Collective Naturalization, *infra*, § 352.

[6] It may be observed that under the existing law of the United States, the marriage of an American woman to an alien is not regarded as productive of her expatriation. See *infra*, § 365A.

[7] As a proposed basis of relaxation of the rule, Art. 15 of the Harvard Draft Convention on the Responsibility of States provides that: "A State is responsible to another State which claims in behalf of one who is not its national only if (1) the beneficiary has lost its nationality by operation of law, or (2) the interest in the claim has passed from a national to the beneficiary by operation of law." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 135.)

sence of agreement to cover special cases, it is difficult, however, for a tribunal to yield deference to particular exceptions to the general rule.[8]

The Department of State in the course of its general instructions for claimants as of 1924, declared:

> The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government cannot undertake to present his claim to a foreign government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States except in case of American seamen.[9]

While the relationship between a State and an alien seaman in service on one of its vessels, who has taken certain initial steps to acquire its nationality may suffice to justify the endeavor by that State to protect him during the period of such service, the seaman does not in consequence of his conduct necessarily change his nationality.[10] For that reason, he may be regarded as outside of the purview of a claims convention concluded by that State and contemplating the arbitration of the claims of nationals of the contracting parties.[11] Again, the State to whose service he is attached may be reluctant to prefer a claim in his

[8] See conclusions of Sir Cecil J. B. Hurst in *Brit. Y.B.*, VII, 1926, 182.

No exception to the rule concerning continuity of nationality is necessarily apparent where a claim is preferred in behalf of a national on account of direct injury sustained through the action of a respondent State causing the death of an alien upon which such national was a dependent. The terms of a claim convention may be deemed to embrace such a claim. See, for example, decisions of Parker, Umpire, in certain Claims of American Nationals for Damages growing out of the Deaths of Aliens, Mixed Claims Commission, United States and Germany, agreement of Aug. 10, 1922, Consolidated Edition of Decisions and Opinions, 208, and 225 (Mary B. Williams Case).

[9] Claims Circular of Oct. 1, 1924 (Revised), Section 6. See, also, Report of War Department Commission of 1912, on Claims against Mexico, in respect to cases arising in El Paso, Texas, and Douglas, Arizona, from gunshot wounds inflicted from the Mexican side of the border, For. Rel. 1912, 975, 979.

[10] See § 1 of Act of May 9, 1918, 40 Stat. 544, repealed by Act of June 15, 1935, 49 Stat. 376.

See Nationality, Seamen, *infra*, § 394; Consuls, *infra*, § 483; also, dictum by Mr. Justice Field in *In re* Ross, 140 U. S. 453, at 472.

See correspondence in For. Rel. 1913, 1310–1339.

[11] See decision of Parker, Umpire, in Edward A. Hilson Case, Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions, 1925, 236.

The British-Mexican Claims Convention of Nov. 19, 1926, British Treaty Series No. 11 (1928), Cmd. 3085, authorized, through Art. 3, the claims commission to deal with claims against Mexico, embracing those of "persons under British protection," as well as British subjects. The Convention between the same parties of Dec. 5, 1930, British Treaty Series No. 22 (1931), Cmd. 3846, which was amendatory of Art. 3 of the previous convention, omitted reference to persons under British protection.

*Cf.* Francis McCready Case, Mexican-American Commission, convention of July 4, 1868, Moore, Arbitrations. III, 2536.

behalf, and especially as against that other State of which he remains a national.[12]

There have been instances where aliens domiciled within the territory of the United States, and who have declared an intention to become citizens thereof, appear to have been regarded as entitled to claim the benefits of American nationality when they have suffered wrong at the hands of foreign States other than the country of origin. The attempts to secure the adjudication of the claims of such individuals before commissions under claims conventions between the United States and countries alleged to have been at fault, have been successful when it has been shown that the claimant was domiciled in American territory at the time of the commission of acts complained of, and continuously thereafter until the preference of the claim; and when also prior to its preference, he had perfected his American naturalization.[13] Such a situation rarely arises, and the conditions permitting interposition must be regarded as exceptional. A claims convention may be interpreted as imposing no obligation upon a respondent State to accept responsibility in such cases.[14]

A mere declaration of intention by a foreigner to become a citizen is, and should be, regarded as in itself insufficient to cause the State whose nationality is sought to be acquired to prefer a claim in his behalf.[15] A declaration of intention on the part of a foreigner to become an American citizen, even though coupled with residence in a State of the United States and participation in the political life of such commonwealth, would not preclude the country of origin from preferring a claim against the United States in behalf of the individual, because such acts on his part would not constitute naturalization according to the laws of the United States.[16]

[12] See documents in Moore, Dig., III, 795–799, indicative of some reluctance on the part of the United States to prefer a claim against another State in behalf of a seaman on an American vessel when his foreign nationality has been established.

[13] See reasoning in the cases of Jarr and Hurst, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2707; case of Hellman, before same Commission, *id.*, 2715; case of Eigendorff, before same Commission, *id.*, 2717. Note the singular application of the principle asserted in the foregoing cases to that of Gosch, before same Commission, *id.*, 2713.

[14] See decisions of Parker, Umpire, in the William Mounsey Case, and in the Herbert K. Harrison Case, Mixed Claims Commission, United States and Germany, agreement of Aug. 10, 1922, Consolidated Edition of Decisions and Opinions, 577, and 586, respectively.

[15] Mr. Frelinghuysen, Secy. of State, to Mr. Alfonso, Nov. 13, 1884, 153 MS. Dom. Let. 194, Moore, Dig., VI, 632; Mr. Porter, Acting Secy. of State, to Messrs. Kennedy & Shellaberger, Jan. 4, 1887, Senate Doc. 287, 57 Cong., 1 Sess., Moore, Dig., VI, 633; also correspondence with the Italian Embassy, concerning the lynching of persons of Italian origin at Tallulah, La., 1899, For. Rel. 1899, 440–466, *id.*, 1900, 715–731, referred to also in Moore, Dig., VI, 634–636.

Numerous cases have arisen before claims commissions where it has been asserted that persons of foreign origin who had merely declared their intention to become American citizens should be regarded as such. While the decisions have not been uniform, the commissioners or umpires have in most cases declared that a declaration of intention is insufficient to enable the foreigner to be regarded as a citizen of the claimant State within the meaning of a claims convention. See case of Kern, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2719; Case of Perez, before same Commission, *id.*, III, 2718; Opinion of Thornton, Umpire, in Case of Schreck, before same Commission, *id.*, III, 2720. See, also, Stevenson Case, British-Venezuelan Commission, 1903, Ralston's Report, 438; also discussion in Ralston, revised ed., 166–169.

[16] In 1896, the Italian Embassy demanded the payment of indemnities in behalf of the heirs of three Italian subjects who had been lynched at Hahnville, La. It was contended by

Neither the United States nor any other State should, as a matter of policy or equity, espouse the cause of one who, according to its own laws, has by prolonged residence abroad or by any other process expatriated himself.[17] Nor should the State of origin prefer a claim in behalf of one who, according to the laws of the foreign State of residence, has voluntarily become naturalized.[18] In the latter situation the fact of domicile in the territory of a foreign country is important only so far as it indicates compliance with one of the conditions prescribed by the local law as a means of perfecting naturalization. In the former it is important only so far as it indicates conduct which the law of the State of origin declares shall result in the loss of nationality, or of the right to claim protection. The fact of domicile appears otherwise to be without significance.[19]

It may be acknowledged that a State should not interpose in behalf of a national as against a foreign State of which the same individual is to be regarded as a national by virtue of a principle in relation to the acquisition or retention of nationality which the law of nations respects, as in a situation where an arbitral tribunal might well deem the doctrine of dual nationality to be applicable.[20] Thus, in 1935, the Department of State took the position that since

---

Mr. Olney, Secy. of State, that the Federal Government was inclined to doubt any right of the Italian Government to prefer a claim against the United States because the victims were "not Italians temporarily residing in the United States," that at the time of their death they apparently intended to remain in the United States permanently, that they were performing no duties as subjects of Italy, that they were successfully evading military service in Italy, and that by qualifying and becoming electors in Louisiana, according to its Constitution and laws, they had become citizens of that State and eligible to hold office. The Italian Ambassador, Baron Fava, was able to show that there had been no evasion of military service. He was unwilling to admit that there was proof of a change of domicile, notwithstanding the long absence of the victims from Italy. Finally, he protested vigorously that declarations of intention to become American citizens together with the qualifying and acting as electors in Louisiana (if such acts were proven to have occurred) did not change the nationality of the victims, or constitute naturalization according to Section 2165 of the Revised Statutes, and hence did not preclude the Italian Government from preferring a claim for indemnity. The Act of Congress that ultimately provided for the payment of an indemnity referred to the decedents as subjects of Italy. See 30 Stat. 106; also For. Rel. 1896, 396–422, Moore, Dig., III, 344–353.

*Cf.*, also, case of three Italian subjects murdered in Colorado, in 1895, on account of whose death an indemnity was paid to the Italian Embassy in 1896, although two of the decedents had declared their intention to become American citizens. For. Rel. 1895, II, 938–956; *id.*, 1896, 426, Moore, Dig., III, 344.

Declares Mr. Ralston: "A declaration of intention may, nevertheless, have effect in divesting the citizens or subjects of certain nations of their right to claim national protection; at least it may be strong evidence of such a state of mind or fact as forfeits the right of appeal to the nation of their origin." (Ralston, revised ed., 168, *citing* the Deucatte Case, French-American Commission, convention of Jan. 15, 1880, Moore, Arbitrations, III, 2582.)

See, also, argument of Mr. Ashton, Agent and Counsel of the United States, in brief filed before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2696.

[17] See Sec. 2 of the Act of March 2, 1907, in reference to the expatriation of citizens and their protection abroad, 34 Stat. 1228.

[18] Argument of Mr. Ashton, Agent and Counsel of the United States, in brief filed before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2696, 2698–2699.

[19] This principle has been applied to cases where the individual was domiciled in a country engaged in war, and against which there was preferred a claim arising from the consequences of military operations. See Case of Barclay, British-American Claims Commission, treaty of May 8, 1871, Moore, Arbitrations, III, 2721. *Compare* Case of Laurent, British-American Claims Commission, Convention of Feb. 8, 1853, Moore, Arbitrations, III, 2671.

[20] See R. S. C. A. Alexander Case, British-American Claims Commission, treaty of May 8,

two claimants concerned had the nationality of the Dominican Republic as well as that of the United States, it could not espouse their claim against that country.[21] It does not follow, however, that a State charged with delinquency may avoid responsibility or maintain that interposition is improper by claiming the individual concerned as a national on colorable grounds with a view to setting up a defense in the particular case.[22] Should there be complete and general acceptance of the doctrine that naturalization normally produces a termination of former nationality, there would be little room for the contention on the part of a State of origin that it could rightfully oppose interposition as against itself, on account of its acts subsequent to naturalization, on the ground that the victim of its alleged wrong-doing was its own national.[23]

(2)

§ 276. **Assignment of Claimant's Interests.** It is believed to be a settled rule of the Department of State that a claim which the United States cannot take cognizance of in its inception, because of the alienage of the claimant, is not brought within its cognizance by an assignment to an American citizen.[1] The same principle has been followed by courts of arbitration.[2] There seems to be no

---

1871, Moore, Arbitrations, III, 2529; Alexander Tellech Case, Tripartite Claims Commission, United States, Austria and Hungary, agreement of Dec. 26, 1924, Final Report, 1929, 71; dictum in award in George J. Salem Case, United States and Egypt, Protocol of Jan. 20, 1931, Dept. of State, Arbitration Series No. 4 (6), 39.

See Art. 16 of Harvard Draft Convention on Responsibility of States, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 200.

Also, F. K. Nielsen, International Law Applied to Reclamations, Washington, 1933, 13.

[21] See statement in Hackworth, Dig., III, 354, in relation to the claim of Evangelina Michelena Schnabel and Oscar Michelena.

[22] "A State is not relieved of responsibility as a consequence of any provision in its own law that an alien should be considered its national for a particular purpose." (Art. 16, Harvard Draft Convention on Responsibility of States, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 200.)

"A Government, in preferring a claim against another Government, must of course show that the claimant has the nationality of the claimant Government. But it is believed that never has the contention been advanced in any international arbitration that a claimant Government must initiate its case by proving that one of its citizens is not a national of the respondent Government or of some other Government. The Turkish Commissioners have cited no authority for such a contention, which, as has been observed, is considered to be unprecedented." (Memorandum by Mr. F. K. Nielsen, of May 3, 1934, American-Turkish Claims Settlement, Nielsen's Opinions and Report, 1937, 54, 58.)

[23] See Expatriation Through Naturalization, *infra,* §§ 376–380.

§ 276. [1] The language in the text is substantially that employed in a communication of Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, No. 42, Feb. 5, 1886, MS. Inst. China, IV, 118, Moore, Dig., VI, 639. See, also, Mr. Evarts, Secy. of State, to Mr. Hodgskin, Oct. 25, 1877, 120 MS. Dom. Let. 238, Moore, Dig., VI, 638; Mr. Gresham, Secy. of State, to Mr. McDonald, Minister to Persia, Nov. 11, 1893, For. Rel. 1894, 485, Moore, Dig., VI, 639. Also, Department of State, Claims Circular, Oct. 1, 1924, Revised, Section 6.

The rule announced does not concern the situation where a foreign concessionaire transfers his concession, capable of assignment, to an American citizen, who upon the violation of his rights thereunder by the grantor State, invokes the aid of the United States. Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, No. 291, Dec. 23, 1898, MS. Inst. Haiti, IV, 103, Moore, Dig., VI, 639; also Eldredge's Case, American-Peruvian Commission, Convention of Jan. 12, 1863, Moore, Arbitrations, IV, 3460.

[2] Thornton, Umpire, in L. S. Hargous Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2327, 2329; Parrott and Wilson Case, Mexican-American Commission, Convention of April 11, 1839, *id.,* 2381; same case before Mexican Claims Commission, Act of Cong., of March 3, 1849, *id.,* 2384; Slocum Case, before same Commission, *id.,* 2385; Dimond Case before same Commission, *id.,* 2386; J. F. Lasarte Case,

objection, however, to the preferment of a demand for redress in behalf of a citizen who is the assignee of the rights of an assignor of the same nationality.[3] Nor can there be doubt that a claim against a foreign government is assignable.[4]

If the owner of property within the territory of a particular State who, from the published terms of a treaty awaiting final consummation, learns of plans whereby a transferee to the sovereignty of that territory may acquire property within a category which may be deemed to embrace his own, and endeavors to safeguard his interests by assigning that property to an alien individual or corporation with the expectation that its sovereign (itself not a party to the treaty) may interpose safeguards against irregular or arbitrary action, it must be obvious that the assignee stands in no better position than the assignor. Moreover, the State of the assignee may evince reluctance to demand such respect for the provisions of the treaty, when it becomes effective, as a party thereto might fairly require.[5]

(3)

§ 277. **Partnership Associations.** A citizen by adopting a foreigner as a partner cannot spread over him the protection of the government of the former.[1] The preferment of a claim in behalf of a partnership should be solely on account of those members thereof who are nationals of the claimant State.[2] Nor can a

---

American-Peruvian Commission, Convention of Jan. 12, 1863, *id.*, 2394–2396; see, also, cases cited in Ralston, revised ed., 156–158.

[3] Declares Prof. Moore: "The principle that the right of intervention cannot be transferred by the assignment of a claim by the citizen of one country to the citizen of another is altogether independent of the assignability of diplomatic claims as between citizens of the same country, where nothing but the private interest passes. [Judson *v.* Corcoran, 17 How. 612.]" Dig., VI, 639. See Camy Case, French-American Commission, Convention of Jan. 16, 1880, Moore, Arbitrations, III, 2398; H. G. Norton Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, 2163; The *Sir William Peel,* British-American Claims Commission, treaty of May 8, 1871, *id.*, IV, 3935, 3948.

[4] See E. M. Borchard, Diplomatic Protection, § 290, and documents there cited.

[5] The statement in the text is based upon a problem that once confronted the Department of State, and which arose from the application of the provisions of certain treaties of peace to which the United States was not a party.

§ 277. [1] The language of the text is substantially that contained in a communication of Mr. Fish, Secy. of State, to Mr. De Long, Sept. 19, 1871, MS. Inst. Japan, I, 472, Moore, Dig., VI, 641. See, also, Thomas Morrison Case, Mexican Claims Commission, under Act of Cong., of March 3, 1849, Moore, Arbitrations, III, 2325; Campbell *v.* Mullett, 2 Swanston, 551, Moore, Dig., VI, 640.

[2] See communication of Government of the United States, May 22, 1929, to the Preparatory Committee for the Codification Conference at The Hague, Conference for the Codification of International Law, Bases of Discussion, III, Supplement, League of Nations Doc. No. C.75(a).M.69(a).1929.V, 24. See, also, Samuel Davies Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 282.

In the Canevaro Case, under an Italian-Peruvian agreement of April 25, 1910, three questions were submitted to the Court assembled at The Hague: first, whether the Peruvian Government ought to pay in coin or in accordance with the provisions of the Peruvian law on the domestic debt of June 12, 1889, certain drafts possessed by the brothers Napoleon, Carlo and Raphael Canevaro, and drawn by the Peruvian Government to the order of the firm of José Canevaro & Son, for the sum of 43,140 pounds sterling, plus the legal interest upon the said amount; secondly, whether the Canevaro brothers were entitled to demand the total of the amount claimed; and thirdly, whether Count Raphael Canevaro had the right to be considered as an Italian claimant. The debt giving rise to the claim was created by a decree in 1880, following which pay checks (*bons de paiement, libramientos*) were issued to the order of the firm of José Canevaro & Sons for 77,000 pounds sterling, payable at different periods, of which 35,000 pounds sterling were paid in 1885. The firm was of Peruvian

foreign partner evade the operation of this principle by the assignment of his interest in a claim of the firm to his co-partners who are nationals of the State which contemplates interposition.[3]

The fact that an American citizen enters into a partnership with foreigners whose business is established in a foreign State (either their own or any other), so as to be regarded as domiciled therein, does not affect his right or that of the United States acting in his behalf to regard his individual interest in the firm as essentially American property, entitled to the same protection as any other such property similarly located. The opinions of arbitrators appear to sanction this view.[4] Even when the partnership according to the law of the country where it is established is regarded as a juridical entity possessing functions similar to those of a corporation, the United States does not hesitate to espouse the cause

---

nationality by reason of the Peruvian nationality of its members and continued in existence until the death of José Francisco Canevaro in 1900. The Court at the outset announced that: "whatever Raphael Canevaro's status may be in Italy with respect to his nationality, the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant." This was due to the fact that he had on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, to which none were admitted except Peruvian citizens, and where he also went to defend his election, and also especially by accepting the office of Consul General of the Netherlands, after having solicited the authorization of the Peruvian Government and Congress.

The other claimants, Napoleon and Carlo Canevaro, were, however, of Italian nationality. Their interest in the firm claim of José Canevaro & Sons arose after the act complained of — the law of June 12, 1889, substituting one per cent. bonds in payment of the domestic debt; and their claim was derived by inheritance from José Canevaro. The Court declared that the Canevaro brothers could not enjoy more favorable treatment than the firm, even if they were regarded as the heirs of José Francisco Canevaro; that the situation was unchanged by the fact that Italians had succeeded to a Peruvian claim. Hence, being subjected to the Peruvian law of 1889, it was decreed that their portion of the unpaid balance of the principal indebtedness should be payable in bonds rather than in pounds sterling. It was ordered, however, that the interest after Jan. 1st, 1889, should be payable in gold. The case presents four noteworthy points: first, the recognition of the Peruvian nationality of Raphael Canevaro; secondly, the consequent denial of the right of Italy to interpose in his behalf; thirdly, the willingness on the part of Peru, for whatsoever reasons, to submit to arbitration, the scope of its duty to pay to Italian subjects, an obligation derived by inheritance from a Peruvian citizen; and fourthly, the definite decision, that those subjects were in no more favorable position than their Peruvian predecessor, and were subject in like manner to the operation of the domestic law. For text of the award, see G. G. Wilson, Hague Arbitration Cases, 242; J. B. Scott, Hague Court Reports, 522; *Am. J.*, VI, 746. Concerning the case, see Editorial Comment, *id.*, VI, 709, also C. De Boeck, in *Rev. Gén.*, XX, 317–372.

[3] Thornton, Umpire, L. S. Hargous Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2327; also, concerning same case, Mr. Blaine, Secy. of State, to Mr. Hargous, June 14, 1890, 178 MS. Dom. Let. 38, Moore, Dig., VI, 641.

[4] See Ruden Case, Peruvian Claims Commission, Convention of Dec. 4, 1868, Moore, Arbitrations, II, 1653, 1654, where the Umpire said: "If it may be said that business firms have a nationality, such nationality is that of the country in whose territory they reside, under whose laws they have been formed, and by which they are governed."

See, also, *dictum* of Thornton, Umpire in the Case of Jennings, Laughland & Co., Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3135, 3136; Wm. Homan Case, Mexican Claims Commission, Act of Cong., of March 3, 1849, *id.*, 3409.

"Other claims [in addition to that shown in the Case of Massardo, Carbone & Co., Italian-Venezuelan Commission, 1903, Ralston's Report, 703] in the condition of having diverse citizenship among the members of the partnership were presented before the Italian-Venezuelan Commission [1903], and awards were given proportionate to the amount of the Italian interest, no suggestion having been made on the part of Venezuela that their domicil in Venezuela had created Venezuelan citizenship in the partnerships." Ralston, revised ed., 140. See, also, Baasch & Römer Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 906. *Contra, dictum,* in L. H. Finn Case, United States-Venezuelan Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, III, 2348.

of individual members who may be American citizens when circumstances necessitating interposition arise.[5]

(4)

CORPORATIONS

(a)

## § 278. Interposition in Behalf of a Domestic Corporation.

It is well settled that a government may intervene in behalf of a company incorporated under its laws, or under the laws of a constituent state or province. In such case the act of incorporation is considered as clothing the artificial person thereby created with the nationality of its creator, without regard to the citizenship of the individuals by whom the securities of the company may be owned. Hence we find in general claims conventions that the submission or settlement uniformly embraces "all claims on the part of corporations, companies, or private individuals, citizens of the United States," or of some other government, as the case may be. In other words, the corporation is recognized as having, for purposes of diplomatic protection, the citizenship of the country in which it is created.[1]

[5] According to a protocol concluded between the United States and Chile Dec. 1, 1909, the so-called Alsop Claim was submitted to His Majesty, King Edward VII, as an "amiable compositeur," to determine what amount, if any, was equitably due to the claimants. King George V consented to act in place of his late Majesty. The firm of Alsop and Co. was registered in Chile, its seat of business being in Valparaiso, but it was composed of American citizens. The claim arose out of a contract made with Bolivia in 1876, by the liquidator of the firm, one Wheelright, for the adjustment of a debt, based upon previous transactions between the Bolivian Government and a Brazilian citizen who had assigned it to Alsop & Co.

This claim had been submitted to the United States and Chilean Claims Commission, convention of May 24, 1897, but had been disallowed, on the ground that as Alsop & Co. was a firm organized as a partnership under the Chilean law, it had become a juridical entity possessing Chilean nationality. It had been held, therefore, that the firm must be regarded as a citizen of Chile, incapable of prosecuting a claim against Chile as an American citizen before an International Commission (Henry Chauncey *v.* Chile, No. 3, United States & Chilean Claims Commission, 1901, The Alsop Claim, Appendix to the Case of the United States, II, 558–569, Moore, Dig., III, 802).

In the Arbitration before King George, the Chilean Government again suggested that as the firm was registered in Chile and was a Chilean company, their grievances could not properly be the subject of a diplomatic claim, and that the claimants should be referred to the Chilean courts for the establishment of any rights they might possess. The learned commissioners to whom His Majesty referred the case declared, in their Report accepted by him as his award, that this contention would be inconsistent with the very terms of the reference to the King, as it would "practically exclude the possibility of any real decision on the equities of the claim put forward." They added that they were "clearly of opinion, by looking to the terms of the reference and to all the circumstances of the case, that such a contention, if intended to be seriously put forward by Chile, should be rejected. We think that it may be disregarded by Your Majesty." (Award pronounced by His Majesty, King George V, as "amiable compositeur" in the matter of the Alsop Claim at London, July 5, 1911, Washington, 1911, 9–10, *Am. J.*, V, 1079, 1085.) See, also, case presented by the Government of Chile, London: 1910, Part III, "Locus Standi of Alsop & Co. and of the United States," 7–13. It should be observed that the United States interposed specifically and by name, "for the persons who had composed the firm or their representatives and not for the firm itself." See Opinion of J. Reuben Clark, Jr., Solicitor to the Dept. of State, Aug. 14, 1912, respecting the "Distribution of the Alsop Award," Washington, 1912, 46–53.

See Award of President Cleveland, March 2, 1897, in the Cerruti Case, Protocol between Italy and Colombia of Aug. 18, 1894, *Am. J.*, VI, 1015, 1016; *compare* Report of Segismundo Moret, Jan. 26, 1888, in the same case, Protocol between the same countries of May 24, 1886, *id.*, 1003, 1011.

§ 278. [1] Statement in Moore, Dig., VI, 641. See, also, Mr. Olney, Secy. of State, to Mr. Sleeper, Minister to Colombia, Feb. 24, 1897, For. Rel. 1899, 227, Moore, Dig., VI, 642.

There appears to be no disposition on the part of the Department of State to question the soundness of the foregoing statement, or to act on a different principle.[2] Nevertheless, as a matter of domestic policy, the United States may be unwilling to interpose in behalf of an American corporation of which all of the shareholders are aliens and nationals of the State against which the corporation seeks to prefer a claim, and in whose territory the corporation carries on its principal operations.[3]

Whether a claims commission is clothed with jurisdiction to award damages to cover the total loss sustained by a corporation incorporated under the laws of a claimant State when a minority of the shares is owned by nationals of such State, and when, in consequence, the award must enure chiefly to the benefit of aliens, depends upon the design of the contracting parties as reflected by the convention providing for the arbitration. The terms of claims conventions commonly fail to indicate a decision of those parties to restrict the jurisdiction that is conferred.[4] For that reason a commission may, in the absence of evidence reflecting a different design, decline to look behind the corporate entity, and award damages for the total loss of the corporation, regardless of the nationality of those who will chiefly profit from such action.[5]

A claims convention may, however, give expression to a definite and limited undertaking; or one of the contracting parties may, for reasons of policy, seek no award as for a total loss where its nationals own merely a minority of the

---

See National Character in Relation to Property at Sea in Time of War, Corporations, *infra*, §§ 794–796; Nationality, Corporations, *infra*, § 394A.

See also Mr. Hughes, Secy. of State, to Mr. Anderson, the American Commissioner, Mixed Claims Commission, United States and Germany, April 22, 1924, Hackworth, Dig., III, 420.

[2] See, for example, Mr. Knox, Secy. of State, to Mr. Arnold, American Consul, No. 80, April 25, 1910, For. Rel. 1910, 197.

[3] Mr. Adee (for Mr. Knox, Secy. of State), to Mr. Bergholz, American Consul General No. 191, Oct. 12, 1909, For. Rel. 1909, 67, with respect to a missionary society incorporated in California in 1908. A majority of the incorporators were described in the articles of incorporation as residents and citizens of California. All, however, were of the Chinese race. The society had appointed as agents in China, five Chinese persons, no one of whom was an American citizen. It had acquired land in China and desired protection as an American missionary society. Mr. Adee (referring to a previous instruction of the Department) declared: "The Department is of the opinion that the . . . Society, as it represents itself in China, does not seem to represent sufficient American interests to entitle it to the protection of this Government, nor does it seem to fall within the spirit of the provisions of the treaties with regard to the privileges of American missionary societies. The Department deems it advisable, therefore, to require more convincing proof of the citizenship of the incorporators of the society and of the persons at present holding the controlling interest therein. And further, in view of the actual situation in China, it is deemed desirable to require the American missionary societies to employ American citizens (not necessarily Caucasians) as their principal and responsible agents in China if they wish to obtain American protection."

See also Mr. Hughes, Secy. of State, to the Consul General at Shanghai, March 25, 1922, Hackworth, Dig., III, 428; also same to same, Dec. 13, 1924, *id.*, 428, footnote.

[4] Thus Article I of the General Claims Convention between the United States and Mexico, of September 8, 1923, made provision for the adjustment of claims against Mexico "of citizens of the United States, whether corporations, companies, associations, partnerships or individuals," likewise of claims against the United States "by citizens of Mexico, whether corporations, companies, associations, partnerships or individuals." (U. S. Treaty Vol. IV, 4441.) See also Article I of the Special Claims Convention between the United States and Mexico, of September 10, 1923, *id.*, 4445.

[5] See William E. Fuller, Special Report on work of Spanish Treaty Claims Commission, Dept. of Justice, 1907, 28–30, respecting Art. VII of the treaty of peace between the United States and Spain of Dec. 10, 1898. Also discussion in E. M. Borchard, Diplomatic Protection, §§ 281–282.

shares in the domestic corporation.[6] In such a situation the question arises concerning the method by which a claims commission may cause its award to be responsive to the contractual design. If, for example, twenty-five per cent of the shares of an American corporation were owned by American nationals, it might be possible for the commission to enter a judgment in favor of the corporation for twenty-five per cent of its total loss, subject to the condition that the amount awarded should enure solely to the benefit of such American shareholders. Obviously, terms of payment may be so regulated by the provisions of an award as to prevent, through the medium of the claimant State or the agency of the corporation itself, pecuniary benefits from reaching those sought to be excluded therefrom.[7] Strongest considerations must inspire the suggestion that the design of contracting States in this regard be given more definite expression in claims conventions yet to be concluded than has heretofore been apparent.

*(b)*

§ 279. **Interposition in Behalf of Nationals Interested in a Foreign Corporation.** The solution of the question whether a State may reasonably interpose to protect the interests of its nationals who are shareholders or bondholders of a corporation incorporated in a foreign State appears, according to American opinion, not to be necessarily tested by any single theory respecting the nationality of a corporation. The conflict of opinion between the publicists of America and England on the one side, and those of continental Europe on

[6] Section 5 of the Joint Resolution of Congress of July 2, 1921, which was incorporated in the treaty restoring friendly relations with Germany, of August 25, 1921, made reference to the terms of the retention by the United States of public and private property, both German and Austro-Hungarian, "until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations. . . ." (Treaty Vol., III, 2596, 2597.) The foregoing language suggests that as the contracting parties referred to the interests of American nationals in American corporations through ownership of shares of stock therein, in the same terms in which reference was made to the interests of those nationals in German, or Austro-Hungarian corporations, the treaty somewhat narrowly prescribed the limits of the jurisdiction of the claims commission to be established in pursuance of it. It is not understood that there was contentious litigation on this point before the Mixed Claims Commission between the United States and Germany, established under the agreement with Germany, of August 10, 1922. (Treaty Vol., III, 2601.) The United States did not press for a final award to cover the total loss of an American corporation where only a small portion of its shares proved to be owned by American nationals. In the few cases where such a situation arose, the agents of the opposing States were able to reach an agreement, and awards in harmony therewith were handed down which were designed to cover and enure solely to the benefit of the minority American interests concerned.

See in this connection, decision of Parker, Umpire, May 25, 1925, Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions, 324–325.

[7] It is also possible to provide through a claims convention for an allotment to the claimant by the domestic corporation of his portion of the loss or damage suffered by it. It will be observed that the allotment method was applied in the General Claims Convention between the United States and Mexico, of September 8, 1923, as a means of providing appropriate treatment for claimants sustaining losses through damages suffered by foreign corporations in which they were interested. (Art. I, U. S. Treaty Vol. IV, 4441.)

the other, as to the correct basis of nationality,[1] although persistent and doubtless illuminating, has not served to convince statesmen that any technical rule should deter them from looking behind the corporate entity when the *bona fide* and substantial interests of their countrymen in foreign territory have required protection or governmental representation.

The Department of State has not infrequently been confronted with the general problem. Mr. Seward, as Secretary of State in 1866, in respect to the case of the *Antioquia*, seemed to deny the propriety of interposition in behalf of American shareholders in a foreign corporation.[2] In 1884, Mr. Frelinghuysen, Secretary of State, appeared to share his view.[3] Later opinions of the Department of State, manifested in the case of the Delagoa Bay Railway, and in that of the Salvador Commercial Company, were, however, to the effect that certain circumstances might arise where interposition became justifiable.

The case of the Delagoa Bay Railway related to a railway belonging to a Portuguese corporation of which practically the entire stock and bonds had been owned by one MacMurdo, an American concessionaire, who had assigned the same to an English corporation, receiving in exchange its entire issue of stock and an undertaking to pay him a lump sum. The English company thereupon issued bonds in order to pay that sum, as well as to build the railway concerned. Following a controversy as to the extension of the line, the Portuguese Government in 1899 seized the railway and cancelled the concession. Both the United States and Great Britain protested. Notwithstanding the contention of Portugal that it could only recognize the Portuguese company which had the power of appealing for protection to the law of Portugal, that State finally agreed, in 1891, to refer to arbitration the amount of compensation due to the American and British claimants as a consequence of the rescission of the concession of the railway and the taking possession of its property. There was an award of damages.[4] In one sense the agreement to arbitrate was more important than the decision of the tribunal. The former was a yielding to the assertion by the United States and Great Britain of a right to interpose in behalf of their nationals interested in a Portuguese corporation. The latter was a determination of the extent of the harm done to those nationals through the wrongful conduct of the territorial sovereign. The decision itself is, therefore, without value as a judicial precedent respecting the propriety of interposition.

§ 279. [1] Attention is called to the thorough discussion of the nationality of corporations and the diversity of the opinions still prevailing, contained in E. M. Borchard, Diplomatic Protection, §§ 277–282.

[2] See communication to Mr. Burton, Minister to Colombia, April 27, 1866, Dip. Cor. 1866, III, 522, Moore, Dig., VI, 644. It should be noted that it appeared from this despatch that there was abundant reason why interposition should be withheld apart from the circumstance that the corporation was a foreign one, even though some of its stockholders were American citizens.

[3] Communication to Mr. Phelps, Minister to Peru, Dec. 6, 1884, MS. Inst. Peru, XVII, 101, Moore, Dig., VI, 646. See, also, *dictum* of Bertinatti, Umpire, in the Accessory Transit Co. Case, United States-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, II, 1562.

[4] Concerning the case of the Delagoa Bay Railway, see Moore, Arbitrations, 1865–1899; Moore, Dig., VI, 647–649; For. Rel. 1900, 845–849, 903–904. Decision and final award of March 29, 1900. *Cf.*, also, Ralston, revised ed., 150–151.

In the claim of the Salvador Commercial Company against Salvador, it appeared that that corporation, incorporated in California, together with certain American citizens were the principal owners of a Salvadorean corporation styled "El Triunfo Company." The practical destruction or cancellation of the franchise of the latter by arbitrary and illegal action on the part of the Salvadorean Government resulted in interposition by the United States. According to the terms of a protocol of an agreement to arbitrate, of December 19, 1901, the issue presented was whether any liability rested upon the respondent State with respect to the Salvador Commercial Company or to any American citizens.[5] Two arbitrators, constituting a majority of the court, concluded that the action of Salvador illegally directed against a domestic corporation served to paralyze the efforts of American shareholders to save it, and also to despoil them of their interests in the enterprise. These arbitrators purposely refrained from discussing in their opinion the right of the United States to make reclamation for the American shareholders for the reason, they declared, "that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration." [6] As that question was not presented to the tribunal in the case relied upon, it is believed that the foregoing language weakens the value of the opinion of the arbitrators in the Salvadorean case, as to the right of interposition.[7]

§ 280. **The Same.** At the present time the Department of State would probably not be reluctant to interpose in behalf of American shareholders or bondholders, should the foreign State of incorporation irreparably injure their interests through illegal conduct, and should there be offered no reasonable means of obtaining redress through domestic channels. The decision as to interposition might, however, in the particular case depend upon the extent of the American interests involved. Thus it might be regarded as essential that, as measured by the number of individuals concerned, or the amount of capital invested, the American interests should represent a substantial portion of the stock of the corporation, or of its bonded indebtedness. It should be noted that in the course of a memorandum from the Department of State, filed with the British Foreign Office in February, 1925, in behalf of the claim of a certain American corporation against Great Britain, it was declared:

[5] For. Rel. 1902, 857. Concerning the Salvadorean case generally, see For. Rel. 1902, 838–873, embracing opinion of W. L. Penfield, Solicitor of the Dept. of State, Award of the Arbitrators of May 8, 1902, and separate opinion of same date of Sir Henry Strong and Hon. Don M. Dickinson, constituting a majority of the tribunal; also Moore, Dig., VI, 649–651.

[6] For. Rel. 1902, 859, 873, Moore, Dig., VI, 651.

[7] *Compare* opinion of Plumley, Umpire, in the Baasch & Römer Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 906, 909–910, where it was declared that the Commission had no jurisdiction over the claim of the liquidators of a firm, three quarters of whose members were Dutch, which held stock to the amount of 26,800 bolivars in a Venezuelan corporation of which the paid-up capital was 240,000 bolivars. The claim was based upon the destruction of the plant of the latter by troops in command of General Freites. The learned Umpire cited P. Arminjon, "*Nationalité des personnes morales*," in *Rev. Droit Int., 2 sér.*, IV, 381–440. See, also, Opinion of Paúl, Commissioner, Kunhardt & Co. Case, American-Venezuelan Commission, 1903, Ralston's Report, 63, 70; Andor Jacobi, "*La condition juridique des sociétés anonymes étrangères*," Int. Law Association, 27th Conference, *Proceedings*, 368, 379.

> Having what is believed to be a solid legal foundation, this Government cannot admit that the fact that the Romano-Americana Company (which is wholly owned by the Standard Oil Company of New Jersey) is a Roumanian corporation has any bearing on the question of the liability of the British Government. The views of Lord Salisbury expressed September 10, 1889, with respect to the Delagoa Bay Railway case are in harmony with the view that the State whose nationals are the owners of the shares of a foreign corporation may interpose in their behalf in case the corporation suffers wrong at the hands of a foreign State when those nationals have no remedy except through the intervention of their own Government. . . . In a word, the Roumanian corporate garb of the American interest did not free the British Government from any obligation to make reparation which it would normally have owed to any neutral national doing business in Roumania. To such a national there long engaged in profitable enterprise involving the use and development of immovable property, the foreign belligerent destroyer of that property owed a distinct obligation to make reparation for the loss which it occasioned.[1]

In the event of arbitration before an international claims commission the problem is not likely to arise whether the claimant State may properly espouse the cause of its nationals by reason of their ownership of the shares or securities of a foreign corporation (possibly incorporated under the laws of the respondent State). The issue, if there be one, is more likely to concern the question whether it was sought to confer jurisdiction upon the commission to pass upon such claims in consequence of an agreement for the arbitration of "all claims owned by citizens" of one of the contracting parties.[2] Some fairly recent conventions concluded by the United States have, however, dealt with the matter in definite terms. Thus the treaty restoring friendly relations with Germany, of August 25, 1921, made reference to claims of American nationals "through the ownership of shares of stock in German, Austro-Hungarian, American or other corpora-

§ 280. [1] For. Rel. 1926, II, 316, 318. It should be noted that in 1928, the claim was pressed against the Government of Roumania on whose soil there had been destruction of the property of the Roumanian corporation. Settlement on a substantial basis by the Roumanian Government was effected in 1929. See Whiteman, Damages, II, 1430–1431.

[2] In the case of Kunhardt & Co., American-Venezuelan Commission, 1903, Bainbridge, Commissioner, declared in the course of his opinion that "While the property of a corporation *in esse* belongs not to the stockholders individually or collectively, but to the corporation itself, it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to the real and personal property of the corporation, as well as to its rights of contract and choses in action, are not destroyed by dissolution or liquidation. . . . Messrs. Kunhardt & Co., as citizens of the United States and the equitable owners of their proportionate share in the property of the dissolved corporation, have a standing before this Commission to make claim for indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession. . . . The value of the corporate shares and the extent of a shareholder's interest in the corporate property are absolutely dependent upon the relation which the assets of the corporation bear to its liabilities." Ralston's Report, 63. 67, and 68.

See, in this connection, case of *Société anonyme du Charbonnage* Frédéric Henri, T.A.M., I (1922), 422; case of *Régie générale de Chemins de fer et Travaux publics et Cie des Chemins de fer Jonction Salonique-Constantinople,* T.A.M., III (1924), 954; case of *La Suédoise Grammont,* T.A.M., III (1924), 570.

tions."[3] The General Claims Convention with Mexico, of September 8, 1923, included in the categories of claims for adjudication those "for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to."[4]

The terms of the foregoing as well as of numerous other claims conventions testify to the existence of a practice acknowledging the propriety of interposition for cause in behalf of nationals interested through ownership of stock or the securities of a corporation created under the laws of a foreign State.[5] The reasonableness of such action is attributable to the closeness of the relationship between a State and its nationals whose pecuniary interests in the foreign corporation are adversely affected by conduct of which complaint is made.

It is not surprising that in 1938, His Majesty's Government in the United Kingdom, in correspondence with the Mexican Government, asserted the right to interpose in behalf of the large majority of shareholders of a Mexican corporation who were of British nationality, when it appeared that that majority were the ultimate sufferers from the action of the Mexican Government in expropriating, in what was regarded as an arbitrary manner, property belonging to the corporation.[6] The soundness of this assertion was vigorously challenged by the Mexican Government.[7]

[3] Treaty Vol. III, 2596, 2597. Also Article I of Claims Agreement with Germany, of Aug. 10, 1922, *id.*, 2601; Article I of Claims Agreement with Austria and Hungary, of November 26, 1924, U. S. Treaty Vol. IV, 3928.

"Under the Treaty of Berlin Germany is obligated to compensate the claimants as American shareholders in British corporations to the extent of the losses if any they have suffered as such shareholders due to the act of Germany in destroying the seven ships owned by such corporations." (Parker, Umpire, in decision of April 21, 1926, in case of Standard Oil Company of New York *v.* Germany, Consolidated Edition of Decisions and Opinions, Mixed Claims Commission, United States and Germany, 1926, 660, 669.)

See also Parker, Umpire, in Administrative Decision No. VII, May 25, 1925, *id.*, Consolidated Edition of Decisions and Opinions, 1925, 308, 325.

[4] Art. I, U. S. Treaty Vol. IV, 4441.

See, also, Art. I of claims convention between the United States and Panama of July 28, 1926, U. S. Treaty Vol. IV, 4547.

[5] See, for example, Art. 3 of British-Mexican Claims Convention of Nov. 19, 1926, British Treaty Series No. 11 (1928), Cmd. 3085; also, Art. 3 of Claims Convention between the same parties of Dec. 5, 1930, British Treaty Series No. 22 (1931), Cmd. 3846.

[6] British White Paper, Mexico No. 1 (1938), British note of April 21, 1938, document No. 3, in the course of which it was said: "If the doctrine were admitted that a Government can first make the operation of Foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad."

[7] See Mexican notes of April 12, 1938, and April 26, 1938, *id.*, documents No. 2 and No. 4, respectively.

f

## Grounds of Interposition

(1)

**§ 281. "Denial of Justice." Exhaustion of Local Remedies.** Before a State prefers a claim in behalf of an aggrieved national it should appear from the available evidence that the foreign State upon which the demand for redress is contemplated has in all probability been guilty of a breach of an international obligation in its treatment of the national or of his property. Such conduct may perhaps, in a broad sense, be referred to as a "denial of justice," at least if that phrase is fairly to be regarded as synonymous with any form of internationally illegal conduct. If it is not to be so regarded, the value of the phrase for purposes of description is greatly diminished, unless it be employed to refer to cases within a well-defined category of which the limits are generally understood and accepted. As a matter of fact, the words "denial of justice" have crept into the nomenclature of international law clothed with a variety of meanings. "Few things have more seriously compromised the development of a satisfactory theory of denial of justice than the uncertainty which has long attended the meaning of the term itself." [1] Diplomatic correspondence and conventional arrangements, as well as the utterances of international tribunals, bear witness to the diversity of the significations. At times the words are said to refer to the delinquencies attributable to the acts of any governmental department.[2] At others, they are em-

§ 281. [1] A. V. Freeman, International Responsibility for Denial of Justice, 84; also *id.*, 2, where reference is made to the "absence of substantial agreement on the terminological significance to be given to the phrase 'denial of justice.'"

[2] "We are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We can not overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise." (Award in Robert E. Brown Case, American and British Claims Arbitration, special agreement of Aug. 18, 1910, Nielsen's Report, 187, 198.)

"I think it is useful and proper to apply the term 'denial of justice' in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of the government. I consider that a denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention." (Separate opinion of Nielsen, Commissioner, in the L. F. H. Neer Case, Opinions of Commissioners under convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 71, 77–78, *citing* Sir Henry Strong and Mr. Don M. Dickinson in the "El Triunfo" Case, For. Rel., 1902, 870.

"They [the Commission] do not concur in the view that the judicial authorities can only be the ones, in other words, that only the courts can be made responsible for international delinquency of this description. They are undoubtedly aware that denial of justice or its undue delay will, in a majority of cases, be an act or an omission of a tribunal, but cases in which administrative, or rather non-judicial authorities, can be blamed for such acts or omissions are equally existent.

"If an alien is arrested by the police on a false charge, his strongest desire will be to be put upon his trial without delay, in order to prove his innocence. But if the authorities in whose power he happens to be prevent him from being led before a court, if they bar him access to a tribunal, this must certainly be characterized as a denial of justice or as an undue delay of justice, the responsibility for which does not rest with the courts or with any judicial authority, but with the non-judicial officials, who deprived the alien of his liberty.

"If an alien, having won a lawsuit and being desirous of seeing the judgment executed, addresses himself to those non-judicial authorities upon whom, in most countries, execution of the judgments of civil courts is incumbent, and they either refuse to assist him, or post-

ployed to point to illegal conduct attributable to, or closely associated with, the operation of the judicial department.[3] At still others, they are used in a narrower sense to refer to the failure of a State to afford a means of redress by judicial process to the individual with respect to whom it has already failed to discharge an international obligation created for his benefit; and the assertion is made that no denial of justice occurs until the aggrieved alien has exhausted his judicial remedies, and the territorial sovereign charged with fault has again been found wanting in consequence of the insufficiency or inadequacy of its judicial system.[4] From a phrase thus variously construed, and of an essentially descriptive character, it has been sought at times to point to bases of international responsibility as well as to grounds for diplomatic interposition. The result has been a failure, as is likely to be the case whenever a descriptive phrase of diverse significations is employed to indicate tests of the propriety of State conduct.[5]

---

pone their action indefinitely, the alien in question is certainly entitled to complain of denial or undue delay of justice, although the responsibility cannot be laid at the door of the tribunal that sustained his action.

"If a foreigner, in the pursuit of his private interests, needs a document, which can only be delivered by one of the administrative authorities in the country where he transacts his affairs, and if this document is improperly withheld or delivered too late to be of any use, this will again constitute the same breach of international law, without any judicial authority being blameable.

"The Commission deem that these examples, which could be supplemented by many others, show that non-judicial authorities also can be guilty of a denial or undue delay of justice, and if it could, in the case now before them, be shown that such authorities had been guilty of that international delinquency, they would not hesitate to declare themselves competent in spite of the claimants having agreed to a Calvo Clause." (The Interoceanic Railway of Mexico Case, Further Decisions and Opinions of the Commissioners under conventions of Nov. 19, 1926, and Dec. 5, 1930, Great Britain and Mexico, 118, 126–127.)

See excellent statement by Eugene Wambaugh, *Proceedings*, Am. Soc. Int. L. (1910), IV, 126, 128–129; Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, No. 134, June 23, 1886, MS. Inst. France, XXI, 330, Moore, Dig., VI, 266.

[3] "Nations are responsible to those of strangers, under the conditions above enumerated, *first*, for denials of justice; and *second*, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous." (Cotesworth & Powell Case, British-Colombian convention of Dec. 14, 1872, Moore, Arbitrations, II, 2050, 2083.)

"If 'denial of justice' covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, 'denial of justice' is applied to acts of executive and legislative authorities as well as to acts of judicial authorities — as is often being done — there would exist no international wrong which would not be covered by the phrase 'denial of justice,' and the expression would lose its value as a technical distinction. . . . Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man." (Van Vollenhoven, Presiding Commissioner, in B. E. Chattin Case, Opinions of Commissioners under convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 422, 427.)

"Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice." (Art. 9 of Harvard Draft Code on Responsibility of States, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 134.)

[4] See, for example, position taken by Mexico in the case of the *Rebecca*, shown especially in communication of Mr. Mariscal, Minister of Foreign Affairs, to Mr. Jackson, American Minister, April 2, 1886, H. Ex. Doc. No. 328, 51 Cong. 41, Moore, Dig., VI, 668.

[5] See The Doctrine of *Uti Possidetis, supra*, § 150A.

It may be doubted, therefore, whether the words "denial of justice" serve a useful purpose in enunciations of the requirements of international law.[6] The problem confronting States charged with delinquency is to determine whether particular forms of conduct constitute a breach of international law, and whether, also, any proffered modes of redress for the violation of that law should defer diplomatic interposition. In the solution of that problem it is unimportant how any acts of the State charged with delinquency are labeled or described. Moreover, confusion of thought is bound to prevail if it is sought to derive from, or base upon, a mere label or description a rule of law marking the absence or existence or scope of an international obligation.

As the preferring of a claim implies wrongfulness of action or conduct on the part of public authority, the State demanding redress must always be prepared to show that the territorial sovereign is responsible for the acts of those whose conduct is the source of grievance. The inquiry as to national responsibility is distinct from that respecting the propriety of interposition. The distinction has not, however, always been apparent. It has been asserted in substance, that the responsibility of the territorial sovereign for the acts of a particular official is dependent upon the steps taken by the aggrieved individual to exhaust his judicial remedies.[7] This contention is reasonable when the act complained of is not in itself internationally illegal.[8] When, however, an agent of a State acting within the scope of his authority commits an internationally illegal act with respect to an alien, there is an international delinquency on the part of the State, and its responsibility instantly comes into being. This consequence is from time to time receiving the fresh acknowledgement of international tribunals. The decision of Dr. Bagge, on May 9, 1934, as Arbitrator in the Anglo-Finnish Arbitration concerning the Finnish Ships,[9] and the judgment of the Permanent Court of Inter-

[6] See Oliver J. Lissitzyn, "The Meaning of the Term Denial of Justice in International Law," *Am. J.*, XXX, 632; F. S. Dunn, The Protection of Nationals, 146–156; Constantin Th. Eustathiadès, *La Responsabilité internationale de l'État pour les Actes des Organes judiciaires et le Problème du Déni de Justice en Droit International*, with preface by M. Nicolas Politis, Paris, 1936; G. G Fitzmaurice, "The Meaning of the Term 'Denial of Justice,'" *Brit. Y.B.*, XIII, 1932, 93; Eagleton, Responsibility of States, § 34; same author, "*L'Epuisement des Recours internes et le Déni de Justice, d'après certaines Décisions récentes*," *Rev. Droit Int.*, XVI, 3 *sér.*, 504; Charles De Visscher, "*Le Déni de Justice en Droit International*," *Recueil des Cours*, 1935, LII, 369.

See also H. W. Spiegel, "Origin and Development of Denial of Justice," *Am. J.*, XXXII, 63, where that writer declares (79–80): "The whole theory of international responsibility is based on a standard varying according to several circumstances of the act in question. The term 'denial of justice' does not convey the innate characteristics of that standard. . . . The term being an offspring of the Law of Nature, can hardly be defined in a purely rationalistic way, and it is, therefore, particularly cherished by those who hope to derive benefit from its obscurity." *Cf.* A. W. Freeman, The International Responsibility of States for Denial of Justice, New York, 1938.

[7] See, for example, Thornton, Umpire, in Chas. B. Smith Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3146.

[8] It frequently happens that a claim finds its origin in acts for the commission of which the territorial sovereign is not to be held internationally at fault, as for example, where the actors are private individuals, for whose conduct the State may not be responsible. In such a situation no ground for interposition arises until, through failing in its duties of jurisdiction, as by preventing the claimant from having access to the courts, the territorial sovereign is itself at fault.

[9] See decision, under convention of Sept. 30, 1932, British Foreign Office Publication, 1934, where it was declared: "Here the alleged fact, creating liability under international law, is an

national Justice of June 14, 1938, in the case concerning Phosphates in Morocco (Preliminary Objections), the latter relating to the effect of the breach of a treaty,[10] are illustrative. Responsibility signifies that there is imposed upon the territorial sovereign the duty either to afford the victim a means of obtaining redress by some reasonable process, or in lieu thereof, to make reparation upon the demand of the State of which the victim is a national. The propriety of interposition would, therefore, seem to depend upon which alternative the delinquent State has chosen. Thus, in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility; the latter to justify interposition.[11]

The foregoing distinction is believed to be of great importance. It serves to bring home to delinquent States a sense of duty to right the wrongs which they have committed as soon as they have been committed, and thus to accentuate the practical value of an immediate choice of procedure. In that immediate choice

---

initial breach of international law, consisting in the alleged taking and using of the Finnish ships without paying for it.

"In this case the local remedies rule serves only the function explained by the British Government (British Memorial, No. 49, note 32) and accepted by the Finnish Government (Finnish Memorial, No. 23, and at the oral hearing, 4.56) to the effect that the respondent State is entitled, first of all, to discharge its responsibility by doing justice in its own way, but also to the investigation and adjudication of its own tribunals upon the questions of law and fact which the claim involves, and then on the basis of this adjudication to appreciate its international responsibility and to meet or reject the claim accordingly." (p. 24.) Declares A. P. Fachiri in relation to the decision: "It is an authority for the view that international responsibility may be incurred by a State in respect of injuries caused to private foreigners even before they have resorted to, or exhausted, their local remedies. Such responsibility is incurred where, but only where, the matter complained of, being the direct act of the government, itself constitutes a breach of international law. But although the initial breach of international law gives rise to international responsibility an international claim by the government of the injured individuals does not lie unless and until they have exhausted their local remedies, if any." ("The Local Remedies Rule in the Light of the Finnish Ships Arbitration," *Brit. Y.B.*, 1936, 19, 33.) See also A. V. Freeman, Responsibility of States for Denial of Justice, 441–446.

[10] Declared the Court: "In its application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law —a definitive act which would, by itself directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it." (*Publications*, Permanent Court of International Justice, Series A/B, No. 74, 28.)

See also in this connection, Mr. Lansing, Secy. of State, to the American Chargé d'Affaires in Mexico, Nov. 29, 1919, in relation to the case of William O. Jenkins, American Consular Agent at Puebla, For. Rel. 1919, Vol. II, 586, 587.

[11] "In other words where there has been an original wrong on the part of the State followed by a failure to redress it, amounting to a denial of justice, the denial may be a necessary condition of intervention, but it is not the ground of it." (G. G. Fitzmaurice, in *Brit. Y.B.*, XIII, 1932, 93, 96.)

*Cf. contra,* E. M. Borchard, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* I, 223, 233–239.

the aggrieved State has a solid interest. It is to its advantage that the delinquent State not only perceive the illegal aspect of its own conduct, but also, in consequence of that perception, be stimulated to take early steps to ward off diplomatic interposition. In a word, consciousness on the part of the wrong-doer of the time when its responsibility accrues, and of the fact that that time is coincident with its commission of illegal acts is a matter of international concern because it must breed alertness to respond through domestic agencies to international responsibilities, and thus to minimize occasions for diplomatic reclamation. Such a consciousness is, moreover, calculated to dissuade the wrong-doer from exposing itself through dilatory tactics to the danger of having its conduct ultimately branded as internationally illegal by an arbitral tribunal charged with the task of ascertaining responsibility and awarding reparation.[12]

It is not here sought to indicate what forms of conduct manifest a violation of international law in public contacts with alien life and property. The point is merely emphasized that the acts of a State frequently exemplify such a violation, and that when they do, the obligation to make reparation immediately springs into being.[13] Foreign offices as well as arbitral tribunals have borne ample testimony to the fact.[14] The Government of the United States has not been disposed to take a different stand. No intimation that it has done so is to be derived from its readiness on appropriate occasion to respect the rule in relation to the exhaustion of local remedies.[15] Advocacy of an opposing view has at times seem-

[12] "Agree with thine adversary quickly, whiles thou art in the way with him; lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison. Verily I say unto thee, Thou shalt by no means come out thence, till thou hast paid the uttermost farthing." (St. Matthew V, 25–26.)

[13] See Aspects of the Responsibility of States, *supra*, § 269A.

[14] See argument of Mr. Bayard, Secy. of State, in communication to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 453–454, Moore, Dig., VI, 277.

Declared the Government of the United States in its communication of May 22, 1929, to the Preparatory Committee for the Codification Conference of 1930 at The Hague: "Where the acts or omissions are contrary to international obligations of the State or tainted with illegality or marked by culpable negligence, frequently the State has been held immediately responsible." (League of Nations Doc. No. C.75(a).M.69(a).1929.V, 15.)

See Robert E. Brown Case, American and British Claims Arbitration, special agreement, Aug. 18, 1910, Nielsen's Report, 187, 198–199; Interoceanic Railway of Mexico Case, Further Decisions and Opinions of Commissioners under conventions of Nov. 19, 1926, and Dec. 5, 1930, Great Britain and Mexico, 118, 126–127; also Nielsen, Commissioner, in Gertrude P. Massey Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 228, 234.

According to Art. XII of Resolution adopted by the Institute of International Law at Lausanne in 1927, on the International Responsibility of States by Reason of Damages Caused on Their Territories to the Persons and Property of Foreigners: "No demand for reparation can be made by a State so long as the aggrieved individual has at his disposal an efficacious and sufficient means of redress in order to obtain the treatment due him. Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages." (*Annuaire*, XXXIII, Vol. III, 334.)

"If a State promulgates a law or ordinance containing a clause or clauses contrary to the rules of international law, it incurs international responsibility as soon as the application of such law or ordinance injures the rights of other States." (Communication of Switzerland to Preparatory Committee, Conference for the Codification of International Law, Jan. 25, 1929, *id.*, 237.)

[15] At the Hague Conference of 1930, the Belgian delegate (by way of substitution for the final sentence of Basis No. 27 from the Preparatory Committee) proposed for acceptance the following words: "This responsibility may, in principle, be invoked only after the parties concerned have exhausted the remedies allowed them under the internal law." By way of

ingly reflected a political rather than a juridical temper, attributable to fear lest close respect for the requirements of logic might beget a tendency to enlarge the responsibility of States in cases where the existing law did not point to the commission of internationally illegal acts.[16] Such advocacy has not, however, weakened the significance of the mass of evidence from the lips of arbitrators and publicists testifying with increasing frequency that in numerous and varied situations the initial acts of States committed by differing agencies may be internationally illegal and productive of an instant obligation to make redress in an appropriate way. In certain fairly recent cases in which the conduct of the United States has been deemed to be of such a character, with resulting injury to foreign life or property, it seems to have been taken for granted by the adjudicating bodies that responsibility not only grew out of, but also was the immediate consequence of acts committed in its behalf.[17]

---

amendment to this proposal, the American delegation offered the following: "Where the foreigner has a remedy open to him in the courts of the State (which term includes administrative courts), international responsibility cannot ordinarily be invoked until the local remedy has been exhausted and a denial of justice or other breach of international law established." (Acts of the Conference for the Codification of International Law, Vol. IV, Minutes of Third Committee, Responsibility of States, League of Nations Doc. No. C.351(c). M.145(c).1930.V, 203, and 233, respectively.) That the American proposal did not necessarily imply that international responsibility could not grow out of an initial violation of international law on the part of a State charged with delinquency, and had reference merely to conditions of interposition through the diplomatic channel, is revealed by the statement of the American delegate, Mr. Hackworth, on March 22, 1930, in explanation of the proposal. He said in part: "In order, however, to accommodate the two schools of thought — the one that responsibility arises when the wrongful act is committed and that the exhaustion of local remedies is merely a matter of procedure in satisfying the obligation of the State, which must take precedence over resort to the diplomatic channel, and the other that international responsibility does not arise until the local remedies have been exhausted — the amendment suggested by the delegation of the United States declares that international responsibility cannot ordinarily be 'invoked' until the local remedies have been exhausted. This, we believe, is an entirely accurate statement, from whatever point of view it may be considered. It is not necessary for us to determine in these meetings the question when State responsibility arises, but it is rather for us to indicate when it is proper for the Government of the foreigner to interpose on his behalf by a formal claim." (*Id.*, 73–74.)

Concerning other aspects of the work of the Third Committee, see Hackworth, Dig., III, 637–639, and documents there cited.

[16] See Green H. Hackworth, "Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners (The Hague Conference for the Codification of International Law)," *Am. J.*, XXIV, 500; also, E. M. Borchard, " 'Responsibility of States,' at the Hague Codification Conference," *id.*, 517.

[17] Declared Mr. Justice Van Devanter, and Sir Lyman Poore Duff, on Jan. 5, 1935, in their Joint Final Report as Commissioners appointed to consider the claim of Canada against the United States in respect to the ship "I'm Alone": "By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law. . . . The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly." ("I'm Alone" Case, Publications, Dept. of State, Arbitration Series No. 2, Part 7, p. 3.)

"We conclude, therefore, that the *Zeelandia* was entitled to clearance under the laws of the United States as well as under the law of nations; that her detention was not justified by the provisions of the espionage act or the trading-with-the-enemy act; that damage was caused to the plaintiff by the detention, for which the United States, under clear principles of international law, must assume responsibility; that the special jurisdictional act by virtue of which this case is heard, authorizes, indeed, compels, this court to give effect to the usages,

Whenever a State is charged with internationally illegal conduct in respect to an alien, the inquiry presents itself: Is there evidence of a principle of law recognized in the practice of nations, making the exhaustion by the victim of local remedies capable of affording complete redress, a condition precedent to just interposition in his behalf?

If the answer be affirmative, numerous instances of interposition may need explanation as limitations of the applicability of the rule; and the operation of it will doubtless appear to exclude, at the present time, a large variety of cases. If the answer be negative, almost all instances of interposition must be attributed to the domestic policy of the aggrieved State, and its freedom of action be regarded as unfettered, except in some irreconcilable situations. A casual glance at certain declarations which have emanated from the Department of State as well as from other foreign offices, might lead to the conclusion that such an answer accurately portrays the existing practice of nations. Such declarations are, however, almost invariably *dicta,* in the sense that they have found expression (and usually the most emphatic expression) on occasions when interposition was a necessity by reason of the impossibility of securing redress by any other process, and when, therefore, the existence of the principle suggested was not at issue.[18] Inasmuch as the reason requiring the exhaustion of local remedies in certain groups of cases is capable of universal application, one may be led to believe that the preferment of claims through the diplomatic channel is due primarily to defects in the machinery of the government of delinquent States rather than to any other consideration.

§ 282. **The Same.** The principal cause of the frequency of cases where the aggrieved alien is not in fact obliged to exhaust his local remedies prior to interposition, is the failure of the State charged with wrongdoing to make provision whereby the nature of its own conduct may be rigidly scrutinized, and redress accorded when that conduct is found to be at fault. It is because justice is not to be had in any domestic forum, rather than on account of the nature of the acts giving rise to complaint that interposition is oftentimes the immediate consequence of national delinquency.[1] Where, on the other hand, the territorial sovereign offers ample means of obtaining justice locally by judicial process, the reason for interposition disappears, and the detriment to the international society through unnecessary and, therefore, premature causation of a diplomatic controversy suffices to establish a rule of practice. The existence of such a rule, however obscured by the frequency of occasions when it may be fairly disregarded, is shown not only by its applicability to almost every situation where a State has established adequate machinery for righting its own wrongs, but also by the increasing tendency of States to insist upon its observance.[2] It has, moreover,

---

customs, and sanctions of such provisions of the law of nations; further, that in equity and good conscience the United States should be held accountable to the plaintiff for the damage which undoubtedly accrued to the owners of the *Zeelandia* by virtue of her detention." (Royal Holland Lloyd *v.* United States, 73 Ct. Cls. 722, 744–745.)

[18] See, for example, Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 179, Jan. 19, 1888, MS. Inst. Peru, XVII, 313, Moore, Dig., VI, 254.

§ 282. [1] See *infra,* § 283.

[2] The Marquis Saionji, Japanese Minister of Foreign Affairs, in a communication addressed

recently received impressive recognition by the Permanent Court of International Justice.[3] The United States generally respects the rule both in dealing with American claimants and in regulating interposition in their behalf.[4]

The natural growth of this tendency of restraint in the preferring of claims must be largely dependent upon the attitude of each State with respect to its own delinquencies. In proportion to the sincerity of its regret for its own shortcomings there is likely to be manifested a readiness to devise means of affording

---

to Mr. Wilson, American Chargé, April 8, 1906, declared that during the period of consular jurisdiction in Japan, the Government was not infrequently called upon to consider in a diplomatic way questions in respect of which unexhausted judicial remedies existed; that disappointed in the expectation that "this irregular and unusual practice would cease after the system to which it gave birth had come to an end," the Government deemed it necessary to establish by formal notice the change in practice. He said, therefore, that "the Imperial Government will be unable hereafter to regard any contentious matter in respect of which a judicial remedy exists as ripe for diplomatic intervention until such remedy has been completely exhausted and a case justifying such intervention is presented." (For. Rel. 1906, II, 1071.)

See Art. 12 of Resolution of the Institute of International Law on the International Responsibility of States by Reason of Damage Caused on Their Territories to the Persons and Property of Foreigners, adopted at Lausanne in 1927, *Annuaire,* XXXIII, Vol. III, 330, 334; Basis of Discussion No. 27, Conference for the Codification of International Law, Bases of Discussion, III, Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V.139; Resolution on the International Responsibility of the State, adopted by the Seventh International Conference of American States at Montevideo in 1933, Report of the Delegates of the United States of America to the Seventh International Conference of American States, Department of State, Conference Series No. 19, 270.

[3] See judgment of Feb. 28, 1939, in The Panevezys-Saldutiskis Railway Case, Publications, Permanent Court of International Justice, Series A/B, No. 76. See, however, dissenting opinion by Jonkheer van Eysinga, who declared: "In fact, compulsory arbitration, accepted unconditionally, constitutes an exception to the applicability of the local remedies rule." (*Id.,* 30, 37.)

[4] "The Department is not disposed to counsel the Nicaraguan Government to resist demands of European countries through diplomatic channels for the direct settlement of their claims; but if the Nicaraguan Government of its own initiative should decide that European claimants must first exhaust the remedies afforded by the Nicaraguan courts or other local tribunals, including the claims commission, the Department believes that international law and practice furnish ample precedents therefor." (Mr. Knox, Secy. of State, to Mr. Gunther, American Chargé d'Affaires, Nov. 10, 1911, For. Rel. 1911, 643.) Also Mr. Adee, Acting Secy. of State to the American Chargé d'Affaires at Madrid, Oct. 10, 1911, *id.,* 639.

Declared Mr. Knox, Secy. of State, to the American Chargé d'Affaires in Mexico, Aug. 17, 1911: "In view of the rule of international law requiring claimants against a government to resort to local tribunals for remedy in the matter of the wrongs which they allege, the Government of the United States could obviously have no ground to object to the establishment of any appropriate tribunal or the endowing of any existing tribunal with the authority to hear and pass upon claims of American citizens for losses sustained during the recent disturbed conditions in that country [Mexico], providing access to the court is easy and prosecution of the claims before the court is not made unduly onerous. The Government of the United States, therefore, would be inclined in the first instance to refer its citizens to any appropriately constituted tribunal authorized to hear and determine their complaints." (For. Rel. 1912, 939.) See, also, Mr. Wilson, Acting Secy. of State, to Mr. Wilson, American Ambassador, April 8, 1912, *id.,* 961; Mr. Carr, for Mr. Knox, Secy. of State, to Mr. Edwards, American Consul at Ciudad Juárez, April 23, 1912, *id.,* 963.

"Articles 1 and 2 of the Agreement of August 18th, 1910, between the United States and Great Britain, providing for the arbitration of claims, and Article 5 of the Claims Convention of September 8th, 1923, between the United States and Mexico, dispense with the rule that local remedies must first be exhausted before a claim can be brought before the tribunal. These provisions, however, are the results of special agreement between the States and have no bearing on the general principles of international law. U. S. Treaty Vol. III, 2620; U. S. Treaty Series, No. 678." (Communication from the Government of the United States to Preparatory Committee, Conference for Codification of International Law, May 22, 1929, Bases of Discussion, III, Responsibility of States, League of Nations Doc. No. C.75[a].M. 69[a].1929.V, 23.)

local redress. Such regret must, however, be inspired by a sense of the wrongfulness of conduct that international law as such proscribes. In so far as complete redress may prove to be obtainable through domestic channels, cases of interposition may be expected to decrease correspondingly, and instances of delinquency towards aliens to become unproductive of international controversy save when domestic tribunals clothed with the requisite jurisdiction have utterly failed as dispensers of the law of nations.

It is believed to be of highest importance to observe with care the theory of current practices, especially as exemplified by the United States, and to note the circumstances when internationally illegal conduct commonly and reasonably causes interposition, as well as the occasions when the rule demanding the exhaustion of local remedies is regarded as applicable and hence obligatory.

(2)

WHEN LOCAL REMEDIES NEED NOT BE EXHAUSTED

(*a*)

§ 283. **When Means of Redress Are Wanting.** The rule requiring the exhaustion of local remedies prior to interposition is based upon the assumption that "at the time of the injury complained of, there were duly established courts to which resort was open and practically available." [1] Thus, the Permanent Court of International Justice declared in the course of its judgment in the Panevezys-Saldutiskis Railway Case, on February 28, 1939: "There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given." [2] As Dr. Bagge, Arbitrator in the Finnish Ships Case, declared the previous year, "the remedy must be effective and adequate" [3] if the exhaustion of it is to be deemed a condition precedent to diplomatic interposition. When, therefore, the State of an aggrieved national has solid reason to believe that justice is not to be had by any process within the domain of the offending territorial sovereign, interposition does not lack justification, and is to be anticipated.[4] This is true whether the claim arises from

§ 283. [1] The language quoted in the text is that of Mr. Bayard, Secy. of State, in a communication to Mr. Buck, Minister to Peru, No. 104, Nov. 1, 1886, MS. Inst. Peru, XVII, 252, Moore, Dig., VI, 267.

Mr. Knox, Secy. of State, in a communication to the American Ambassador to Mexico, Jan. 18, 1912, For. Rel. 1912, 954, while acknowledging that "under the rules of international law local remedies should be exhausted," declared that the Ambassador was not precluded from "pressing diplomatically" certain specified claims for an early consideration by a local Mexican Claims Commission (which, he stated, "being an administrative rather than a judicial body, apparently may be approached by the Executive without incurring the objection of interference with the judiciary"), or by some other duly constituted body.

[2] Publications, Permanent Court of International Justice, Series A/B, No. 76, 18.

[3] Decision under Anglo-Finnish agreement of Sept. 30, 1932, British Foreign Office publication, 1934, p. 16. See, in this connection, Edwin M. Borchard, in *Am. J.*, XXVIII, 732; A. V. Freeman, International Responsibility of States for Denial of Justice, 423–434.

[4] Mr. Fish, Secy. of State, to Mr. Pile, Minister to Venezuela, May 29, 1873, MS. Inst. Venezuela, II, 228, Moore, Dig., VI, 677; Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Lord Palmerston in the House of Commons, June 25, 1850, on the Case of Don Pacifico, Moore, Dig., VI, 681.

contract or tort. Illustrations have been frequent and varied. Justice has been deemed to be wanting where "it would be absurd to attempt to seek it by judicial process," [5] or where local authorities prevent the claimant from making out his case,[6] or where the courts lack power to denounce the illegality of the acts of another department of the territorial sovereign,[7] or where the invocation of judicial aid imposes a burden on the claimant disproportional to the redress obtainable.[8]

If the existing local remedies may be fairly regarded as insufficient, the individual claimant will not be compelled by his own government to exhaust them. This is true where the courts are deemed unworthy of respect by reason of their known subserviency to the political department, or of their habit of disregarding the local laws or existing treaties, or well-defined principles of international law.[9] Declared Mr. Hackworth, the American delegate, in the Third Committee of the Conference for the Codification of International Law, at The Hague, on March 22, 1930:

> To this general rule [as to the exhaustion of local remedies] there are, however, certain well-recognized exceptions, as, for example, when the courts are notoriously corrupt, where there is amnesty or legislative immunity, where the courts have been superseded by the military or executive power, where the State refuses "either to entertain the complaint at all or to allow the right to be established before its tribunals," and where there are "studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal." Phillimore well states that, where the tribunals of a State are "unable or unwilling to entertain and adjudicate upon the grievances of a foreigner, the ground for interference is fairly laid." [10]

If a complainant State is urged by the government of another charged with wrong-doing to withhold interposition on the ground that a local remedy is

[5] Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 54, Dec. 16, 1873, MS. Inst. Mexico, XIX, 48, Moore, Dig., VI, 975; Case of Pradel, under convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3141; Case of Donoughho, under same convention, *id.*, 3012.

[6] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Lieber, Umpire, in Garrison's Case, under convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3129; opinion of Mr. Frazer, American Commissioner, respecting certain cases before the American and British Claims Commission under treaty of May 8, 1871, Moore, Arbitrations, III, 3154, 3156; Ballistini Case, French-Venezuelan Commission, 1902, Ralston's Report, 1903, 503, 504.

[7] Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 179, Jan. 19, 1888, MS. Inst. Peru, XVII, 313, Moore, Dig., VI, 254.

[8] Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, No. 570, May 17, 1884, For. Rel. 1884, 358, Moore, Dig., VI, 679.

[9] See Promemoria of the German Embassy at Washington, Dec. 11, 1901, respecting conditions in Venezuela, For. Rel. 1901, 192, Moore, Dig., VI, 692; Mr. Everett, Secy. of State, to Mr. Marsh, Minister to Turkey, No. 24, Feb. 5, 1853, Senate Ex. Doc. 9, 33 Cong., 2 Sess., 5, 8, 9, Moore, Dig., VI, 262; Mr. Adee, Acting Secy. of State, to Mr. McKenzie, Minister to Peru, July 9, 1895, MS. Inst. Peru, XVII, 650, Moore, Dig., VI, 691.

Also Prize Courts and Procedure, Discussion between the United States and Great Britain during The World War, *infra*, §§ 894–895.

[10] Acts of the Conference for the Codification of International Law, Vol. IV, Minutes of Third Committee, Responsibility of States, League of Nations Doc. No. C.351(c).M.145(c). 1930.V, 74.

available in a designated court, and thereafter, when attempt is made to invoke its aid, that government proceeds in the course of the adjudication to deny that the tribunal has jurisdiction to pass upon the question involved, the complainant State is believed to be free to accept such denial as proof of the insufficiency of the remedy, and to prosecute the claim through the diplomatic channel.[11]

In theory, the nature of the act giving rise to complaint is not necessarily connected with, or decisive of the value of, the opportunity accorded the individual claimant to obtain redress by local process. In practice, however, the character of the grievance or of the authority to which it is attributable oftentimes appears to be decisive of the respect with which local remedies are regarded by the outside world. Thus the confiscatory breach of a contract committed by the executive department of the territorial sovereign shatters confidence in the local judicial system and encourages interposition.[12] The manifestation of bad faith on the part of the highest responsible officials of one department of a government serves to diminish respect for those in control of any other. Dr. Östen Undén, as Arbitrator in the dispute between Greece and Bulgaria over the application of Article 181 of the Treaty of Neuilly, declared: "The rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or by a member of the government performing his official duties. There rarely exist local remedies against the authorized organs of the State." [13] Possibly the learned arbitrator was endeavoring to point to a situation where a remedy was not likely to exist, rather than to lay down a rule that the commission of acts through the particular agencies which he mentioned sufficed in itself to excuse the claimant from the normal obligation to exhaust local remedies.

Where international delinquency is apparent in the neglect of the authorities of a State to use the means at their disposal to prevent the commission of criminal acts directed against an alien, or to prosecute the actors after the commission of such acts, the victim rarely finds a means of obtaining redress as against such State through domestic channels. This is commonly due to the lack of domestic tribunals clothed with jurisdiction to pass upon the conduct of their sovereign and to award compensatory damages against it.[14] Hence interposition may be the normal consequence of such forms of delinquency. For the same reason, interposition is oftentimes to be anticipated in cases where the local authori-

[11] The Government of the United States on one occasion, to which it is unnecessary to advert, found American claimants, who were litigants in a foreign court at the suggestion of the foreign office of its sovereign, confronted with such an obstacle.

[12] Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 725; Mr. Bayard, Secy. of State, to Mr. Thompson, Mar. 9, 1886, MS. Inst. Hayti, II, 544, Moore, Dig., VI, 704; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 179, Jan. 19, 1888, MS. Inst. Peru, XVII, 313 Moore, Dig., VI, 254.

[13] *Am. J.*, XXVIII, 773, 789.

[14] Glenn's Case, under Convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3138; Case of Zambrano, For. Rel. 1904, 473–482, Moore, Dig., VI, 747; Case of Ruden & Company, before Peruvian Claims Commission, under Convention between the United States and Peru of Dec. 4, 1868, Moore, Arbitrations, II, 1653. Also, Cases of Mob Violence, *infra*, §§ 290–292.

ties of a State prove themselves to be the agencies through which internationally illegal acts are perpetrated as against alien life or property.[15]

It will be seen that at times when an alien has been arrested and is held in custody under circumstances that appear to be at variance with the requirements of international law, interposition ensues, not merely for the purpose of obtaining redress for the consequences of what has taken place, but also to prevent the perpetration of continued and possibly irreparable injury incidental to prolonged detention, which the prisoner, if unaided by his own government might be helpless to prevent.[16] In a word, interposition may prove to be a necessary means of thwarting the further commission of internationally illegal acts directed against the national of the aggrieved State.

(*b*)

§ 284. **When Local Remedies Have Been Superseded.** The rule that an alien must, before seeking the aid of his government, endeavor to obtain redress in the courts, does not apply where the offending government has, by the acts of its proper organ, relieved the party complaining from appealing to the courts.[1] A typical case was that of an American Consul, Mr. Myers, at San Salvador. In 1890, in the course of a revolution, governmental troops violated the American Consulate, destroying property belonging both to the United States and to the Consul, and injuring the person of the latter. After having agreed to pay for the destruction of the property of the United States and of the Consul, the Salvadorean Government declared in substance that the claim could not be regarded as fixed in amount and justifying payment on demand until judicial proceedings appropriate to that end had been had in the local courts. In response, Mr. Blaine, Secretary of State, maintained that the question whether an indemnity was due had been adjusted by the agreement, that the execution of the agreement was not, therefore, a matter for the consideration of the local courts, and that the effect thereof was to render any issue as to the amount of damages a matter for diplomatic adjustment.[2]

[15] Case of John E. Wheelock, Moore, Dig., VI, 744 and 769, and documents there cited; Case of William Wilson, For. Rel. 1894, 465–477, Moore, Dig., VI, 745; Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895 (concerning Case of George Webber), S. Ex. Doc. No. 33, 54 Cong., 1 Sess., 4, Moore, Dig., VI, 746.

[16] Case of Pflaum, Moore, Dig., VI, 771, and documents there cited; Van Bokkelen's Case, under protocol between the United States and Haiti, of May 24, 1888, Moore, Arbitrations, II, 1807–1853, Moore, Dig., VI, 699 and 772.

§ 284. [1] The language in the text is that in Moore, Dig., VI, 682, *citing* opinion of Mr. Akerman, Attorney-General, Dec. 28, 1871, in the matter of the New Granadian Passenger-Tax, 13 Ops. Attys.-Gen., 547. It should be obvious, however, that the rule in relation to the exhaustion of local remedies refers, in so far as international law is concerned, to a condition precedent to appropriate diplomatic interposition, rather than to action to be taken by the individual claimant before he may properly invoke the aid of his own government.

[2] Although the matter of reparation for the personal injuries sustained by Mr. Myers was not covered by the agreement, it was "upon general principles" regarded by Mr. Blaine "as one likewise to be determined solely by the agreement of the two governments." Mr. Blaine, Secy. of State, to Mr. Shannon, Minister to Central America, April 6, 1892, For. Rel. 1892, 34, 36, Moore, Dig., VI, 682–684. See, also, concerning the same case, For. Rel. 1892, 37–43, 49–51, and *id.*, 1893, 174–180, 181, 182, 184.

*Cf.*, also, award of Hon. Wm. R. Day, Arbitrator, in the matter of the Claims of John D. Metzger & Co. *v.* The Republic of Haiti, under protocol of Oct. 18, 1899, For. Rel. 1901, 262, Moore, Dig., VI, 689.

Again, in 1925, the Government of the United States felt itself justified in interposing on behalf of an American claimant in diplomatic correspondence with the Government of Ecuador regardless of the absence of any litigation in the courts of that country, because the Government thereof through the express agreement of its Executive contained in a communication of February 5, 1922, to the American Minister, and through subsequent assurances given by the succeeding Executive, relieved that claimant from any obligation to appeal to the courts.[3]

After a claimant has appealed to his own State for protection and it has interposed in his behalf, there is removed from him in a domestic sense, in so far as his own Government is concerned, any duty to exhaust local remedies. Nevertheless, the fact of interposition is not necessarily decisive of the propriety of such action, or of the wisdom of the complainant State in not requiring its own national to have recourse to the courts of the respondent.[4]

Where the claim is contractual, and an agreement for its adjustment has been made, either with the individual claimant, or with his government, the matter is thereafter regarded as one of an international character, justifying governmental action if the agreement is not performed.[5]

(*c*)

§ 285. **When Unjust Discriminations Are Applied.** If a State subjects an alien who is a defendant in a criminal case to a discrimination deemed by the government of his country to be unjust, its interposition in his behalf is to be anticipated.[1] The discriminatory conduct may be productive of, or constitute one of those "arbitrary deprivations of liberty" which "are condemned by a long

[3] Mr. Kellogg, Secy. of State, to the American Legation at Quito, telegram, March 17, 1925, in the course of which it was declared that "no judicial remedy would be adequate which did not embrace a decree subjecting the State or Government to an obligation to provide by law through appropriate taxation for the payment of the debts of the Company."

[4] In connection with the Bluefields incident of 1899, Mr. Hill, Acting Secy. of State, declared in a communication to Mr. Merry, Minister to Nicaragua, Sept. 29, 1899: "The Government of the United States does not admit the competency of any Nicaraguan court or tribunal to determine the rights of American citizens in Nicaragua when they have appealed to their Government for protection, and when it has taken up and made their cause its own." (For. Rel. 1900, 809, Moore, Dig., VI, 685.) It should be observed that this language had reference to a situation where the Governments of Nicaragua and the United States had agreed the previous year, that the issue, which related to the second payment by American merchants of certain duties, should be adjusted if possible by the two Governments.

[5] See Lord John Russell, British For. Secy., to Sir C. L. Wyke, British Minister, March 30, 1861, Brit. and For. State Pap., LII, 237, 238, Moore, Dig., VI, 719; Mr. Trail, Chargé at Rio de Janeiro, to Mr. Bayard, Secy. of State, Jan. 21, 1887, For. Rel. 1887, 54, 55, Moore, Dig., VI, 720; Edwin M. Borchard, "Contractual Claims in International Law," *Columbia Law Rev.*, XIII, 457, 470, *citing* the foregoing authorities.

See, also, Mr. Frelinghuysen, Secy. of State, to Mr. Phelps, Minister to Great Britain, March 30, 1883, MS. Inst. Great Britain, XXVI, 609, Moore, Dig., VI, 711, with relation to the position of France respecting its convention of July 29, 1864, in Venezuela, for the payment of 600,000 francs in full settlement of all claims against the latter.

§ 285. [1] Mr. Fish, Secy. of State, to Mr. White, Jan. 7, 1874, MS. Inst. Argentine Republic, XVI, 57, Moore, Dig., VI, 698; Opinion of Dr. Wharton, Solicitor of the Dept. of State, in case of W. A. Davis *v.* Great Britain, 1885, cited in Mr. Day, Acting Secy. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699; Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI, 699.

established diplomatic and arbitral practice." [2] That the impropriety of conduct assumes such a form does not necessarily establish that there is a solid excuse for the failure to exhaust local remedies. The discrimination applied in such a case usually, however, betokens a perversion of the judicial system, or serves to shatter foreign confidence in it. In such case, the situation may resemble one where justice is deemed to be wanting. Moreover, such a conclusion is likely to be fortified by the absence of a local forum in which the individual may obtain redress.

Whenever the discrimination is regarded as unjust because deemed to be in violation of the terms of a treaty, special grounds for diplomatic protest or interposition arise.[3] As a breach of the agreement constitutes the violation of an obligation towards another contracting party as such, the claim may be fairly dealt with as a public one. In so far as it is based upon an interpretation of a treaty, of which the correctness is challenged, an issue presents itself which may not be capable of final adjustment by an adjudication in a domestic forum; for the foreign contracting party may always contend with reason that it is not bound in such a matter to respect the opinions of judges to whom it has not consented to refer its cause.[4]

g

**§ 285A. The Relationship of a State to Events Occurring Abroad.** Control breeds responsibility. A State must be deemed to be internationally responsible for the consequences of internationally illegal conduct within any area over which it in fact asserts control in time of war or peace.[1] That area may be its own or foreign territory, and may even under certain conditions embrace areas outside of either. On March 5, 1923, Secretary Hughes declared in the course of a communication to the American Ambassador to France:

> It is believed, in a word, that the Government of the United States should make a demand for the recognition of the principle that occupation by the Government of France carries with it responsibility of the French for any occurrences within the region of the Ruhr which the Government of the United States may fairly regard as being contrary to international law; and that the occupying power will be held to strict accountability for any abuses of power, such as above indicated, and in particular for the levying of double taxes on exports and for any discriminatory acts that are distinctly adverse to American citizens.[2]

The same principle was enunciated in the course of a memorandum communicated early in February, 1925, to the British Government in relation to a claim arising from the success of British efforts to effect the destruction of certain oil

[2] A. V. Freeman, International Responsibility of States for Denial of Justice, 197.
[3] Report of Thrasher's Case by Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, 6 Webster's Works, 530, Moore, Dig., VI, 698.
[4] See Operation and Enforcement of Treaties, Province of the Courts in the United States, *infra*, § 526.

§ 285A. [1] See Belligerent Occupation, Nature and Effect, *infra*, § 688.
[2] Paraphrase of telegram of March 5, 1923, For. Rel. 1923, II, 194, 198.

properties in Roumania in 1916, and by way of response to the suggestion that the United States must look to the Roumanian sovereign as the source of damages for the consequences of acts committed on Roumanian soil. Therein it was said:

> The British Government, learning of the offensive designs of the enemy in Roumania, evolved the plan of destroying the oil properties therein in order to prevent them from falling into the hands of the enemy. The British authorities were determined to carry out that plan regardless of the approval of Roumania. The properties of the Romano-Americana Company were accordingly destroyed under the direction of British military authorities; much of it being destroyed before the Roumanian Government consented to destruction, and practically all of it was destroyed under the direction of British rather than Roumanian officers. The work of destruction was thus an essentially British war measure carried out pursuant to a deliberate British policy under British direction on Roumanian soil. It reveals a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally. Instead of placing an efficient weapon of destruction at the disposal of Roumania, Great Britain itself made use of that weapon on Roumanian soil and compelled Roumania to yield consent. From that consent no freedom from responsibility was attained by the primary actor.[3]

An independent State is normally not permitted to deny responsibility for the consequences of internationally illegal conduct within its own territory. It may, however, do so when that territory is occupied by the armed forces of another, or when by any other process actual control thereof is lodged in another.

The political connection between a State within whose territory internationally illegal acts are committed, and a foreign dominant or protecting power may under certain conditions suffice to impose upon the latter responsibility for the consequences of those acts. It should be observed, however, that the mere fact of wardship is not necessarily indicative of such a result.[4] This is believed to be true even though the protecting power participates in, and exercises a substantial control over the conduct of the foreign relations of the ward. The latter, so long as it possesses the attributes of statehood, although it be dependent statehood and remains an entity with or in behalf of which foreign relations are conducted through an appropriate channel,[5] must normally be regarded as exercising ad-

[3] For. Rel., 1926, II, 316, 319. *Cf.* Mr. MacDonald, British Foreign Secy., to the American Ambassador at London, Oct. 6, 1924, *id.*, 312.

[4] See Requisites of a State of International Law, *supra*, § 7.

[5] There has been a marked tendency in recent years manifested in the drafts of codes, to make the conducting of foreign relations of another political unit a ground for imposing responsibility upon the conductor of those relations for the consequences of internationally illegal conduct suffered by alien life and property within the territorial limits of that unit. See, for example, Art. 9 of Resolution adopted by the Institute of International Law at Lausanne in 1927, on the International Responsibility of States by Reason of Damages Caused on Their Territories to the Person and Property of Foreigners, *Annuaire*, XXXIII, Vol. III, 332; Art. 3 of Harvard Draft Convention on Responsibility of States, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 133; Basis of Discussion No. 23, Conference for the Codification of International Law, Bases of Discussion, Responsibility of States, League of

ministrative control over its own territory, and as being obligated to make direct response to foreign allegations charging failure to perform duties of jurisdiction with respect to foreign life and property. If, however, the action of the protector serves in any way to prevent the ward from properly discharging those duties, the requisite connection between the protector and the internationally illegal conduct of which complaint is made becomes apparent and responsibility for the consequences thereof inevitably follows.[6] Again, responsibility may be brought home to the protector if by any process it proceeds to thwart the efforts of foreign aggrieved States to employ appropriate and not unlawful means of obtaining redress in behalf of themselves or their nationals, and does not itself simultaneously offer to those States or to their nationals an efficacious substitute for the procedure which it has endeavored to frustrate.[7]

h

## Claims Arising from Acts Primarily Attributable to the Authorities of a State

(1)

§ 286. **Arrest and Imprisonment.** It has been seen that in the enactment of criminal laws, and in their application without discrimination to aliens and nationals alike, the ultimate test of the propriety of the conduct of the territorial sovereign is the standard which the international society has fixed.[1] It has also been observed that that standard is such as to enable each State to enjoy largest freedom in the administration of criminal justice.[2] For that reason the rigor with which the territorial sovereign applies to aliens its criminal code will rarely be looked upon as decisive of internationally illegal conduct, when it appears that the proceedings are in every way regular.[3] Even when an alien prose-

---

Nations Doc. No. C.75.M.69.1929.V, 124. This is reasonable when the political unit does not possess the attributes of statehood and is not held out to the world as an international personality. A colony or one of the American commonwealths may offer an appropriate example. The bare circumstance, however, that a State acknowledged to be such in an international sense entrusts the conduct of its foreign relations to another does not necessarily signify more than that that other is the medium or instrumentality through which there is brought home to the dependent or protected State foreign allegations of responsibility for consequences of particular events occurring within its territory. It is not suggested that the controller of foreign relations of a dependent State may not by its own conduct relieve foreign aggrieved States of the burden of looking beyond itself when seeking reparation for the consequences of internationally illegal conduct within the domain of its ward.

[6] See Mr. Sherman, Secy. of State, to Mr. Powell, Minister to Hayti, No. 83, Dec. 22, 1897, MS. Inst. Hayti, IV, 23, Moore, Digest, VI, 475. Also, Eagleton, Responsibility of States, Chap. II.

[7] See, in this connection, The Monroe Doctrine, Certain Acts Involving or Threatening Permanent Occupation, *supra*, § 92.

§ 286. [1] Duties of jurisdiction, *supra*, §§ 266–267; also Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to England, April 25, 1882, For. Rel. 1882, 230–234, Moore, Dig., VI, 275–277. See separate opinion of Nielsen, Commissioner, in L. F. H. Neer Case, Opinions of Commissioners, convention between the United States and Mexico, Sept. 8, 1923, 1927 Vol., 74, 77.

[2] Mr. Gresham, Secy. of State, to Mr. Morse, May 31, 1893, 192 MS. Dom. Let. 184, Moore, Dig., VI, 282. See, also, Mr. Root, Secy. of State, to Minister Furniss, May 4, 1906, concerning claim of M. J. Kouri, For. Rel. 1906, II, 871.

[3] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., VI, 275.

cuted in good faith and with careful regard for his rights of defense is, nevertheless, convicted of a crime of which he is innocent, the result does not necessarily indicate the breach of an international obligation.[4] Nor does the sustaining of the conviction by an appellate court of last resort indicate conclusively that the territorial sovereign has abused its right of jurisdiction or violated any principle of international law.[5] The reluctance in such a case on the part of the State of the accused to interpose in his behalf for the purpose of either securing his release or of obtaining an indemnity, is due to the absence of internationally illegal conduct in the matter of prosecution. The case differs from that where, notwithstanding delinquency on the part of the territorial sovereign, a foreign State deems it necessary to refrain from interposition until the accused shall have endeavored to obtain redress through domestic channels.

At any stage of his prosecution the accused alien may, however, be subjected to what may be fairly regarded as internationally illegal treatment. This is sometimes obvious when, for example, the provisions of the local law are disregarded,[6] or the relevant terms of a treaty are violated,[7] or some requirement of what is deemed to be the international standard, such as that forbidding the cruel or arbitrary treatment of prisoners,[8] or the refusal to hear testimony in their behalf, is unheeded.[9] If the Department of State believes that for any of the fore-

"Detention of witnesses to prevent their disappearance and insure their giving testimony when called for is common in the jurisprudence of all countries, and special provisions exist in those where the principles of the civil law are in force relative to the detention *au secret* of an accused person; but such detention should be reasonable and not unduly prolonged or harshly enforced, and is merely a temporary measure in the administration of justice." Mr. Frelinghuysen, Secy. of State, to Mr. Langston, Minister to Haiti, No. 324. Jan. 20, 1885, For. Rel. 1885, 490, Moore, Dig., VI, 773.

[4] Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, June 28, 1882, MS. Notes to Austria, VIII, 338, Moore, Dig., VI, 765. See, also, Mr. Marcy, Secy. of State, to Mr. Starkweather, Aug. 24, 1855, MS. Inst. Chile, XV, 124, Moore, Dig., VI, 264; Same to Chevalier Bertinatti, Sardinian Minister, Dec. 1, 1856, MS. Notes to Italy, VI, 178, Moore, Dig., VI, 659; Thornton, Umpire, in Benjamin Burn Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3140.

[5] Mr. Gresham, Secy. of State, to Mr. Hevner, June 10, 1893, 192 MS. Dom. Let. 296, Moore, Dig., VI, 282.

[6] Mr. Foster, Secy. of State, to Mr. Terres, Chargé at Port au Prince, telegram, Dec. 2, 1892, For. Rel. 1893, 358, concerning Case of Frederick Mevs, also other documents, *id.*, 355–382, Moore, Dig., VI, 767–768. See, also, case of the unlawful treatment of W. H. Argall by Guatemalan authorities, For. Rel. 1894, 312, *id.*, 1895, II, 771–775, Moore, Dig., VI, 768; Case of Charles Lillywhite, subjected to false imprisonment and deportation from New Zealand to England, For. Rel. 1901, 231–236, Moore, Dig., VI, 768.

[7] Case of C. A. Van Bokkelen imprisoned in Haiti, Moore, Arbitrations, II, 1807–1853.

See also Sartori's Case, where the conduct of the respondent State, Peru, was at variance with the terms of Art. XIX of its treaty with the United States of 1851, Moore, Arbitrations, III, 3120.

[8] Mr. Frelinghuysen, Secy. of State, to Mr. Soteldo, Venezuelan Minister, April 4, 1884, concerning Case of John E. Wheelock subjected to cruelty by an officer of justice of Venezuela in 1879, For. Rel. 1884, 599, Moore, Dig., VI, 321; also concerning same case, For. Rel. 1885, 932–934; Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, Oct. 15, 1880, For. Rel. 1880, 1041, 1043, Moore, Dig., VI, 769; see, also, same to Mr. Langston, Minister to Haiti, No. 23, April 12, 1878, MS. Inst. Haiti, II, 136, Moore, Dig., VI, 656.

*Cf.* Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 423, Dec. 29, 1890, MS. Inst. Mexico, XXII, 687, Moore, Dig., VI, 773, concerning the enforced labor of two American citizens accused but not convicted of crime in Mexico; also Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Feb. 1, 1907, concerning ill-treatment of David A. Backer, For. Rel. 1907, II, 742.

[9] Mr. Conrad, Acting Secy. of State, to Mr. Peyton, Chargé to Chile, Oct. 12, 1852, MS. Inst. Chile, XV, 93, Moore, Dig., VI, 274.

going reasons, an American citizen is being wrongfully held in restraint of his liberty, or subjected to ill-treatment, his release will be demanded. Thus in the case of A. K. Cutting, an American citizen, held in custody in Mexico in 1886, the United States was able to show that the criminal prosecution was an abuse of the right of jurisdiction and so contrary to international law, that the judicial proceedings preliminary to imprisonment were palpably unjust, and that the prisoner "was subjected to pains and depredations which no civilized Government should permit to be inflicted on those detained in its prisons." Mr. Bayard, Secretary of State, therefore, demanded (without success, however), the "immediate release" of the prisoner.[10] In the case of Mr. W. O. Jenkins, the American Consular Agent at Puebla, who, after having been kidnapped by bandits and held for ransom in October, 1919, was, after his release, arrested and prosecuted by Mexican authorities on a charge of perjury in a judicial declaration, the Department of State demanded the release of the accused on the ground that Mexico was perverting its judicial system in prosecuting the victim instead of the perpetrators of the crime of abduction.[11]

[10] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, telegram, July 19, 1886, For. Rel. 1886, 700, Moore, Dig., VI, 281.

Not infrequently where it has appeared that the accused was not unjustly or even unreasonably being prosecuted, the United States has encouraged its representatives to exert their influence, for light punishment if not the release of the prisoner, especially where the commission of the offense charged was marked by the absence of circumstances indicating moral turpitude on the part of the actor. Mr. Uhl, Acting Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Nov. 17, 1893, For. Rel. 1894, 26, Moore, Dig., VI, 766; Mr. Olney, Secy. of State, to Mr. Gould, June 29, 1896, 211 MS. Dom. Let. 149, Moore, Dig., VI, 766.

When an American citizen has been criminally prosecuted under circumstances creating suspicion as to the propriety or regularity of the conviction or punishment inflicted, the United States has not hesitated to request of the prosecuting State full information as to the conduct of proceedings. Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., VI, 283; Mr. Blaine, Secy. of State, to Mr. Ryan, Minister to Mexico, Feb. 16, 1891, MS. Inst. Mexico, XXIII, 38, Moore, Dig., VI, 284; Mr. Sherman, Secy. of State, to Mr. Sepulveda, American Chargé d'Affaires *ad interim* at Mexico, May 5, 1897, For. Rel. 1897, 396, Moore, Dig., VI, 285.

[11] Mr. Jenkins was taken by bandits in the city of Puebla on Oct. 19, 1919, and held for ransom until Oct. 26, following, when he was released after having undergone physical suffering, his captors obtaining cash payments for a part of the sum demanded and security for the balance. In November, he was arrested by Mexican authorities on a charge of having made a false oath in a judicial declaration. On Nov. 20, 1919, the Department of State, through the Embassy at Mexico City, made peremptory demand for Mr. Jenkins's release, declaring that according to evidence in hand, the arrest was deemed "entirely unjustified and an arbitrary exercise of public authority." In a note of Nov. 26, 1919, Mexico declined to yield to this demand, declaring that the imprisonment was not unjust or arbitrary, and that there was evidence justifying the charge made. It challenged the propriety of diplomatic interposition in the case, and adverted to constitutional difficulties preventing the Executive from compelling a judge of a Mexican State court to release an offender. In this connection attention was called to the practice in the United States. In a reply communicated through the American Embassy at Mexico City, under date of Nov. 30, 1919, Secretary Lansing declared in substance that the Mexican arguments were mere excuses for the harassing of an American Consular Officer entitled to fair treatment. He contended that there had been a denial of justice, and noted the impropriety of the assertion of jurisdiction by a Mexican State court, in view of the constitutional requirement conferring jurisdiction in such cases on the Mexican Federal tribunals. He said: "Stripped of extraneous matter, with which the Mexican note of Nov. 26, endeavors to clothe it, the naked case of Jenkins stands forth: Jenkins, a United States Consular Agent, accredited to the Government of Mexico, is imprisoned for 'rendering false judicial testimony,' in connection with the abduction of which he was the victim." He contended in substance that the prosecution was allied with the abduction, in the sense that the abduction and what it entailed was the real cause of the prosecution which was undertaken for the purpose of harassing Mr. Jenkins, and that, therefore, no technical ground for demanding that the United States refrain from interposition was entitled to respect. On Dec. 4, 1919,

Again, if the Department of State believes that from the nature of the offense charged or from the proceedings already instituted, the prisoner is exposed to improper treatment, it may demand assurance of his adequate protection at trial.[12] Where, however, after his release from custody, the victim seeks pecuniary redress for irregular imprisonment, or on account of improper treatment accorded him during his restraint, the United States is not disposed to intervene when it appears that he can obtain redress by any local process, directed either against the territorial sovereign or the officials made by the local law responsible for the injuries sustained.[13] The exhaustion of the local remedy is thus made a condition

---

Mr. Jenkins was released on bail furnished by another person. Somewhat later in December, the Mexican Government, in response to Mr. Lansing's note, declared that the release under bail should remove any motive for misunderstanding between the Governments concerned, and reiterated its contention that the criminal charge against Mr. Jenkins was not unfounded. The Mexican Government, it was said, could not admit that American citizens could be "tried and absolved on simple reports from the State Department, nor on recommendations or suggestions from the United States, instead of trying them by Mexican courts and according to Mexican laws." There appeared to be no disposition to abandon the prosecution. The Department of State was not, however, satisfied with the situation resulting from the release of the accused on bail.

On June 30, 1920, the Department of State reported the receipt of information indicating the confession by a number of peons before the criminal court at Puebla at a re-trial of Mr. Jenkins, that their previous testimony against him had been false, and that they had been forced to give such testimony under threats of death. It was also reported that one Cordova, later a general, had admitted to the court that he alone was responsible for the abduction of Mr. Jenkins. Dept. of State, statement for the Press, June 30, 1920, No. 1. In December, 1920, it was reported that all charges against Mr. Jenkins had been dismissed by a Mexican court which had decreed his freedom and directed the return of bail. See For. Rel. 1919, Vol. II, 578–590.

[12] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, No. 226, July 26, 1886, MS. Inst. Mexico, XXI, 535, Moore, Dig., VI, 281.

[13] Mr. Bayard, Secy. of State, to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 453–454, Moore, Dig., VI, 277–279; Same to Mr. Gebbard, Sept. 9, 1885, 157 MS. Dom. Let. 88, Moore, Dig., VI, 279; Mr. Buchanan, Secy. of State, to Mr. Pakenham, British Minister, Dec. 26, 1846, MS. Notes to Great Britain, VII, 149, Moore, Dig., VI, 659; Mr. Fish, Secy. of State, to Mr. Warren, Feb. 26, 1875, 107 MS. Dom. Let. 7, Moore, Dig., VI, 661; Mr. Day, Acting Secy. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 670; Mr. Hay, Secy. of State, to Mr. Lombard, Oct. 3, 1898, 232 MS. Dom. Let. 56, Moore, Dig., VI, 671.

See Award of Señor Quesada, Nov. 19, 1897, in Oberlander and Messenger Case, protocol between the United States and Mexico, March 2, 1897, For. Rel. 1897, 382, 387, 388, Moore, Dig., VI, 670.

In the J. R. Pierce Case, Mexican-American Commission, July 4, 1868, Thornton, Umpire, was of opinion that the reprimanding and dismissal of an official who had arbitrarily arrested an American citizen, freed the respondent State from the obligation to pay an indemnity. Moore, Arbitrations, IV, 3252.

In the Case of Tunstall, a British subject, killed in New Mexico in 1878 while pursued by a sheriff's posse, Mr. Bayard, Secy. of State, in denying the duty of the United States to pay an indemnity, asserted, first, that the killing, in personal malice, by an officer, of a defendant in a civil process in the officer's hand, and after the execution of the writ, was to be considered as collateral to his official action and one for which the Government was not responsible; secondly, that it had been held by the Federal courts that the Federal Government was not liable for the torts of officers of a territory organized under Congressional legislation; thirdly, that in countries subject to the English common law where there was an opportunity given for a prompt trial by a jury of the vicinage, damages inflicted upon foreigners should be redressed through the instrumentality of the courts, and were not the subject of diplomatic intervention; and fourthly, that great practical inconvenience would result from the payment of the claim by the confusion of the boundaries between judicial and executive actions, and by opening the door to the bringing of a vast mass of claims of each Government against the other. It was stated also that Tunstall having an apparent domicile in New Mexico "was not even, so far as concerns the administration of the judicial function there, a foreigner," and that his representatives had, "under the law of nations, no title to the intervention of a foreign

precedent to the preferring of any claim. When, however, it has not been shown that the aggrieved citizen can obtain redress through domestic channels, the Department of State is unwilling to yield to any suggestion emanating from the territorial sovereign that the victim should be left to his own resources. In such case interposition is to be anticipated.[14]

§ 286A. **The Same.** Numerous cases adjudicated before claims commissions within recent years bear impressive testimony to the fact that in the course of the arrest and imprisonment of aliens, or in that of individuals subjecting them to violence, a State may, and not infrequently does, conduct itself in a way that it is difficult to reconcile with the requirements of international law. Thus, for example, one Harry Roberts, arrested in Mexico in 1922, was unlawfully held a prisoner without trial for some seven months. The jail in which he was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, a straw roof, a single window, a single door and no sanitary accommodations. Thirty or forty men were at times thrown together in this single room; the prisoners were given no facilities to clean themselves; the room contained no furniture except that which the prisoners were able to obtain by their own means; they were afforded no opportunity to take physical exercise; and the food given them was scarce, unclean, and of the coarsest kind.[1] This conduct was not deemed to satisfy the international standard.[2]

---

sovereign." Communication to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450–459. The extract is taken mainly from the statement of Mr. Bayard's position contained in Moore, Dig., VI, 664–666. It is to be doubted whether Mr. Bayard's conclusions derived from the domicile of the decedent were sound.

[14] Mr. Bayard, Secy. of State, to Mr. Cox, Minister to Turkey, Aug. 17, 1885, concerning the Case of Dr. Maurice Pflaum, For. Rel. 1885, 859, Moore, Dig., VI. 771–772; Mr. Frelinghuysen, Secy. of State, to Mr. Soteldo, Venezuelan Minister, April 4, 1884, concerning the Case of John E. Wheelock, For. Rel. 1884, 599, Moore, Dig., VI, 321; Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, No. 91, Oct. 15, 1880, For. Rel. 1880, 1041, Moore, Dig., VI, 744–745; also Case of Dr. John Baldwin, Mexican-American Commission, Convention of April 11, 1839, Moore, Arbitrations, IV, 3235; opinion of Thornton, Umpire, in Pradel Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, III, 3141.

*Compare* attitude of Mexico in Case of Howard C. Walker, Moore, Dig., VI, 770 and documents there cited from For. Rel. 1884, 1888, 1889 and 1890.

§ 286A. [1] Case of Harry Roberts, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 100, 104–105. Also, separate opinion of Nielsen, Commissioner, in Case of W. H. Faulkner, *id.*, 86, 92, 93.

[2] In the course of its opinion the Commission declared, in response to the contention of Mexico that Roberts had been accorded "the same treatment as that given to all other persons": "Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment." (*Id.*, 105.)

See, also, Case of Francisco Quintanilla, *id.*, 136; Case of Mary Ann Turner, *id.*, 416; Case of L. J. Kalklosch, *id.*, 1929 Vol., 126.

In the Case of Peter Koch, where the claimant, an American citizen, was subjected to brutal treatment when his boat was searched by Mexican customs officials who proceeded to arrest him, the General Claims Commission, through the Presiding Commissioner, Dr. Sindballe, declared on Oct. 18, 1928: "The Commission is of opinion that there can be no doubt that the brutal manner in which the claimant was treated when the *Ella* was searched constitutes a delinquency for which Mexico must be responsible under international law." (*Id.*, 118, 119.) See, also, Case of Daniel Dillon, where the same presiding commissioner declared, Oct. 3, 1928, for the Commission: "The long period of detention, however, and the keeping of the claimant incommunicado and uninformed about the purpose of his detention,

The cases serve, moreover, to challenge anew the suggestion that the responsibility of a sovereign for the consequences of acts of its officials is to be tested by the relative rank of the actor rather than by the character of what he does when acting in its behalf. The courts have, on occasion, been inclined to comment on the point. Thus, it was declared by Commissioner Nielsen, in the Case of Gertrude P. Massey, before the General Claims Commission, under convention between the United States and Mexico of September 8, 1923:

> I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.[3]

---

constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make The United Mexican States responsible under international law." (*Id.*, 61, 63.)

See, also, Case of Louis Chazen, *id.*, 1931 Vol., 20, 34–35; Case of Abraham Solomon, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 476; Case of Cecelia Dexter Baldwin, *id.*, 330, 335.

See award of Beichmann, Umpire, in Case of Madame Chevreau, agreement between France and Great Britain, of March 4, 1930, *Am. J.*, XXVII, 153; also Manley O. Hudson, "The Chevreau Claim Between France and Great Britain," *id.*, XXVI, 804.

See also documents in Hackworth, Dig., III, § 285, concerning "Protection and Standard of Treatment."

[3] Opinions of Commissioners, 1927 Vol., 228, 234. Declared Commissioner Nielsen elsewhere in the same opinion: "An examination of the opinions of international tribunals dealing with the question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to which application has been given in cases in which the question has arisen. To attempt by some broad classification to make a distinction between some 'minor' or 'petty' officials and other kinds of officials must obviously at times involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. As the Commission has heretofore pointed out, it appears to be a proper construction of provisions in Article I of the Convention of September 8, 1923, that uncertainty with respect to a point of responsibility was largely eliminated by the two Governments when they stipulated that the Commission should pass upon 'all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice.'" (*Id.*, 230–231.)

See opinion of same Commissioner, for the Commission, in Case of William T. Way, *id.*, 1929 Vol., 94, 106, where he declared: "It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility."

In its decision in the case of Cecilia D. Baldwin, awarding damages on account of acts of policemen, the American and Panamanian General Claims Commission was impervious to the contention of Panama that "a State is not responsible in international law for the acts of petty authorities such as policemen, inasmuch as the responsibility of a State may be involved only by authorities of a higher category." (Hunt's Report, Department of State, Arbitration Series No. 6, 330. See extracts from brief of Panama, *id.*, 324–327.)

See also Michael J. Malamatinis case, Nielsen's American-Turkish Claims Settlement, Opinions, 603, 608, where it is said: "It may be impracticable to state a principle more definitely than to say that, when acts or omissions on the part of persons concerned with the discharge of functions of government, whatever may be their precise status or rank under domestic law, result in a failure of a nation to live up to obligations under international law, the delinquencies of such persons are misfortunes for which a nation must bear responsibility."

Close scrutiny of events that mark the experiences of States manifested in clashes between various agencies thereof and the nationals of foreign countries must bring home to both judges and statesmen fresh appreciation of the fact that officials of lesser rather than of higher rank are likely to be the instruments through which the sovereign for which they profess to act unleashes itself in its contacts with alien life and property. The character and frequency of those contacts, the ignorance of such officials of the law of nations, their relative susceptibility to the influence of passion or caprice or local prejudice, offer at times temptations that are irresistible. Thus it happens that a policeman may prove to be more dangerous than a president both to the State whom he serves and to the alien whom he encounters.[4] As a careful observer has recently declared: "The principle is simply that an internationally unlawful act may be traceable to any agent or official of the State. Given the violation of an international obligation, the legal effect of an injury inflicted by a lower organ must be precisely the same as that inflicted by a higher." [5] Whether the action of a minor official is to be deemed a breach of an international obligation on the part of his country towards another must depend upon the facts of the particular case.[6] The precise question in each instance would appear to be whether those facts point to the commission of acts which are contemptuous of what the standard of the international society as reflected in the practice of States seemingly demands. The same question may be put in the form given it by Dr. Dunn who asks, "Does the delinquency of a particular official indicate a failure on the part of the State to establish governmental organs capable of maintaining the minimum conditions necessary for the carrying on of normal social and business relations?" [7] Such a test is responsive to the conditions of the international life. It prevents, moreover, a State that enables an agent of lesser grade to be the means of loosening or weakening accepted standards of propriety of conduct from avoiding the conse-

[4] For an admirable discussion of the matter, see F. S. Dunn, The Protection of Nationals, 1932, 125–136, where that author makes trenchant criticism of Article 7 of the Harvard Draft Convention on the Responsibility of States, which is as follows: "(*a*) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress. (*b*) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the State has failed to discipline the officer or employee." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 133–134.)

[5] A. V. Freeman, International Responsibility of States for Denial of Justice, 450, where he adds: "The only qualification, of course, is that the particular organ should have acted within the scope of its apparent authority."

[6] "It seems in fact that none of the various rules advanced which seek to determine international responsibility by reference to the relative rank of the official or employee committing the injury is of much value, (1) as a summary of past cases, (2) as a basis of forecasting future decisions, or (3) as a workable method of solving the particular problem of international responsibility that is involved." (F. S. Dunn, The Protection of Nationals, 131–132.)

[7] *Id.*, 134, where he adds: "If it does, then the State assumes the risk, otherwise not. Or the question might be put in another way. Is the delinquency of a type which, if permitted to occur generally, would make the conduct of customary social and business relations impossible? One might express this in familiar language by saying that a State is 'under a duty' to provide conditions of this character, and that if it fails in this duty, then it becomes liable to make reparation."

quences thereof by mere reliance upon the inferiority of his rank. Above all, it measures responsibility according to the inherent character of what takes place and does not permit the estimate thereof to be appraised or determined by the grade of the particular actor.

It may, however, prove difficult in the particular case to determine whether, in applying Dr. Dunn's test, the prosecuting State in the course of apprehending, detaining, or penalizing an alien charged with the commission of a criminal act has conformed with the requirements of the international standard. That State may deny that its conduct or that of its authorities has been remiss in that regard, despite the opposing view of the State of which the alien is a national. The solution may have to await an adjudication before an international tribunal.

(2)

§ 287. **Acts of Judicial Officers.** When the action of judicial authorities expressed in decisions adverse to the contentions of alien litigants has been the subject of complaint, confusion of thought has arisen from the failure of arbitral tribunals as well as of foreign offices to observe with care what constitutes a violation of international law on the part of a court of first instance. That matter may have oftentimes appeared to be unimportant in view of the common requirement that when an alien claimant has had recourse to domestic courts, or has been compelled to respond to a suit therein, his appeal from an adverse decision to the court of last resort should precede interposition on his behalf.[1] From this practice it has been natural to infer that no violation of international law appears until the decision of the inferior court has been confirmed by the highest judicial authority.[2] Such a conclusion is a reasonable inference from the situation arising in a broad class of cases where, notwithstanding the error of the court of first instance, no act on its part is to be regarded as internationally illegal. Its conduct does not necessarily present an internationally illegal aspect, when, for example, acting in good faith and with impartiality, and without violating local rules of practice upon which the alien litigant relies for protection, the court, nevertheless, errs in its view of the local law, or in the application thereof to the facts of the particular case, and pronounces a decision adverse to the alien. Nor can the territorial sovereign through the operation of whose judicial system such a result has occurred be justly regarded by the State of the alien as having wronged him.[3] This is believed to be true not only because the courts may, in a

§ 287. [1] Mr. Clay, Secy. of State, to Mr. Tacon, Feb. 5, 1828, MS. Notes to For. Leg. III, 423, Moore, Dig., VI, 652; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 30, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 659; Mr. Gresham, Secy. of State, to Mr. Ryan, Minister to Mexico, April 26, 1893, MS. Inst. Mexico, XXIII, 359, Moore, Dig., VI, 270. See, also, Seth Driggs Case, United States-Venezuelan Claims Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, III, 3160.

[2] Mr. Davis, Assist. Secy. of State, to Mr. Moseby, June 23, 1873, 99 MS. Dom. Let. 260, Moore, Dig., VI, 661; Same to Mr. Chase, consul at Tampico, Jan. 10, 1870, 57 MS. Inst. Consuls, 101, Moore, Dig., VI, 750; Mr. Mariscal, Mexican Minister of Foreign Affairs, to Mr. Morgan, Minister to Mexico, April 2, 1886, H. Ex. Doc. 328, 51 Cong., 1 Sess., Moore, Dig., VI, 668. See, also, Ralston, revised ed., 85.

[3] Mr. Forsyth, Secy. of State, to Mr. Welsh, March 14, 1835, 27 MS. Dom. Let. 261, Moore, Dig., VI, 261; Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, June 28, 1882, MS. Notes to Austria, VIII, 338, Moore, Dig., VI, 765.

domestic sense, be independent of the political department, or because of the existence of an appellate tribunal capable of rendering nugatory the errors of an inferior court, but chiefly for the reason that the decision of the court of first instance did not itself constitute a violation of international law.

Instances are plentiful, however, where the decision of the inferior court has possessed an internationally illegal character. Decisions are believed to be of such a kind when, for example, the terms of a treaty, concerning the interpretation of which there is no dispute, are flagrantly disregarded, or when the safeguards provided by the local law for the security of the accused (in a criminal case) are unheeded.[4] In such cases international delinquency is apparent by reason of the character of the relevant acts and their commission by an authority of the State. Such conduct on the part of a department of the government to which is confided the special duty to administer justice may destroy reason for hope in the foreign State that its national may still obtain redress by exhausting his remedies through appeal to a higher branch of the same department. The internationally illegal quality of acts of inferior courts have served more than once to produce such an effect and to inspire interposition.[5] In cases where, notwithstanding evidence of international delinquency through the action of a court of first instance, the State of the alien complainant has refrained from espousing his cause until he has fully exhausted his judicial remedies, the withholding of interposition has indicated solid respect for the principle that the propriety of diplomatic reclamation depends upon something more than the bare fact that international law has been violated, and that interposition lacks justification so long as the claimant may obtain redress through domestic judicial channels.[6]

Courts of arbitration have frequently expressed the opinion that the territorial sovereign is not responsible for the misconduct of an inferior judicial tribunal, when no attempt has been made by the aggrieved litigant to obtain

[4] Mr. Forsyth, Secy. of State, to Mr. Semple, Chargé d'Affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV, 58, Moore, Dig., VI, 249. See, also, Parrott Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3009, at 3011, in regard to which it was said, in a report by the American members: "The abuse of judicial functions and the perversions of the laws have been such . . . in relation to proceedings in which the claimant was interested, as to have produced great wrong and a denial of justice"; opinion of Thornton, Umpire in the Bronner Case, Mexican-American Claims Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3134, in which it was said that "the decision appears to him [the Umpire], so unfair as to amount to a denial of justice"; also opinion of same umpire in the Jonan case, before same Commission. Also Ruden Case, Peruvian Claims Commission, Convention of Dec. 4, 1868, Moore, Arbitrations, II, 1653; Tagliaferro Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 764. *Compare* Bertinatti, Umpire, in Medina Case, United States-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, III, 2316, 2317.

[5] Mr. Everett, Secy. of State, to Mr. Marsh, Minister to Turkey, concerning the Case of Rev. Jonas King, No. 24, Feb. 5, 1853, S. Ex. Doc. 9, 33 Cong., 2 Sess., 5, 8, 9, Moore, Dig., VI, 262; Report of Mr. Bayard, Secy. of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49 Cong., 2 Sess., Moore, Dig., VI, 666.

[6] As has been seen, there is no duty on the part of a claimant to exhaust his judicial remedies when it would be useless to do so (Donoughho Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3012, 3014), or when he is prevented from so doing by intrigue on the part of the government (Garrison Case, before same commission, Lieber, Umpire, *id.*, 3129). See, also, Ballistini Case, French-Venezuelan Commission, 1902, Ralston's Report, 503–504; Gray, Admr. *v.* United States, 21 Ct. Cl. 340, 402, Moore, Dig., VII, 644.

justice from a higher court.[7] Such a statement is misleading in so far as it conveys the idea that the responsibility of a State for the acts of its agent is dependent upon the grade of the actor rather than upon the quality of his act. Obviously, moreover, the establishment of responsibility is not decisive of the procedure to be followed in obtaining redress for injuries sustained. Thus, it may be that when arbitrators have referred to the absence of responsibility on the part of a State for the misconduct of inferior courts, they have merely sought to express the thought that whether or not international delinquency is attributable to the conduct of a particular judge, no duty is necessarily imposed upon his sovereign to respond directly to damages to the alien litigant, or to his country through the diplomatic channel, until he has exhausted his judicial remedies by appealing to the court of last resort. In a word, when an inferior court, like any other agency of a State becomes the instrumentality through which it may be deemed to violate international law, the breach of an international obligation is apparent, but the reasonableness of interposition through the diplomatic channel is dependent upon the sufficiency of the redress obtainable by appeal to the court of last resort. Ordinarily, the existence of an appellate tribunal empowered to correct the errors of an inferior court is *prima facie* evidence that redress is within the reach of him who invokes its aid.[8]

The more recent cases indicate the deference shown by claims commissions for the acts of the judicial authorities of respondent States,[9] as well as the

[7] See, for example, opinion of Thornton, Umpire, Mexican-American Commission, Convention of July 4, 1868, in case of Jennings, Laughland & Co., Moore, Arbitrations, III, 3135–3137; in Green Case, *id.*, 3139; in Case of the "Ada," *id.*, 3143; in Burns Case, *id.*, 3140; in Blumhardt Case, *id.*, 3146; in Smith Case, *id.*, 3146. Also opinion of Ralston, Umpire in De Caro Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 810, 819; Mr. Clay, Secy. of State, to Mr. Tacon, Feb. 5, 1828, MS. Notes to For. Leg. III, 423, Moore, Dig., VI, 652.

[8] See interesting opinion of Frazer, Commissioner, in case of The Brig Napier, American-British Claims Commission, treaty of May 8, 1871, Moore, Arbitrations, III, 3154; also ground of disallowance of demurrer by the Commission in this and similar cases, *id.*, 3157; also report of Hale, Agent of the United States, *id.*, 3159.

In the course of the Russo-Japanese War the seizures of American-chartered vessels and American cargoes by Russian naval authorities, and the decisions of condemnation by the Vladivostok prize court following and interpreting a Russian Imperial order of Feb. 29, 1904, were believed by the United States to be "in disregard of the settled law of nations in respect to what constitutes contraband of war." Mr. Hay, Secy. of State, to Mr. McCormick, American Ambassador to Russia, Aug. 30, 1904, For. Rel. 1904, 760. The Russian Government informed the United States that appeals could be taken, and that a final decision belonged only to the supreme prize court constituted by the admiralty board. It was contended, therefore, that until the decisions were reviewed by the supreme court "reclamations regarding questions of fact are beyond the jurisdiction of the imperial ministry of foreign affairs." *Id.*, 769. The Government of the United States thereupon rendered all possible assistance to claimants in taking their appeals. *Id.*, 777. Considerable difficulties were, however, experienced in this regard, owing to the existence of a state of war, the remote theater of operations, the differences in procedure of Russian and American Courts, and the uncertainty of American claimants. *Id.*, 1905, 743. Decisions were duly rendered by the Supreme Court. *Id.*, 753.

See, also, The Brig Freemason *v.* United States, 45 Ct. Cl. 555, based upon the treaty between the United States and France, of Sept. 30, 1800, as interpreted in the case of The Peggy, 1 Cranch 103.

[9] See opinion of Nielsen, Commissioner, in George A. Kennedy Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 296, 299; opinion of same Commissioner in B. E. Chattin Case, *id.*, 440, 447; opinion of Van Vollenhoven, Presiding Commissioner, same case, *id.*, 422, 426–429; opinion of Commission in Margaret Roper Case, *id.*, 205, 210.

See, also, award in George J. Salem Case, protocol of Jan. 20, 1931, United States and

readiness of such commissions to point to the internationally illegal aspect of those acts whenever the evidence serves to establish it.[10] The evidence is at times deemed to do so where, in the course of the prosecution of an alien unconscionable delay or the imposition of an unwarranted penalty reveals a glaring defect in the local administration of justice.[11] Delinquency is seen also in cases where the judiciary becomes a direct participant with other public agencies in conduct manifesting neglect on the part of a State to prosecute and punish individuals at whose hands an alien has been subjected to criminal violence.[12] It is in these situations that a court of first instance may assert a power that thwarts and even renders completely abortive the performance of the international obligation to endeavor to penalize the malefactors.[13] Again, in some cases, a domestic court of last resort may reveal itself as the instrumentality through which its sovereign accentuates or magnifies the wrong which an inferior tribunal or other agency initiated.[14]

(3)

§ 288. **Acts of Other Officials.** There is no special rule of procedure to be followed in cases where the acts of officials other than those of the judicial department, such, for example, as customs officers, become the subject of complaint. Difficulty may arise in ascertaining whether the particular official, at the

---

Egypt, Department of State, Arbitration Series No. 4(6), 65. *Cf.* dissenting opinion of Commissioner Nielsen, *id.*, 71.

[10] See, for example, Clyde Dyches Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 193.

See, also, Abraham Solomon Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 476.

[11] See Clyde Dyches Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 193; Harry Roberts Case, *id.*, 1927 Vol., 100; B. E. Chattin Case, *id.*, 422.

[12] See, for example, Margaret Roper Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 205; Laura A. Mecham Case, *id.*, 1929 Vol., 168; Ethel Morton Case, *id.*, 151; Lillian G. Sewell Case, *id.*, 1931 Vol., 112, in the course of which Commissioner MacGregor, for the Commission, declared: "The Commission holds that, following its own precedents and the international precedents relating to the subject, the imposition of a penalty inadequate to the crime committed constitutes a denial of justice, and that this clear inadequacy exists in this case." (*Id.*, 119.)

[13] See Margaret Roper Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 205, 210.

Attention is called to the facts set forth by Charles H. Watson in *Yale L. J.*, XXV, 561, 563–566, in relation to the trial at Chester, Illinois, of persons accused of participating in the killing of certain Italian subjects in 1914 and 1915.

[14] See Abraham Solomon Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 476, 479, where the Commission declared that "the conviction and imprisonment of the claimant herein constituted a palpable injustice." In his comment on the decision, Mr. Hunt, the American Agent, declares: "When it shall have become universally recognized, as it virtually is at present, that the judgments of supreme municipal courts with respect to the rights of foreigners are properly subject to review by international tribunals, the occasions for such review will naturally decrease. Nations should understand that their insistence upon the alleged principle of immunity of final judgments from international judicial inquiry is not only out of harmony with the established order but tends to encourage the very development of circumstances which make such inquiry a necessity and to complicate their international relations." (*Id.*, 489.)

See analysis of decisions in A. V. Freeman, International Responsibility of States for Denial of Justice, 332–354; also his "Summary of Principles," *id.*, 298–300.

time of his alleged misconduct, was acting within the scope of his employment,[1] or whether his acts, regardless of that circumstance, constituted the breach of an international obligation on the part of his sovereign.[2] In this connection it may be observed again that the rank of the official is not necessarily decisive of the question whether his conduct in relation to alien life or property was of a character such as to impose upon his country responsibility for the consequences thereof.[3] Even if, however, his acts may be fairly regarded as productive of such a result, the duty imposed upon his country to do justice in the premises may be satisfied in various ways; and the special obligation to make reparation through the diplomatic channel is, as in other cases, contingent upon its failure to afford an adequate means of local redress, as through the instrumentality of the courts. When, therefore, the State charged with delinquency by reason of the conduct of its officials meets this requirement, interposition normally lacks justification until the exhaustion of the judicial remedy has proved to be unavailing.[4]

§ 288. [1] Thus in the (third) Bensley Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3018, the act complained of was regarded as outside of the scope of the authority of the actor — the Governor of San Luis Potosí; see, also, Joseph N. Wilson Case, before same commission, *id.*, 3021.

[2] See, for example, (second) Bensley Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3017.

"Great difficulty arises in determining what is the scope of an official's authority. Seldom if ever are officials given authority to commit wrongs. As the Comment on the Harvard draft remarks, 'it is probable that officers are instructed to act rightfully only.' Hence it might be argued that any wrongful act was outside the scope of an officer's authority, and could not directly involve the responsibility of the State. But this would in large measure defeat the purpose of the institution of diplomatic protection. It does not do much good to substitute the phrase 'within the scope of the office or function' of the official, as is done in the Harvard draft convention, since that has an almost equally wide borderland of doubtful meaning. Is participation in a mob uprising by a police official 'within the scope of his office or function'? Yet States have often been held responsible for such acts. According to the test suggested above, if an official uses his governmental power to commit an injury (however limited that power may be), then the question is to be dealt with as one involving the responsibility of the State for the acts of its officials, and the rule applied accordingly. All other cases are to be dealt with as if the wrongful act had been committed by a private individual." (F. S. Dunn, The Protection of Nationals, 135–136.)

See Guillermo Colunje Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 746.

[3] Arbitrators have oftentimes lost sight of this fact, even when they have correctly denied redress for the misconduct of petty officials in cases where local remedies have not been exhausted. See, for example, Leichardt Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3133, 3134; (second) Bensley Case, Mexican Claims Commission, Act of Cong., March 3, 1849, *id.*, 3017.

See Case of outrages on George Milliken and Simon Shine, American citizens in Guatemala who were subjected to outrage in that country in 1907, For. Rel. 1908, 410–417. In this case following interposition, indemnities were paid and a readiness evinced by the Government of Guatemala to remove from office a certain officer. The State Department did not ask for his removal but merely requested that he be reprimanded, trusting to the good offices of the Guatemalan Government to make appropriate disavowal of wrongful acts committed.

[4] Mr. Fish, Secy. of State, to Mr. Ruger, Oct. 21, 1869, 82 MS. Dom. Let. 224, Moore, Dig., VI, 660; Same to Messrs. Geo. Friend, Jr. & Co., May 31, 1871, 89 MS. Dom. Let. 449, Moore, Dig., VI, 660; message of the President to the Senate, Feb. 8, 1889, concerning the case of the American ship *Bridgewater,* S. Ex. Doc. 103, 50 Cong., 2 Sess., Moore, Dig., VI, 668; Case of Dr. John Baldwin, Mexican-American Commission, Convention of April 11, 1839, Moore, Arbitrations, III, 3126; Wadsworth, Commissioner in Leichardt Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, 3133. But see *contra,* Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, No. 25, July 20, 1885, MS. Inst. Mexico, XXI, 337, Moore, Dig., VI, 679; also Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, May 19, 1884, concerning the case of the American schooner, *E. D.*

The instances where officials of diverse categories and differing rank have committed acts which were regarded as at variance with the requirements of international law and as engaging the responsibility of their respective sovereigns are numerous. It is not here sought to marshal the array of international delinquencies which they reflect. A few cases suffice to illustrate how a State, after assigning a task to a particular instrumentality, may find itself burdened with the duty to make redress for the consequences of the action thereof. The United States has on several occasions been confronted with such an obligation. In its award of October 13, 1922, the tribunal of arbitration between the United States and Norway, under agreement of June 30, 1921, declared through its president, Dr. Vallotton, that the action of the United States Emergency Fleet Corporation in retaining funds of certain Norwegian claimants without restoring their ships that had been taken over was contrary to international law, as well as to the municipal law of the United States.[5] In 1932, the United States Court of Claims concluded that the Netherland vessel *Zeelandia,* having been entitled to clearance under the laws of the United States "as well as under the law of nations" when she entered an American port in October, 1917, was detained without justification, detention having been effected by the direction of the War Trade Board, and that the United States "under clear principles of international law" must assume responsibility for the damage caused thereby.[6] In 1935, a Joint Commission concluded that the sinking of the Canadian vessel *I'm Alone* on March 22, 1929, on the high seas, in the Gulf of Mexico, by the United States Revenue Cutter, *Dexter,* could "not be justified by any principle of international law," and penalized the United States accordingly.[7]

---

*Sidbury,* No. 574, MS. Inst. Mexico, XXI, 82, Moore, Dig., VI, 679, in which case a Mexican collector of customs refused to obey a judicial order for the restoration of the vessel which had been seized by the customs authorities, until a final order was issued containing the intimation that non-compliance therewith would result in the use of force. See, also, John C. Jones Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3018.

It is to be doubted whether the award of an indemnity in the Sheldon Lewis Case, American-British Claims Commission, treaty of March 8, 1871, by reason of the action of customs officials in New York in wrongly interpreting an order of the Secretary of the Treasury, was sound. Moore, Arbitrations, III, 3019–3021. The contention of the United States that local remedies should have been exhausted, was, it is believed, entitled to the approval of more than one Commissioner (Frazer).

In the Lalanne and Ledour Case, French-Venezuelan Commission, 1902, Ralston's Report, 501, in which damages were allowed because of the unjustified refusal of customs officials to clear a ship, there was no discussion of the question as to the duty of the claimant to exhaust his judicial remedies. In the Davy Case, British-Venezuelan Commission, 1903, Plumley, Umpire, declared that the claimant was not obliged to resort to the courts for his remedy and that "where, as in this case, there has been an agreed submission of the claims of British subjects to a mixed commission created to consider them the tribunal thus constituted has undoubtedly jurisdiction of the parties and of the subject matter." Ralston's Report, 410, 412.

[5] *Am. J.,* XVII, 362, 377. See letter of Mr. Hughes, Secy. of State, to the Norwegian Minister at Washington, Feb. 26, 1923, in relation to the award, *id.,* 287.

[6] Royal Holland Lloyd *v.* United States, 73 C. Cls. 722, 744–745.

[7] Final Joint Report of Jan. 5, 1935, Department of State, Arbitration Series No. 2 (7), p. 3.

i

## Claims Arising from Tortious Acts not Primarily Attributable to the State

(1)

§ 289. **Acts of Private Individuals.** The wrongful acts of private individuals directed against aliens are not primarily attributable to the sovereign of the place where they are committed, save on the rare occasions when those acts are to be regarded as amounting to a violation of international law.[1] The mere commission of them does not, therefore, ordinarily breed international responsibility.[2]

As the American-Panamanian General Claims Arbitration Tribunal declared in 1933: "The mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law." [3] The alien victim is expected to seek redress through local judicial channels, as by proceeding directly against the wrongdoer.[4] The Department of State has, fairly recently, expressed itself thus: "While it is a general principle of international law that a government is obligated to take all reasonable measures necessary to protect the property of aliens within its jurisdiction, a government is not ordinarily regarded as internationally responsible for losses or damages sustained by aliens as a result of the acts of private indi-

§ 289. [1] See The Relation of International Law to Private Individuals, In an Objective Sense, *supra*, § 11A.

"The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign." The Ship Resolution, 2 Dall. 1.

[2] "The legal authorities are in fairly general agreement that a State is not responsible for wrongs committed by individuals unless there is connected with such wrongs some independent delinquency on the part of the State itself, or its officials." (F. S. Dunn, The Protection of Nationals, 136.)

See Art. 3 of Resolution adopted by the Institute of International Law at Lausanne in 1927, on the International Responsibility of States by Reason of the Damage Caused on Their Territories to the Person and Property of Foreigners, *Annuaire*, XXXIII, Vol. III, 331. See, also, Art. 11 of Harvard Draft Convention on the Responsibility of States, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 134.

Mr. Lincoln, Atty.-Gen., 1 Ops. Attys.-Gen., 106, Moore, Dig., VI, 787; Mr. Forsyth, Secy. of State, to Mr. Calderon de la Barea, Sept. 17, 1839, MS. Notes to Spain, VI, 39, Moore, Dig., VI, 787; Mr. Fish, Secy. of State, to Mr. Mariscal, Mexican Minister, Feb. 19, 1875, For. Rel. 1875, II, 973, Moore, Dig., VI, 787; Mr. Bayard, Secy. of State, to Mr. Rodriguez, March 15, 1887, 163 MS. Dom. Let. 306, Moore, Dig., VI, 790; Mr. Hay, Secy. of State, to Mr. Fowler, April 15, 1899, 236 MS. Dom. Let. 354, Moore, Dig., VI, 792. See, also, Mr. Scruggs, Umpire, Cotesworth & Powell Case, Convention between Great Britain and Colombia, of Dec. 14, 1872, Moore, Arbitrations, II, 2053, 2082; Wipperman Case, American-Venezuelan Claims Commission, Convention of Dec. 5, 1885, *id.*, III, 3039; Thornton, Umpire, in Dickens Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, 3037.

[3] Walter A. Noyes Case, Hunt's Report, 155, 190, 194. See also Mr. Hackworth, Legal Adviser, Dept. of State, to M. F. Lyons, Feb. 7, 1935, Hackworth, Dig., III, 632, footnote.

[4] See Mr. Sherman, Secy. of State, to Mr. Hoshi, Japanese Minister, March 31, 1897, For. Rel. 1897, 368, Moore, Dig., VI, 791.

See, generally, communication from the Government of the United States, of May 22, 1929, to the Preparatory Committee for the Codification Conference at The Hague of 1930, Bases of Discussion, III, Supplement, League of Nations Doc. No. C.75(a).M.69(a).1929.V, 4; also, Bases of Discussion Nos. 17, 18, and 19, Bases of Discussion, III, League of Nations Doc. No. C.75.M.69.1929.V, 96, 99, 102.

viduals in the absence of evidence of complicity or negligence on the part of its authorities." [5]

Nevertheless, close scrutiny of the cases where an alien has suffered injury at the hands of private individuals reveals the fact that in the series of events immediately prior to, associated with, or subsequent to the acts productive of harm, the territorial sovereign has oftentimes been delinquent in affording requisite protection, and has been penalized accordingly. Delinquency has been apparent in the failure to take measures of prevention which, in the circumstances of the particular case, could and should have been taken, or in neglect to make reasonable endeavor to prosecute the malefactors.[6] It has also been apparent at times in measures calculated to thwart the victim in his efforts to obtain reparation in the courts.[7] A faithful picture of the relevant law demands, therefore, a taking cognizance of these factual accompaniments that frequently appear on the scene when private individuals do their worst to alien life or property, and which are decisive of the question whether the State within whose domain they occur is subject to an international obligation to make redress. These factors are believed to be duly heeded when it is said that normally [8] the freedom of a State from responsibility for the consequences of wrongful acts of private individuals directed against aliens is subject to the condition subsequent that such State did not conduct itself before or after the commission of those acts in such a way as to establish delinquency in the performance of its duties of jurisdiction. Evidence of such delinquency has, according to the conclusions of claims commissions in numerous cases of fairly recent date in which the United States was a party litigant, been apparent in the circumstances attending the failure of the territorial sovereign to apprehend or punish adequately the individual offenders.[9]

[5] Statement for the General Information of American Nationals Desiring to Present International Pecuniary Claims for Losses or Damages Sustained in Spain. [Undated.]

[6] See Report of Dr. Wharton, Solicitor for the Dept. of State, April 21, 1885, For. Rel. 1885, 212, accompanying communication of Mr. Bayard, Secy. of State, to Mr. Scruggs, Minister to Colombia, May 19, 1885, *id.*, 211.

[7] See Mr. Lincoln, Atty. Gen., 1 Ops. Attys. Gen., 106, Moore, Dig., VI, 787; Mr. Hay, Secy. of State, to Mr. Fowler, April 15, 1899, 236 MS. Dom. Let. 354, Moore, Dig., VI, 792; Mr. Scruggs, Umpire, Cotesworth & Powell Case, convention between Great Britain and Colombia, of Dec. 14, 1872, Moore, Arbitrations, II, 2053, 2082; Wipperman Case, American-Venezuelan Claims Commission, convention of Dec. 5, 1885, *id.*, III, 3039.

[8] The word "normally" in the text is used with a view to excluding those unusual situations where the private individual actor appears to violate an injunction seemingly imposed upon him by the law of nations. See *supra*, § 11A.

[9] See, for example, Laura M. B. Janes Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 108; J. W. Swinney Case, *id.*, 131; Thomas H. Youmans Case, *id.*, 150; Margaret Roper Case, *id.*, 205; Ida R. S. Putnam Case, *id.*, 222; Charles S. Stephens Case, *id.*, 397; Gertrude P. Massey Case, *id.*, 228; F. R. West Case, *id.*, 404; Salomé de Galván Case, *id.*, 408; George D. Richards Case, *id.*, 412; John D. Chase Case, *id.*, 1929 Vol., 17; J. J. Boyd Case, *id.*, 78; Norman T. Connolly Case, *id.*, 87; Louise O. Canahl Case, *id.*, 90; Laura A. Mecham Case, *id.*, 168; Hazel M. Corcoran Case, *id.*, 211; George M. Waterhouse Case, *id.*, 221; S. J. Stallings Case, *id.*, 224; Richard A. Newman Case, *id.*, 284; Elvira Almaguer Case, *id.*, 291; Lillie S. Kling Case, *id.*, 1931 Vol., 36; J. N. Tribolet Case, *id.*, 68; Martha Ann Austin Case, *id.*, 108; William E. Chapman Case, *id.*, 121; Sarah Ann Gorham Case, *id.*, 132; Minnie East Case, *id.*, 140; Helen O. Mead Case, *id.*, 150; Lillian G. Sewell Case, *id.*, 112.

See, also, Lettie Charlotte Denham Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 244; Gust Adams Case, *id.*, 275.

If a State seeks to profit from the fact that the act of the private individual committed within a place under its control was not internationally illegal, it should be able to show that it has not through its own conduct forfeited the privilege of availing itself of that defense. The United States has at times appeared to be unable to make such a showing. Thus, for example, the murder of seven Mexican shepherds in Texas in 1873, required immediate and diligent effort on the part of the local authorities to discover and prosecute the perpetrators. It is believed that the Mexican Minister, Mr. Mariscal, was justified in asserting that a denial of justice was apparent in the attitude of the authorities of Texas in not trying to discover the murderers "by all the means used by public authorities in civilized countries (such as Texas doubtless is) for the discovery of the perpetrators of any crime which is not a mere injury or offense of a private character, as murder never has been." [10] He was also correct in declaring in substance that the obligation to take measures for the detection of the wrongdoers was not dependent upon the furnishing of information on oath as to the facts and as to the perpetrators.[11]

When American nationals have suffered criminal violence at the hands of individuals in foreign countries, the United States has declared it to be "the duty of the State diligently to prosecute and properly punish the offenders," maintaining that "for its refusal to do so it may be held answerable for pecuniary damages." [12] This principle has been invoked in discussions where it has appeared, as in the case of Frank Lentz,[13] an American citizen murdered in Kurdistan in 1894, and in that of Charles W. Renton,[14] an American citizen

[10] Communication to Mr. Fish, Secy. of State, April 17, 1875, For. Rel. 1875, II, 982, 983, Moore, Dig., VI, 787, 789.

[11] Mr. Fish, Secretary of State, had admitted the duty of a State to prosecute such offenders according to the law by all the means in its power, but he insisted that no person could be arrested upon suspicion of having committed a crime except upon the affidavit of a credible witness, and he adverted to the fact that murder could, in the United States, only be prosecuted upon information under oath, and he stated that the Department was not aware that such information had been furnished. It is believed that these suggestions were inept. The public duty to prosecute embraced the duty to investigate and make reasonable efforts to detect the murderers. Fulfillment of the latter would doubtless have established the foundation for criminal prosecution by indictment. Failure, however, in this regard did not shift to the Mexican Government or to interested friends of the victims the burden of securing evidence sufficient to justify complaints on information under oath specifying the offenders. It is to be regretted, therefore, that the United States persisted in its refusal to grant redress. The correspondence with the Mexican Legation is contained in For. Rel. 1875, II, 954–985, and *id.*, 1888, II, 1306–1308. An abstract is contained in Moore, Dig., VI, 787–790.

[12] The language quoted is that of Mr. Hay, Secy. of State, in a communication to Mr. Combs, Minister to Guatemala and Honduras, Feb. 25, 1904, concerning the claim of Mrs. Charles W. Renton against Honduras, For. Rel. 1904, 352, 363, Moore, Dig., VI, 798.

[13] Concerning the Lentz Case, see Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895, For. Rel. 1895, II, 1257, 1316, 1332, *id.*, 1899, 766–767, Moore, Dig., VI, 792–794.

[14] In the Renton Case, the gross misconduct of the officials of Honduras was apparent also in other ways. A United States Naval board "found that Mrs. Renton's claim for $37,420 was a just one; that all the portable property on Renton's place at the time of his murder had since been either destroyed or appropriated by the company; that the Honduran authorities had taken no steps to prevent such destruction or appropriation, and that all legal steps taken by them in relation to the murder of Renton, the abduction of his wife and niece, the burning of his dwelling, and the robbery of his personal property were either half-hearted and farcical, or were smothered at the outset by bribery and corruption." Statement in Moore, Dig., VI, 796. Concerning the case see For. Rel. 1904, 352–369, Moore, Dig., VI, 794–799.

whose wife and niece were abducted, his property destroyed or appropriated and himself murdered in Honduras, that there was gross negligence, if not complicity, on the part of local officials in permitting the escape from their custody of the guilty parties.

In some instances American citizens in foreign countries have suffered injury to their persons or property through the acts of bands of brigands, and frequently under circumstances indicating neglect on the part of the territorial sovereign to afford protection or to prosecute the wrongdoers.[15] Delinquency has assumed a form not to be reconciled with the requirements of international law as applied to the circumstances of the particular case and has, therefore, been deemed to suffice to produce international responsibility. When the Department of State has believed the victims to be entitled to redress from the territorial sovereign, they have at times not been left to their own resources, or been called upon by the United States to press their legal remedies through domestic channels. Nor has it often been urged by respondent States that interposition was premature or unreasonable.[16] Such action on the part of the United States has usually been justified not merely because the territorial sovereign was delinquent in the matter of prevention or prosecution, but rather for the reason that the form of delinquency was such as to destroy all reasonable expectation of securing justice through domestic channels, or because no process was known whereby the territorial sovereign was obliged to respond in damages to the suit of a private claimant.[17]

A situation may arise where brigandage becomes rampant throughout a por-

---

See Baron Komura, Japanese Minister of Foreign Affairs, to Mr. Griscom, American Minister, March 4, 1904, respecting the vigorous efforts taken at the suggestion of the United States to punish the natives of Botel Tobago, who, in 1903, had murdered shipwrecked seamen of the American ship *Benjamin Sewell,* For. Rel. 1904, 444, also Moore, Dig., VI, 799.

Concerning case of the murder of the American Vice-Consul Stuart, a British subject, at Batum, in 1906, see For. Rel. 1906, II, 1290–1295.

[15] Attention is called to Case of Knapp and Reynolds (Turkey), 1883, For. Rel. 1883, 1884, 1885, 1889 and 1890, Moore, Dig., VI, 800–801; Case of L. M. Baldwin (Mexico), 1887, For. Rel. 1888, Moore, Dig., VI, 801–806; Marauders in Peru, 1899, Moore, Dig., VI, 806; Case of Ion Perdicaris (Morocco), 1904, For. Rel. 1904, Moore, Dig., VI, 807; Case of Rev. B. W. Labaree (Persia), 1904, For. Rel. 1904, 1905, 1906, 1907, 1908, in part in Moore, Dig., VI, 806–807.

In the Case of L. M. Baldwin (Mexico), 1887, amplest notice was given to both State and Federal authorities of the lawless proceedings of those who committed the crime. Their depredations had been long continued and the offenders were well known. No serious steps were taken to afford protection. Mr. Bayard, Secy. of State, to Mr. Bragg, Minister to Mexico, No. 8, March 15, 1888, For. Rel. 1888, II, 1144, Moore, Dig., VI, 801, Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802. See, also, Mr. Bacon, Acting Secy. of State, to Mr. Leishman, American Ambassador to Turkey, July 2, 1907, For. Rel. 1907, II, 1072.

[16] In the Knapp and Reynolds Case, the Turkish Government informed General Wallace, American Minister, April 6, 1885, "that in penal matters there is no provision giving a private individual, who considers himself injured in his rights, permission to claim pecuniary indemnity from the State. . . . I believe, however . . . that it is lawful for the parties interested to bring suit against the magistrates for prejudice to their cases by reason of irregularities in the proceedings." For. Rel. 1885, 847. See response of Mr. Bayard, Secy. of State, Aug. 17, 1885, *id.,* 859.

In the L. M. Baldwin Case, the Mexican Minister, Mr. Mariscal, "invoked the familiar rule that the claimants must pursue their remedies in the courts of the country before they can resort to diplomatic interposition." Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802, 805.

[17] Declared Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, Jan. 5, 1891, in the L. M. Baldwin Case, "This Government is not aware of any courts or of any processes by

tion of the State whose government is deemed to evince a chronic attitude of passivity or tolerance. In such case the mere frequency and success with which bandits carry on their operations cannot be acknowledged as indicative of inability on the part of the territorial sovereign to rid the country of such individuals.[18] There may be little ground for the inference that it has made, or is making, full use of the means at its disposal to suppress and punish the actors. Evidence of failure in this regard clearly justifies interposition. Such action may embrace a notification to the authorities of the disaffected State demanding protection for alien life and property when they are endangered.[19] Protracted impotence or unconcern on the part of such State may not only excuse sterner measures, but also serve in fact to arouse aggrieved States to make use of them.[20]

It should be borne in mind that "the protection of a community through the exercise of proper police measures is of course a function of authorities of a State and not of persons having no official functions"; that "the discharge of duties of this nature should not be contingent on requests of members of the community"; and that "obviously the fact that requests for protection are not made in a given case does not relieve authorities from their solemn responsibilities." Accordingly, "in the determination of questions of international responsibility, evidence in relation to requests for protection has a bearing merely on matters pertaining to the need for protection and the warning conveyed by such requests." [21]

(2)

§ 289A. **Damages Arising from Neglect to Prosecute.** When the delinquency of a foreign State is confined to neglect in the prosecution of offenders,

---

which the issue could be tried and redress obtained by the claimant in Mexico. Nor, where the question presented is whether the Government of a country has discharged its duty in rendering protection to the citizens of another nation, can it be conceded that that government is to be the judge of its own conduct." Moore, Dig., VI, 805. See, also, opinion of Ralston, Umpire, in the Poggioli Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 847, 869.

[18] Concerning the notorious failure of Mexican governmental authorities, for a protracted period between 1911 and May, 1920, to prevent or check the recurrence of acts of brigandage directed against American life and property in various parts of Mexican territory, see Investigation of Mexican Affairs, Preliminary Report (May 28, 1920) and Hearings of the Committee on Foreign Relations, United States Senate, pursuant to S. Res. 106, Senate Doc. No. 285, 66 Cong., 2 Sess.

*Cf.*, however, the situation in the British Protectorate of Sierra Leone, in 1898, as referred to in Home Missionary Society Case, American-British Pecuniary Claims Arbitration, convention of 1910, Nielsen's Report, 423, 425–426, Hackworth, Dig., III, 633, footnote.

[19] Thus, in February, 1935, the American Legation at Nanking notified the authorities of Kansu and Shensi Provinces that the interests of Americans should be protected during a period of Communistic activities of threatening aspect, and those authorities were reported to have promised to take steps necessary for the according of such protection. See *New York Times*, March 2, 1935, p. 4.

[20] See, in this connection, Mr. Lansing, Secy. of State, to the Secretary of Foreign Relations of the *de facto* government of Mexico, June 20, 1916, For. Rel. 1916, 581; The Pursuit of Villa, *supra*, § 67.

[21] Case of Mrs. Elmer Elsworth Mead, American-Mexican Claims Commission, Convention of September 8, 1923, Opinions of Commissioners, 1931, 150, 153. See also case of William E. Chapman before same Commission, *id.*, 121, 123–124, 130, where it appeared that a warning of imminent danger had been communicated to the territorial sovereign. Both of these cases are referred to in Hackworth, Dig., III, 634–635.

and no remissness is apparent in the matter of prevention, the United States commonly interposes and demands an indemnity unless an ample remedy is locally available to the claimant. Doubtless, in some cases, such neglect, although subsequent to the acts of violence, has caused special injury to the claimants as by enhancing the difficulty, or even destroying the means of ascertaining the identity of assailants and of subjecting them to civil actions for damages.[1] The amount of indemnity sought or obtained by means of diplomatic interposition, or through the awards of arbitral tribunals has, however, oftentimes appeared to be out of proportion to any pecuniary loss sustained by claimants in consequence of the bare neglect to prosecute.[2] This circumstance justifies careful inquiry as to the correct explanation of what has taken place and of what may fairly be anticipated. Of late, tribunals have sought anew to make clear the reasons for their own action, and in so doing to enunciate the theory by virtue of which damages should be assessed.[3]

It has been declared that the State which has neglected to prosecute "has transgressed a provision of international law as to State duties," and that "the damage caused by the government's negligence is the damage resulting from the non-punishment of the murderer"; and effort has been made to measure damages according to the supposed effect of this particular delict.[4] In so doing, however, a tribunal is likely to find that the claimant has suffered but slight pecuniary loss from the governmental neglect, and may be put to it to show a solid basis for the awarding of substantial damages; [5] and if such damages as may be awarded are designed to be compensatory, the complainant is seen to be compensated not merely for the consequence of the neglect to prosecute, but

§ 289A. [1] This was notably true in the case of the Mexican shepherds murdered in Texas in 1873. It has also been true in certain cases of mob violence.

"If the Government had not committed its delinquency — if it had apprehended and punished Carbajal — James' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit." (Van Vollenhoven, Presiding Commissioner, in Laura M. B. Janes Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 108, 115.)

[2] Respecting the Case of Frank Lentz murdered by brigands in Kurdistan in 1894, Mr. Hay, Secy. of State, declared that if the "murderers had been duly punished, this Government would not have felt disposed to demand an indemnity," but because a light punishment was inflicted and the guilty parties permitted to escape, the United States demanded and secured a considerable sum for the parents of the deceased. Communication to Mr. Straus, Minister to Turkey, March 25, 1899, For. Rel. 1899, 766–767, Moore, Dig., VI, 794. It is difficult to see how the parents of the victim in this particular case sustained any pecuniary loss through the misconduct of the Turkish Government in lightly prosecuting the wrongdoers or in permitting them to escape.

[3] See, for example, Laura M. B. Janes Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 108, embracing separate statement regarding damages by Nielsen, Commissioner, *id.*, 120. See, also, separate opinion of same Commissioner in the L. F. H. Neer Case, before same Commission, *id.*, 71, 74; George A. Kennedy Case, before same Commission, *id.*, 289; George D. Richards Case, before same Commission, *id.*, 412; Salomé de Galván Case, before same Commission, *id.*, 408; Gertrude P. Massey Case, before same Commission, *id.*, 228.

[4] Van Vollenhoven, Presiding Commissioner, in Laura M. B. Janes Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 108, 115.

[5] Thus, in the Laura M. B. Janes Case, the Presiding Commissioner declared: "Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government's attitude." (Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 108, 119.)

rather for that resulting from something quite extrinsic to it. In a word, they seem to satisfy a fiscal loss with which the mere governmental delinquency lacks a causal connection. For that reason, the theory mentioned fails to offer a satisfactory explanation of the awards of arbitrators who are inclined to support it.[6]

It is believed that the weight of judicial opinion manifests respect for a different theory that measures damages according to the pecuniary loss sustained at the hands of the original wrongdoers, and compensates the claimant accordingly.[7] It is said in substance that when the State neglects to prosecute it is to be deemed to approve of or condone the wrongful acts of those who did violence to the claimant, and to assume a responsibility therefor.[8] The result is not unreasonable.[9]

The condonation theory affords a more satisfactory explanation than that which imputes complicity in the commission of acts of violence where none was in fact apparent.[10] A State may by its neglect condone conduct without becom-

[6] States are unlikely to agree to confer jurisdiction upon a claims commission to award punitive damages for the benefit of a national of either contracting party. Parker, Umpire of the Mixed Claims Commission, United States and Germany, declared in his opinion in the Lusitania cases, November 1, 1923: "The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals." (Consolidated Edition of Decisions and Opinions, 1925, 17, 27.) See, however, basis of damages awarded in Charlie R. Richeson Case (embracing that of James Langdon), American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 268, 272, where "improper police action" as well as "inadequate police protection" constituted the basis of the award. Declared Van Vollenhoven, Presiding Commissioner, in the Laura M. B. Janes Case: "The culprit cannot be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the government can be sentenced once the non-performance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here." (Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 108, 115.)

[7] "It is clear that arbitral tribunals in assessing damages for the failure of authorities to punish wrongdoers have taken account of the damage caused by the wrongful acts of the culprits for which governments have been held responsible." (Nielsen, Commissioner, in the Laura M. B. Janes Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 123.)

*Cf.* Edwin M. Borchard, in *Am. J.*, XXI, 516, 517.

[8] See, for example, Cotesworth and Powell Case, Moore, Arbitrations, II, 2050, 2082, 2085; opinion of Little, Commissioner, in Amelia de Brissot Case, *id.*, III, 2967; opinion of Findlay, Commissioner, in same case, id., 2969.

[9] "Assuredly the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary." (Separate statement of Nielsen, American Commissioner, in Laura M. B. Janes Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927, Vol., 120, 123.)

[10] "The logical and reasonable theory upon which liability is properly to be founded in this class of cases is that, by failing to prosecute or to punish adequately, the government condones and adopts as its own the damaging act of the unpunished criminal. This is a sound and essential theory of international law, for which there is abundant authority." (Comment of Mr. Hunt, American Agent, in Lettie C. Denham Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 244, 246.)

In the Poggioli Case, Ralston's Report, 847, 869, complicity was deemed to exist.

"The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor." Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mex. XIX, 18, *citing* Calvo, *Droit Int.*, II, 397, Moore, Dig., VI, 655.

ing an accomplice of the actor. To forgive is not necessarily to become a sharer of the guilt of him who is forgiven. Inaction that betrays unconcern on the part of a State whether the penalties of the law are to be visited upon him who in contempt thereof directs his criminal violence against alien life or property, deprives the State of defenses which it might normally set up. It can no longer maintain, as against the victim, that it is not answerable for the consequences of what has taken place. Thus, as the simplest explanation of the practice that sanctions the awarding of substantial damages, it is suggested that a State which has failed in the performance of its international obligation in the matter of prosecution is not permitted to deny responsibility for the consequences of the criminal acts of individuals or mobs as measured by the pecuniary losses which they themselves have produced. This explanation does no violence to the facts; and it heeds the principle that damages should be computed in such a way as to disclose a causal connection between particular acts and losses resulting from them. The law, as so interpreted, doubtless penalizes a State for its shortcomings by imposing a responsibility where none would normally be apparent; but damages flow directly from the acts for which the State is held responsible and in that sense are compensatory rather than penal in character. The views of claims commissions expressed in recent cases to which the United States has been a party have, however, revealed neither clearness nor uniformity of thought in relation to the matter.[11]

The neglect to prosecute affects also the State of the victim which is possessed of an essentially public interest in the delinquency. That State is itself injured when one of its nationals is subjected to criminal violence.[12] It is conceivable that in a particular case the extent of the injury, by reason of the conspicuous or unique value of the victim to the State, may be fairly appraised and computed in terms of money. If, or when, it can be, there exists the basis of a reasonable demand for reparation. In such a situation it may be contended that damages, in order to be compensatory for the entire injury occasioned by the original wrongdoers, should be so computed as to satisfy the public as well as the private pecuniary loss, because the State itself is one of those dependent upon the victim. It is not understood, however, that the United States has ever made claim for reparation on such a theory.[13]

[11] See, for example, George A. Kennedy Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 289; Laura A. Mecham Case, *id.*, 1929 Vol., 168; Martha Ann Austin Case, *id.*, 1931 Vol., 108; Lettie C. Denham Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 244.

See, in this connection, J. L. Brierly, "The Theory of Implied State Complicity in International Claims," *Brit. Y.B.*, IX, 1928, 42; Eagleton, Responsibility of States, Chap. VIII; F. S. Dunn, The Protection of Nationals, 172–187; William G. Rice, Jr., "State Responsibility for Failure to Vindicate the Public Peace," *Am. J.*, XXVIII, 246; A. V. Freeman, International Responsibility of States for Denial of Justice, 1938, Chap. XIII.

[12] Declared Parker, Umpire, Mixed Claims Commission, United States and Germany, on October 21, 1924, in his Opinion on the Nationality of Claims: "The nation is injured through injury to its national, and it alone may demand reparation, as no other nation is injured" (citing Vattel, Book II, Chapter VI, Section 71). Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions, 1925, 175, 176.

[13] It may be noted in this connection that among the categories of claims which the Mixed Claims Commission, United States and Germany, was authorized to pass upon, were the

There is, however, a more acute and oft-recurring public interest in the neglect to prosecute which is not to be measured in terms of money, and which is unproductive of issues susceptible of adjudication before claims commissions. The State of which the victim is a national deplores and resents "the transgression of international law" because the failure of public justice in the territory of the delinquent State operates as a stimulus to criminal offenses against alien life and property, and renders increasingly hazardous the safety therein of nationals of the aggrieved State.[14] This obvious result, responsible at times for the acerbity of diplomatic protest,[15] may arouse such State to deal rigorously with that other

---

following: "(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons or to property, rights, and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war." (Agreement with Germany, August 10, 1922, Treaty Vol. III, 2601.)

[14] In the Case of Rev. B. W. Labaree, an American missionary, murdered by a band of Kurds near Urumia, Persia, in 1904, the relation of the indemnity to the prosecution of certain accessories to the murder, became the matter of diplomatic discussion. It was reported that the chief ecclesiastic of Urumia had instigated the crime and sheltered the criminals. For. Rel. 1904, 659–660. The reported failure of the Persian Government to punish the murderers impelled the United States to demand an indemnity of fifty thousand dollars in behalf of the widow and children. *Id.*, 675–676. An arrangement for settlement was, however, made on the following basis. The imprisonment of the principal murderer who had been caught, the arrest and punishment of the accomplices, and the payment of fifty thousand dollars in gold, of which sum thirty thousand dollars was to be paid at once to the American Minister and the balance of twenty thousand dollars was to be paid to him in case of the escape from prison of the principal murderer through official negligence or connivance, or in case the known accomplices identified as participants were not captured and punished by a fixed date, or if any portion of the indemnity should be exacted from the Christian population in Urumia or elsewhere in Persia. *Id.*, 1905, 723. The chief accomplices were captured, brought to the capitol, there held for seven months, and then remanded to Urumia for trial; but they escaped or were liberated on the way. *Id.*, 1906, II, 1209. In response to the suggestion that the Kurdish tribes in sympathy with the accused persons would pay the widow the twenty thousand dollars which was conditionally abated, as a substitute for the punishment of the accused, the Persian Government was informed that "gold cannot atone for American blood," and that punishment according to the measure of guilt was the only reparation acceptable to the United States. *Id.* Then the effort was made by the Persian Government to settle finally the controversy by paying to the American Minister the twenty thousand dollars for the benefit of the widow and children. This offer was rejected. *Id.*, II, 1215. Thereupon through its Legation at Washington the Persian Government suggested that the punishment of the accomplices take the form of a fine rather than imprisonment. *Id.* 1907, II, 941. There was some misunderstanding as to the exact meaning of this offer. Mr. Root, Secy. of State, took occasion to point out the distinction between the "remedial reparation due to the widow," which had been fully made and the "exemplary redress due to the Government of the United States." He added that that Government would not accept blood money from Persia or from innocent Persians in substitution of the just claim that punishment be visited upon the guilty; and that that punishment, of whatsoever form, should possess an exemplary character and effect a deterrent purpose. He also suggested that a money penalty exacted as punishment, if devoted to the erection of a memorial structure, such as a hospital, would serve as a lasting lesson in favor of law and order. For. Rel. 1907, II, 943, 944. It later appearing that the principal murderer had died in jail, that some of his accomplices had been killed in skirmishes, and that all the others were on Turkish soil, the United States agreed to abandon further insistence on the exaction of a pecuniary indemnity from their relatives, and to consider the matter closed, with the understanding that the Persian Government would visit punishment upon the fugitives should they return to its territory. *Id.*, II, 947–948; *id.*, 1908, 680–681.

See, opinion of Plumley, Umpire, in the Maal Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 914, 916.

See, also, views of The Permanent Court of International Justice in Chorzów Case between Germany and Poland, Proceedings, Permanent Court of International Justice, Series A, No. 17, 27–29.

[15] See, for example, note from the Italian Embassy to Mr. Hay, Secy. of State, Nov. 14, 1901, For. Rel., 1901, 297.

through whose remissness it suffers, and, in the event of frequent recurrences of such neglect, to have recourse to intervention, if no contractual arrangement imposes a restraint.[16]

(3)

MOB VIOLENCE

(*a*)

§ 290. **Claims against the United States.** Numerous demands for redress for the consequences of mob violence have, in years past, been preferred against the United States. International delinquency has oftentimes been apparent, for the facts associated with the particular cases have in many instances revealed gross neglect on the part of local authorities either to prevent what occurred or to prosecute the wrongdoers.[1] Trivial effort to afford protection has at

[16] The murder on Greek soil in August, 1923, of Italian members of a Commission appointed by the Conference of Ambassadors to fix the boundary between Albania and Greece, resulted in a final decision of the Conference of Ambassadors, September 27, 1923, in which it was declared in part: "Observing also that several omissions have been noted on the part of the Greek authorities as regards the conduct of the enquiry; and observing that, as regards the discovery of the guilty parties, several negligencies have been recorded; considering that the 5th condition contained in the Note of September 8th, can, in consequence, not be regarded as fulfilled; decides that the Hellenic Government shall pay to the Italian Government by way of penalty on this account a sum of 50 million Italian lire. . . ." (World Peace Foundation Pamphlets, VI, 209, 210.)

By Resolution of September 28, 1923, the Council of the League of Nations instructed a special Commission of Jurists to reply to certain questions arising out of the interpretation of the Covenant and "other points of international law." On January 24, 1924, the Commission notified the President of the Council of the replies agreed upon by the Jurists. The fifth question was: "In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?" The reply was: "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

"The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf." (League of Nations, *Official Journal,* 1924, 523–524.)

See in this connection "How the League of Nations Met the Corfu Crisis," by Manley O. Hudson, *New York Times,* October 7, 1923, reprinted in World Peace Foundation Pamphlets, VI, 176; "Legal and Political Questions," by same writer, *Proceedings,* Am. Soc., 1924, XVIII, 126; "*L'Incident de Janina entre la Grèce et l'Italie,*" by Karl Strupp, *Rev. Gén.,* XXXI, 255; "The Law of Reprisals as Affected by the League Treaty," by Thomas H. Black, *Canadian Bar Review,* I, 729, and 825.

§ 290. [1] Attention is called to the following cases: Spanish Consul and Spanish subjects at New Orleans, 1851, Moore, Dig., VI, 811–815, and documents there cited; Chinese at Denver, 1880, For. Rel. 1881, 319–337, Moore, Dig., VI, 820–822; Chinese at Rock Springs, Wyoming, 1885, For. Rel. 1886, 101–168, Moore, Dig., VI, 822–835; Italians at New Orleans, 1891, For. Rel. 1891, 658–728, Moore, Dig., VI, 837–841; James Bain, a British subject, at New Orleans, 1895, For. Rel. 1895, I, 686–696, For. Rel. 1896, 298–301, Moore, Dig., VI, 849–850; Italians at Walsenburg, Colorado, 1895, For. Rel. 1895, II, 938–956, Moore, Dig., VI, 841–843; Mexicans at Yreka, California, 1895, Moore, Dig., VI, 851, and documents there cited; Italians at Hahnville, La., 1896, For. Rel. 1896, lxxvi, 396–422, For. Rel. 1897, 353–354, Moore, Dig., VI, 843–845; Italians at Tallulah, La., 1899, For. Rel. 1899, xxii, 440–466, For. Rel. 1900, xxii, 715–731, Moore, Dig., VI, 845–848; Italians at Irwin, Miss., 1901, For. Rel. 1901, 283–299, Moore, Dig., VI, 848–849; nationals of Austria-Hungary, Greece, and Turkey, at South Omaha, 1909, House Doc. No. 576, 64 Cong., 1 Sess.; Angelo Albano, an Italian killed in Florida, 1910, Senate Rep. No. 118, 63 Cong., 1 Sess., For. Rel. 1913, 613–624; Albert Piazza, and J. Speranza, Italians killed in Illinois, 1914 and 1915, respectively, reported by C. H. Watson, in *Yale Law J.,* XXV, 561–581.

times been the only response to warnings of the violence to be anticipated.[2]

The attempts to prosecute have sometimes been a travesty on justice. Inquests over the remains of victims have been purposeless. Oftentimes local officials have failed to discover any responsible perpetrators of the acts committed. Even when such persons have been known, grand juries have usually failed to indict.[3] In one instance the action of such a body was aptly described as a burlesque.[4] Happily, however, there has in recent years been a great diminution of instances where foreign Governments have found occasion to complain of delinquency on the part of the United States.

When the violence has occurred within the domain of any State of the Union, the National Government, by reason of the lack of a Federal law permitting it to instigate criminal proceedings therein, has been obliged to content itself with requesting the Governor of such State to set in motion the local machinery of justice, or with sending an agent to make an investigation or to observe any

---

Attention is also regretfully called to the deplorable case at Rock Springs, Texas, where in 1910, following the killing of certain officers by a body of Mexicans who had crossed the Rio Grande at San Benito, one Antonio Rodriguez was burned alive on account of the rape and murder of an American woman. For. Rel. 1911, 349 and 354.

Between Aug. 5 and 8, 1920, certain Italians at West Frankfort, Ill., were victims of mob violence, which caused the death of one Luigi Carrero and the destruction and loss of much property.

See, also, the case of Etienne Derbec, before Commission under convention between the United States and France of Jan. 15, 1880, Moore, Arbitrations, 3029; James Bryce, "Legal and Constitutional Aspects of the Lynching at New Orleans," *New Review* (London, 1891), IV, 385; J. B. Moore, "Responsibility of Government for Mob Violence," *Columbia Law Times,* V, 211; E. W. Huffcut, "International Liability for Mob Injuries," *Annals,* Am. Academy, Pol. & Soc. Sc., II, 69; H. Arias, "The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War," *Am. J.,* VII, 724; Julius Goebel, Jr., "International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars," *Am. J.,* VIII, 802. All of these monographs have been noted by Dr. Borchard in his Diplomatic Protection, § 89. See, also, discussion, Borchard, Diplomatic Protection, §§ 89–92; Charles H. Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens," *Yale Law J.,* XXV, 561.

See Art. 7 of Resolution adopted by the Institute of International Law at Lausanne in 1927, on the International Responsibility of States by Reason of Damages Caused on Their Territories to the Person or Property of Foreigners, *Annuaire,* XXXIII, Vol. III, 332; Art. 11, and Comment thereon, of Harvard Draft Convention on the Responsibility of States, *Am. J.,* XXIII, *Special Supplement,* April, 1929, 134, 189; Bases of Discussion Nos. 22, 22 (*a*), 22 (*b*) and 22 (*d*), submitted by the Preparatory Committee for the Codification Conference of 1930, Conference for the Codification of International Law, Bases of Discussion, III, Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V, 111, 113, 116, 120.

[2] This was true in the case of the lynching of Italians at New Orleans, in 1891. See Baron Fava, Italian Minister, to Mr. Blaine, Secy. of State, March 15, 1891, and March 18, 1891, with enclosure, For. Rel. 1891, 666 and 668, respectively. It may have also been true in the case of the lynching of Italians at Hahnville, La., in 1896. Such at least was the contention of the Italian Embassy. See For. Rel. 1896, 412, 413, in response to the suggestion of the Department of State that all normal precautions for the safety of the prisoners had been taken. *Id.,* 409–410. In the cases of Italians at Walsenburg, Colorado, in 1895, at Tallulah, La., in 1899, and Irwin, Miss., in 1901, neglect in the matter of protection was not apparent, and if it existed, such delinquency was overshadowed in all but one of these cases by the evidence of neglect with respect to prosecution.

[3] In the case of Italians at Tallulah, La., in 1899, the Italian Embassy furnished the names of persons believed to have been active participants. For. Rel. 1900, 715–718. No persons were indicted.

[4] Mr. Cheng Tsao Ju, Chinese Minister, to Mr. Bayard, Secy. of State, Nov. 30, 1885, respecting the Rock Springs Case, For. Rel. 1886, 102, Moore, Dig., VI, 823.

local judicial proceedings. Frequently a painful lack of efficiency or zeal on the part of local officials entrusted with the duty of prosecution has resulted in a miscarriage of justice.

In the earlier cases it was stoutly maintained that there was no legal duty on the part of the United States to pay indemnities.[5] This was due, at least in one instance, to the fact that national responsibility for the occurrence was denied, and such denial was based upon the assertion that there had been no neglect in the matter of protection or prosecution.[6] Constitutional reasons for the inaction of the Federal Government, in view of the existing state of law, were also emphasized.[7] Even where neglect on the part of local authorities was admitted, the obligation to respond in damages was not acknowledged. Moreover, in one such case it was grimly announced that the courts were open to the alien victims or their dependents who should therein exhaust their judicial remedies.[8] While such a contention would have been sound if the wrongful acts had been chargeable solely to private individuals, it was not applicable where, through the laches of public officials, there had also been delinquency on the part of the territorial sovereign, unless the nation or some agency thereof afforded not merely free access to the courts, but also the means whereby the public treasury should be chargeable with the payment of such compensatory damages as might be judicially awarded. As no such remedy was available the demand for redress through the diplomatic channel found ample warrant.

[5] Statement of Mr. Moore, in Moore, Dig., VI, 809. Such was the position of Mr. Webster in 1851 in the New Orleans case, of Messrs. Evarts and Blaine in 1881, as to the Denver case of the previous year, and of Mr. Bayard in 1886, in the Rock Springs case.

[6] In the case of Chinese subjects who were victims of mob violence in Colorado in 1880, the duty to pay an indemnity was denied by Mr. Evarts, Secretary of State, chiefly because he was of opinion that there had been no neglect on the part of the local authorities in suppressing the mob. For. Rel. 1881, 319–320. The Chinese Minister, Mr. Chen Lan Pin, thereupon called attention to the verdict of the coroner's jury imputing neglect to the local police force, and declaring that its incompetency and inefficiency as well as the failure of county authorities to render necessary aid, enabled the mob to destroy human life. *Id.*, 321, 322. Mr. Blaine, who succeeded Mr. Evarts as Secretary of State, approving of the attitude of his predecessor, was of opinion that while at the outset one or two local functionaries might have "shown some timidity and hesitation," a more successful resistance to a mob of such character and numbers could not be found in the history of any community or country. He adverted also to the fact that certain ringleaders had been arrested, and that two of them, identified as assailants of a Chinese victim, were held for trial for murder. *Id.*, 335–336.

[7] Mr. Evarts, Secy. of State, to Mr. Chen Lan Pin, Chinese Minister, Dec. 30, 1880, For. Rel. 1881, 319, Moore, Dig., VI, 820; Mr. Bayard, Secy. of State, to Mr. Chen Tsao Ju, Feb. 18, 1886, For. Rel. 1886, 158, 160; see, also, Robert Lansing, *Proceedings*, Am. Soc., II, 44, 52–53; Elihu Root, *id.*, III, 16, 24.

[8] In the deplorable instance of mob violence at Rock Springs, Wyoming, Sept. 2, 1885, twenty-eight Chinese subjects were killed, fifteen were wounded, and property of considerable value destroyed or appropriated. For. Rel. 1886, 101–168. Mr. Bayard, Secretary of State, denied emphatically all liability on the part of the United States to indemnify any individuals, and declared with equal emphasis that "just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government." He stated, however, that as there was a "gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law, or punish the criminals, or make compensation for the loss of property pillaged or destroyed," the President would be disposed to bring the matter before the benevolent consideration of Congress. For. Rel. 1886, 158, 168, Moore, Dig., VI, 826, 834. A suitable indemnity was paid.

See, also, Mr. Bayard, Secy. of State, to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 456.

(i)

§ 291. **President Harrison's Attitude.** It remained for President Harrison to declare with candor in his message of December 9, 1891, that in the absence of an Act of Congress making offenses against the treaty rights of foreigners domiciled within the United States cognizable in the Federal Courts:

> the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such cases as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.[1]

In the case which inspired this utterance (that of the lynching of certain Italians at New Orleans in 1891), Mr. Blaine, Secretary of State, ultimately announced to the Marquis Imperiali, the Chargé d'Affaires of Italy, that the President deemed it to be "the solemn duty, as well as the great pleasure of the National Government to pay a satisfactory indemnity." [2]

In the cases that have since arisen an indemnity has commonly been paid by the United States. Payment has been accompanied by a declaration expressed either by Congress or by the Department of State that such action was taken out of humane consideration and without reference to the question of liability.[3]

§ 291. [1] For. Rel. 1891, vi, Moore, Dig., VI, 840.

[2] For. Rel., 1891, 728, Moore, Dig., VI, 840. See, also, Mr. Blaine, Secy. of State, to the Marquis Imperiali, Royal Italian Chargé d'Affaires, April 14, 1891, For. Rel. 1891, 682, 685. Concerning this case generally see For. Rel. 1891, 658–728, Moore, Dig., VI, 837–841; Clunet, XVIII, 1147–1161; F. Despagnet, "*Les Difficultés Internationales venant de la Constitution de certains pays,*" *Rev. Gén.*, II, 184; also City of New Orleans *v.* Abbagnato, 62 Fed. 240; James Bryce, in *New Review*, IV, 385.

[3] See, for example, Act of Nov. 14, 1913, authorizing payment of the sum of $6000 to the Italian Government as full indemnity to the heirs of Angelo Albano, an Italian subject who was killed by an armed mob at Tampa, Florida, Sept. 20, 1910. 38 Stat. 1229.

In the case of Italians at Walsenburg, Colorado, in 1895, there was little or no proof that the local authorities had failed in their duty. See report of the Italian Consul at Denver, For. Rel. 1895, II, 944. Nevertheless, Mr. Olney, Secy. of State, invited the Italian Ambassador to formulate a claim. *Id.*, 950. In the case of Italians at Hahnville, La., in 1896, Mr. Olney, Secy. of State, and similarly President Cleveland, did not agree with the Italian Ambassador that the facts indicated a denial of justice. For. Rel. 1896, 410, and lxxvi. With respect to the case of Italians at Tallulah, La., in 1899, Mr. Hay, Secy. of State, declared to the Italian Ambassador, June 12, 1900: "It having been shown that Italian subjects were slain by said lynching and that there has been a failure on the part of the only competent authorities to indict or bring the guilty parties to trial in any form, the President feels that a case has been established that should be submitted to the consideration of Congress, with a view to the relief of the families of Italian subjects who lost their lives by lawless violence, which will accordingly be done on the reassembling of Congress in December next." For. Rel. 1900, 722. See, also, President McKinley, Annual Message, Dec. 3, 1900, *id.*, xxii, Moore, Dig., VI, 847.

In the case of Greeks and others who were victims of mob violence at South Omaha in 1909, the Department of State declared that an investigation made by an official of the Department of Justice revealed evidence tending strongly to rebut conclusions of the representative of the Greek Legation "to the effect that prior to the beginning of the riots the police had been warned against possible violence to the Greeks and that while the rioting was taking place the authorities did not take all proper and possible steps to suppress them." In this case the Department was not ready to admit legal liability on the part of the United

While attention has been called to the dilemma of the Federal Government in the absence of appropriate legislation permitting Federal prosecution of offenders, that circumstance does not appear to have been relied upon as a means of evading national responsibility. In the Italian case at Irwin, Mississippi, in 1901, the Department of State took pains to inform the Italian Embassy that the President had recommended to Congress not only the tendering of an indemnity, but also the enactment of legislation "to give the Federal Courts original jurisdiction of treaty offenses against aliens." [4]

(ii)

§ 292. **Local Statutory Liability.** In certain States of the United States a county or municipality is made liable for the consequences of mob violence occurring therein.[1] In the cases of Piazza and Speranza, Italians who were lynched by mobs in Illinois in 1914 and 1915, respectively, the criminal prosecutions proved abortive. Civil suits in both cases, instituted in the United States District Court against the County (in the Piazza case) and the municipality (in the Speranza case) rendered liable by local statute for the consequences of mob violence, resulted in verdicts and judgments for the plaintiffs, awarding damages in favor of dependents residing in Italy.[2]

---

States to pay an indemnity. In view of the circumstance, however, that Greek subjects were driven out of the city, their property destroyed, and personal injuries inflicted on some of them, the Department was disposed to recommend that an appropriation be made by Congress in satisfaction of the claims. Mr. Lansing, for Mr. Bryan, Secy. of State, to the Greek Legation, Sept. 2, 1914, House Doc. No. 576, 64 Cong., 1 Sess., 16–17.

It is to be regretted that notwithstanding the report by the Solicitor for the Department of State of April 13, 1911, in relation to the lynching of Angelo Albano, an Italian subject, at Tampa, Florida, in September, 1910, in which it was stated that "as a result of the lack of adequate protection" the prisoners were easily taken from their custodian and shortly thereafter were lynched (For. Rel. 1913, 613, 614), Secretary Knox, on March 1, 1913, declared that he was not persuaded that under all the circumstances of the matter, his Government would "in justice and under the applicable principles of international law, be clearly warranted in taking the course desired by the Royal Italian Government." (*Id.*, 617.) *Cf.* Mr. Bryan, Secy. of State, to the President, June 24, 1913, *id.*, 619.

[4] Mr. Hill, Acting Secy. of State, to Signor Mayor des Planches, Italian Ambassador, Jan. 2, 1902. For. Rel. 1901, 299. This communication was in response to a severe arraignment of the United States by the Italian Embassy in which it was stated that "In this condition of things the Government of the King had sent me express instruction to enter the most energetic protest against what is, all at once, a denial of justice, a flagrant violation of contractual conventions, and a grave offense to every human and civil sentiment. The Federal Government itself admitted after the preceding lynching that in this respect the judiciary organization of the country is deficient, and that the defect calls for a prompt remedy, since it is thereby placed in the irksome position of being unable to keep faith with the treaties that bear its signature. The illustrious President recently carried off by a tragic death had earnestly recommended in one of his messages that provisions be made therefor, but the bills introduced in both Houses of Congress at the suggestion of the President did not come to the test of a vote. Until the desired reform shall have become an accomplished fact the Government of the King not only will have grounds of complaint for violation of the treaties to its injury, but will not cease to denounce the systematic impunity enjoyed by crime, and to hold the Federal Government responsible therefor." *Id.*, 297.

§ 292. [1] See E. M. Borchard, Diplomatic Protection, § 92.

[2] Illinois Criminal Code, Chap. 38, Section 256w, Hurd's Rev. Stat. of Illinois, 1917, p. 1007, declaring that: The "surviving spouse, lineal heirs, or adopted children or any such other person or persons who, before the loss of life, were dependent for support upon any other person who shall hereafter suffer death by lynching at the hands of a mob, in any county or city of this State, may recover from such county or city damages for injury sustained by reason of the loss of life of such person, to a sum not exceeding five thousand dol-

Some of the more recent American statutes have exemplified the foregoing ideas.[3]

(*b*)

§ 293. **Claims against Foreign States.** The United States has frequently interposed in behalf of American victims of mob violence in foreign States. In so doing it has correctly asserted that when any agency of a territorial sovereign either wantonly or passively fails to use the means at its disposal to prevent violence or to prosecute the perpetrators, a delinquency in an international sense is apparent and responsibility for the consequences of the action of the mob comes into being, irrespective of the relationship of such sovereign to the delinquent local authorities.[1] The principle that national responsibility should be measured by such a test has generally been observed by arbitral tribunals.[2] In cases at Harpoot and Marash, in Asiatic Turkey in 1895, the United States was able to adduce abundant proof that the destruction of American missionary property was due to the complicity and participation of local Turkish soldiery.[3] Cases arising out of claims in later years against both Mexico and

---

lars." Concerning the criminal prosecutions in the cases referred to in the text, see Charles H. Watson in *Yale Law J.*, XXV, 561.

[3] See Laws of Illinois, Act approved July 3, 1931, Fifty-seventh General Assembly, House Bill No. 974; Laws of Nebraska, 1927, Chap. 148, p. 397; New Jersey Laws, 1934, Chap. 213, p. 496; General Statutes of Kansas (annotated), 1935, Section 12–201, p. 108; Throckmorton's Ohio Code, annotated, 1940, Baldwin's certified Revision, §§ 6280–6289.

§ 293. [1] Declared Mr. Fish, Secy. of State, in a communication to Mr. Partridge, Minister to Brazil, No. 141, March 5, 1875: "It is the duty of Brazil when she receives the citizens of a friendly State, to protect the property which they carry with them or may acquire there. If persons in the service of that Government connive at or instigate a riot, for the purpose of depriving a citizen of the United States of his property, the Imperial Government must be held accountable therefor." MS. Inst. Brazil, XVI, 455, Moore, Dig., VI, 815, 816. See, also, Mr. Evarts, Secy. of State, to Mr. Gibbs, Minister to Peru, No. 107, May 28, 1878, MS. Inst. Peru, XVI, 362, Moore, Dig., VI, 817; Mr. Blaine, Secy. of State, to Mr. Egan, Minister to Chile, Jan. 21, 1892, respecting the case of violence directed against sailors of the U.S.S. *Baltimore*, Oct. 16, 1891, For. Rel. 1891, 307, Moore, Dig., VI, 857. Concerning this case generally, see For. Rel. 1891, vi, and 194–313; For. Rel. 1892, xiii, Moore, Dig., VI, 854–864.

See, also, Resolution of the Institute of International Law of Sept. 10, 1900, *Annuaire*, XVIII, 254.

[2] Sir E. Thornton, Umpire in the Jeannotat Case, under convention between the United States and Mexico, of July 4, 1868, Moore, Arbitrations, IV, 3673; same Umpire, in the Donoughho Case, under same convention, *id.*, 3012, 3014; *dictum* of Sir Henry Strong, Umpire in the Gelbtrunk Case against Salvador, For. Rel. 1902, 877, 879; *dictum* of Henry Barge, Umpire in the Underhill Case against Venezuela, Ralston's Report, 49.

No different test is asserted in the Derbec Case, under convention between the United States and France of Jan. 15, 1880, Moore, Arbitrations, III, 3029. *Compare* the *dictum* of the Commissioners in the early Case of Lagueruene, before the Commission under Act of Congress of March 3, 1849, Moore, Arbitrations, III, 3027, 3028. Concerning the claims resulting from the Panama Riot of April 15, 1856, and the special obligation of protection assumed by New Granada in consequence of Art. XXXV of its treaty with the United States of Dec. 12, 1846, and of Art. I of the convention of Sept. 10, 1857, see Moore, Arbitrations, II, chap. XXVIII, 1361–1420.

See, also, Karpinsky *v.* Egyptian Government, Egypt, Summary Court of Alexandria, 1925, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 93; Sarropoulos *v.* Bulgarian State, Greco-Bulgarian Mixed Arbitral Tribunal, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 162.

[3] For. Rel. 1895, II, 1255–1470, concerning condition of affairs in Asiatic Turkey, especially, Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895, *id.*, 1256–1260, and also documents, *id.*, 1342, 1345, 1356, 1357, 1369, 1370, 1395, 1423, 1430, 1434, 1444, 1446–1448, 1455; also For. Rel. 1896, xxviii, 880, 881, 882, 883, 892, 893, 894, 895, 897; For. Rel. 1901, 518, Moore, Dig., VI, 865–868.

Panama revealed, in the course of adjudications before claims commissions, a participation by soldiers or police.[4] It has not commonly been suggested that individual claimants should have exhausted local remedies prior to interposition, for it has not appeared that redress would have been obtainable by such action.[5]

It should be observed, however, that in 1912, the Department of State, in response to an inquiry from the American Embassy at Mexico City with respect to possible attacks on property by mobs, and the inability of local authorities to render protection, announced that it could not lay down any rules other than those provided by international law, which, it was declared, would doubtless meet the situation.[6]

## j

## Claims Growing Out of War

### (1)

§ 294. **In General. Absence of Local Remedies.** War claims are those which arise from and are deemed to be chargeable to the conduct of a State while a belligerent, or while engaged in hostilities as though it were one.[1] Such claims are of great variety. They may be founded on any form of activity incidental to the prosecution of war, whether on sea or land, and whether attribut-

---

Concerning the destruction of Anatolia College, at Marsovan, by an unrestrained mob, in 1893, see President Cleveland, Annual Message, Dec. 4, 1893, For. Rel. 1893, x; Mr. Wharton, Acting Secy. of State, to Mr. Thompson, American Minister, March 1, 1893, *id.*, 604. Concerning case of attack on the premises of Dr. Christie, at Tarsus, Aug. 4, 1895, see For. Rel. 1895, II, 1271–1292; see, also, Mr. Sherman, Secy. of State, to Mr. Angell, Minister to Turkey, Aug. 23, 1897, For. Rel. 1897, 592.

Concerning riots at Lienchou, Province of Canton, 1905, and resulting claims of the United States, see For. Rel. 1906, I, 308–324.

[4] See Thomas H. Youmans Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 150; Agnes Connelly Case, *id.*, 159; Mary E. A. Munroe Case, *id.*, 1929 Vol., 314; Hampden O. Banks Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 148; Charlie R. Richeson Case (embracing that of James Langdon), *id.*, 268; Cecelia Dexter Baldwin Case, *id.*, 330.

[5] In response to such a suggestion in a Peruvian case, Mr. Evarts, Secy. of State, declared to Mr. Gibbs, American Minister to Peru: "As regards the alleged failure of Messrs. Wexel and De Gress to pursue the rioters in court, it is not made evident that they could have indemnified themselves for their losses by such proceeding; it is not made clear, indeed, that the police discovered any responsible perpetrators of the deeds complained of." No. 107, May 28, 1878, MS. Inst. Peru, XVI, 362, Moore, Dig., VI, 817.

See, also, opinion of Sir E. Thornton, Umpire, in the Donoughho Case, under convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3012, 3014.

[6] For. Rel. 1912, 958, where attention was called to Moore, Dig., VI, 809, and following. Prof. Moore there makes the following statement: "The question of a government's liability for injuries suffered by foreigners within its jurisdiction has on various occasions been discussed and determined in cases of mob violence. Such cases sometimes apparently present strong grounds of national liability because of the popular approval of the mob's action, and the consequent immunity of the actors from prosecution and punishment. The rule, however, which has generally been maintained in argument, even if not in practice, is that while a government is bound to employ all reasonable means to prevent such disorders, it is not required to make indemnity for the losses that may result from them, unless, as in the case of Art. XXXV of the treaty of 1846 with New Granada, or as in the case of an attack on official representatives, there is a special obligation of protection."

§ 294. [1] See, in this connection, E. M. Borchard, Diplomatic Protection, §§ 98–100.

able to the military or civil arm of the government. Thus they may spring from the conduct of the commander of a submarine or that of the occupant of enemy territory; they may grow out of the acts of an army in the field, or of a collector of a port. Such claims may have an enemy as well as neutral origin. The treaty of peace terminating the conflict may, however, contain a waiver of such claims,[2] or it may provide that one party shall itself adjust those possessed by its nationals against its former enemy.[3] Again, the treaty may burden one party with responsibility for illegal acts attributable to it, and impose a duty upon it to meet claims of nationals of the enemy arising therefrom.[4]

Claims of neutral origin are obviously unaffected by the terms of a treaty of peace. Moreover, they may be based upon the theory that the particular act of a belligerent State involving the taking or injury of property was not internationally illegal, but merely of a kind such as to require as a condition subsequent, a duty to compensate the owner; and the absence of adequate arrangement to establish locally such an obligation and to satisfy it, may be the reason for interposition.

The preferment of a war claim through the diplomatic channel should be in harmony with the principles generally applicable to interposition on account of claims of other types. Such action always involves inquiry into the question whether the conduct of the belligerent whose acts are the subject of complaint constituted a breach of an international obligation, and also whether, if its conduct be deemed to amount to one, an adequate local remedy is available to the claimant.

It is perhaps distinctive of war claims that there is rarely available a local remedy which the State of the claimants deems to be adequate. Even the opportunity accorded neutral claimants to test the propriety of the seizure of their property by the naval forces of a belligerent through the medium of the prize courts thereof oftentimes proves to be without value. In general, domestic tribunals, regardless of the scope of their jurisdiction, are likely to be incapable of adjudicating without prejudice upon the quality of the acts of the authorities of their own sovereign when engaged in conflict. Such bodies find it extremely difficult to denounce as internationally illegal, acts believed by that sovereign to be necessary or reasonably incidental to the successful prosecution of a war, when the lawfulness of them is challenged by a foreign power. For that reason, if adjudications are to be responsive to the requirements of international law, a reference to neutral judges would commonly appear to be essential.

[2] See, for example, Sections 8 and 9 of Annex III, following Art. 244 of treaty of peace with Germany of June 28, 1919, embracing the waiver by Germany of certain claims against the Allied and Associated Governments with respect to German vessels detained, employed, damaged, sunk or salved.

"Local remedies, however, for the adjustment of claims growing out of war are seldom provided, as their settlement is generally comprehended in the treaty of peace." Department of State, Claims Circular, Oct. 1, 1924, Revised, § 8.

[3] See, for example, Art. VII of the treaty of peace between the United States and Spain, of Dec. 10, 1898, Malloy's Treaties, II, 1692.

[4] See obligation imposed upon Germany, by Art. 231 of the treaty of peace of June 28, 1919. See, also, Arts. 232–247, with annexes, embodying the reparation clauses of Part VIII of the treaty. See *infra*, § 298.

The challenge by a neutral State of the propriety of the acts of a belligerent may attack the very roots of a policy which the latter is determined, if possible, to uphold.[5] A clash of essentially public interests may ensue in which the injuries sustained by individual claimants may appear to the State which produced them to be relatively small incidents. Under such circumstances the belligerent may be reluctant to permit, especially during the course of the conflict, the correctness of its conduct to be subjected to the scrutiny, and possibly to the criticism of any international tribunal.[6] Grave differences of opinion concerning what a State when engaged in war may not unlawfully do in relation to neutral persons and property doubtless still encourage such an attitude. Nevertheless, the thought of the members of the international society has, in the course of the past century, undergone in this regard some improvement. States are readier than heretofore, to permit, after the termination of a war, the legal aspect of their acts as belligerents to be examined and passed upon by impartial judicial bodies. Thus the neutral challenge of belligerent conduct is sometimes ultimately tested in an appropriate court clothed with the requisite jurisdiction. In such situations the issue concerns the extent to which belligerent acts productive of injury to the claimant constituted the breach of an international obligation. In numerous cases international courts have passed upon such questions, and in so doing have been the expositors and vindicators of the law of nations. In some of these cases the United States has been a party litigant.

In order to determine whether a particular act of a belligerent in relation to an alien or his property was lawful or unlawful, reference must be had to the requirements of the law of nations; and these must be examined partly in the light of the position taken by the State charged with wrongdoing, and as revealed by the terms of general conventions to which it may be a party, such as, for example, those emanating from the Hague Peace Conferences of 1899 and 1907. Such is believed to be the mode of ascertaining whether neutral property, public or private, has been lawfully taken or destroyed under any of the numerous and varying conditions confronting a belligerent fighting by land and sea and air, and in territory other than its own, and whether also the act of taking or destruction, even though not unlawful, gives rise to a duty to make reparation to the owner.

It may be fairly claimed that whenever a belligerent violates a principle of international law with respect to a State which is not engaged in the conflict, by reason of the treatment accorded the persons or property of its nationals, the rights of the latter in seeking to obtain justice are as broad as those arising from claims of non-belligerent origin, and that the propriety of interposition is

[5] See attitude of Germany expressed in its correspondence with the United States in relation to submarine warfare, 1915 and 1916, as discussed *infra*, §§ 747–749.

See Viscount Grey of Fallodon, in his Twenty-Five Years, 1892–1916, New York, 1925, Vol. II, Chap. XXII entitled "America and the War."

[6] In the course of the conflict a belligerent may be unwilling to desist from a policy deemed to be essential to its success, and, therefore, be unwilling to expose itself to an arbitral award which might preclude it from the contention that thereafter, while the war ensued, it could properly shape its conduct along lines that that policy appeared to dictate.

not altered or limited by any special rule due to the nature of the claim or the grounds on which it may be opposed.

When the complaint of belligerent action comes from the enemy, or from a State that was the enemy, the basis of objection may also be the assertion that international law has been violated. The excesses of the opposing States in the course of their conflict may, however, be attributable to both or all belligerents. This circumstance may discourage effort to incorporate in the final arrangements for peace provisions contemplating the judicial examination of the lawfulness of the acts of their respective forces or other agencies, and may also leave unsettled the larger public issue as to responsibility for the initiation of the war. If, however, the successes of one belligerent (or of the group of belligerents aligned on one side) suffice to enable it to control the terms of peace, it may impose upon its adversary the burden of accepting responsibility for the consequences of its conduct, and thereby create a burden of reparation that has no necessary connection with the legal aspect of acts on account of which redress is to be made. In such case, any tribunal empowered to pass upon the scope of the obligations thus imposed, may not be concerned with more than the proper interpretation of the provisions of the treaty in which they were embodied; and it may find itself unauthorized to enquire whether the acts for which reparation should be made were in contravention of international law.[7]

(2)

§ 295. **Certain Hazards of War.** In areas where States are engaged in conflict, life and property alien to either or any belligerent may sustain injury or meet with destruction incidental to the commission of hostile acts in the place where they are. In such situations it may be impossible to prove that the State of the actor violated any international obligation towards the State of the victim whether the enemy of the former, or a neutral to the conflict; for it would be difficult to establish that a belligerent is obliged to conduct hostilities in such a manner as not to produce harm to non-participants and their property,[1] or that the propriety of military operations depends upon the extent to which they can be undertaken without interference with the safety of non-combatants of any nationality. This does not imply that a belligerent may not abuse its power, as through the wanton commission of acts which the laws of war may enjoin, and so become responsible for the consequences thereof.[2] It signifies merely that in the latitude possessed by a belligerent as to choice of

[7] See agreement between the United States and Germany of August 10, 1922, for a Mixed Commission "to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two Governments of August 25, 1921," U. S. Treaty Vol. III, 2601.

§ 295. [1] See, for example, Little, Commissioner in Castel Case, United States and Venezuelan Claims Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 3710, Moore, Dig., VI, 893.

See Ralston, revised ed., § 703; Eagleton, Responsibility of States, 154–156.

[2] Such an abuse of power might manifest itself in deliberate and wanton attacks upon alien life or property, and possibly also in an offensive movement against the enemy where the strategic advantage sought to be gained was a minor one, and under the circumstances to be deemed of lesser moment than the sacrifice of alien life or property thereby necessarily entailed.

means and character of operations, it may not unlawfully embark upon a course that is essentially dangerous to non-participants regardless of their connection or lack of connection with the enemy, and that when from the pursuit of such a course non-participants become incidentally the sufferers, the State to which they belong may be unable to maintain that they have been the victims of internationally illegal conduct.[3]

Courts of arbitration have emphasized the broad scope of the hazards accepted by neutral aliens residing in or having property in the territory of a belligerent, and which sustained injury in the course of hostilities.[4] A few may be noted. Houses may catch fire from buildings destroyed by shells,[5] or may be deliberately burned when affording cover to the enemy;[6] walls and pavements may be torn up in the course of a siege,[7] and crops ruined by cavalry passing over them in a battle or while approaching the scene of conflict.[8] In numerous other ways devastation may be the natural result of hostilities.[9] Such occurrences do not necessarily imply that international law has been violated, or that the neutral owners of property so injured or destroyed are entitled to compensation on account of their losses.

With respect to persons and property of neutrals within territory of the enemy of the belligerent whose operations result in injury or destruction, the individual claimants find themselves subject to the familiar rule that they and their property may be fairly regarded as, respectively, enemy persons and

[3] "In general one principle seems to have been followed in the war: that military objectives could be bombed wherever found, regardless of their location, and, it seems, regardless of the injury to non-combatants and private property." (M. W. Royse, Aerial Bombardment, New York, 1928, 193.) See, also, William C. Chambliss, "Air Bombardment Regulation," United States Naval Institute Proceedings, LX, Nov. 1934, 1577.

See E. R. Kelley Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1931 Vol., 82, 92–93.

[4] See Upton Case, American-Venezuelan Commission, 1903, Ralston's Report, 172; Bembelista Case, Netherlands-Venezuelan Commission, 1903, *id.*, 900; Volkmar Case, American-Venezuelan Commission, 1903, *id.*, 258.

Declared Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, April 28, 1871: "The Court of Claims, adopting the language of my predecessor, Mr. Seward, has decided it to be the law and usage of nations that one who takes up his residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chooses to reside; and his only chance, if any, is against the government of that country, in which his own sovereign will not interest himself. Such has been the doctrine and practice of the United States and of the great powers of Europe, and this Government, therefore, cannot intervene in behalf of Mr. Fougen, or of any citizen of the United States, under the same circumstances." For. Rel. 1871, 335, Moore, Dig., VI, 888.

[5] Donaldsonville Cases, French-American Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, IV, 3689, 3697; see, also, Bercier Case, before same Commission, *id.*, 3706; Cleworth Case, British-American Claims Commission, Convention of May 8, 1871, *id.*, 3675.

[6] Jardel Case, French-American Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, IV, 3699.

[7] Blumenkron Case before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3669.

[8] Cole Case, Mexican-American Claims Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3670. See, also, Hale's Report of the Work of the American-British Claims Commission, treaty of May 8, 1871, *id.*, 3678.

[9] Wilson Case, Spanish Claims Commission, agreement of Feb. 12, 1871, Moore, Arbitrations, IV, 3674; see, also, Giles Case, French-American Commission, Convention of Jan. 15, 1880, *id.*, 3703.

enemy property by the State whose acts were productive of the loss sustained.[10] It may here be noted that the courts of the United States have applied the same rule in the treatment of the claims of American citizens having property in the limits of the Confederate States during the Civil War,[11] and in Cuba during the war between the United States and Spain in 1898.[12]

It is believed that, in general, the equities of the neutral claimant whose property suffers injury or destruction in the course of military operations, through the acts of the territorial sovereign, are likely to be stronger under some circumstances than where complaint is made of the acts of the enemy of that sovereign and incidental to attacks upon its territory. In the former situation, the circumstances of the particular case may be such as to establish a just demand for compensation even when the act of injury or destruction is in no sense unlawful. Thus, in 1925, the United States contended, in correspondence with Great Britain, that British military action productive of the destruction in Roumania by British and Roumanian forces in 1916, of oil-producing plants and accumulated oil stocks belonging to the subsidiary of an American corporation, when the area in which they were located was not within a zone of hostilities, and when the work of destruction was designed to place such plants and stocks beyond the reach of Germany should it (as was anticipated) ultimately gain control of that area, imposed a legal obligation upon the principal actor to make reparation for the loss sustained.[13] The case illustrates not only the distinction between the risk of injury or loss through accidents incidental to military operations, and that arising from the taking or destruction of prop-

[10] Mr. Seward, Secy. of State, to Count Wydenbruck, Austrian Minister, Nov. 16, 1865, MS. Notes to Austrian Legation, VII, 193, Moore, Dig., VI, 885; Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, No. 272, April 28, 1871, For. Rel. 1871, 335, Moore, Dig., VI, 888; Same to Sir E. Thornton, British Minister at Washington, May 16, 1873, MS. Notes to Great Britain, XVI, 101, Moore, Dig., VI, 890.

"Foreign Offices and municipal and international courts have frequently laid down the rule that neutral property permanently situated in enemy territory, or property of neutrals who voluntarily enter or continue to reside in belligerent territory assumes the risks of injury incident to war." E. M. Borchard, Diplomatic Protection, § 101. See, also, Gallego, Messa & Co. *v.* United States, 43 Ct. Cl. 444.

See, also, Brief of Messrs. Strobel and Cruz, in behalf of the Respondent in Case of C. D. Blodgett, No. 14, United States and Chilean Claims Commission, under convention of May 24, 1897, reviving convention of Aug. 7, 1892; award in William Hardman Case, American-British Pecuniary Claims Arbitration, under special agreement of Aug. 18, 1910, Nielsen's Report, 495, 497, where it was declared that "notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitary conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest."

See Schoenrich's Report of Nicaraguan Mixed Claims Commission, under Nicaraguan laws of 1911, p. 61, announcing as Rule 1 adopted by the Commission that "The Government is not responsible for damages suffered during a battle, or as a direct consequence of military operations."

[11] See, for example, Mrs. Alexander's Cotton, 2 Wall. 404, 419; Brandon *v.* United States, 46 Ct. Cl. 559.

[12] Juragua Iron Co., Ltd. *v.* United States, 212 U. S. 297, 307; Herrera *v.* United States, 222 U. S. 558, 569.

[13] See Memorandum re claim of Standard Oil Company of New Jersey against Great Britain, Jan. 31, 1925, For. Rel. 1926, II, 316.

erty for an essentially military purpose, but also the contrasting absence of a hazard accepted by the alien that his property outside of the zone of hostilities and perhaps remote therefrom may be taken or destroyed without at least the payment of compensation therefor.[14]

(3)

§ 295A. **American Claims against Germany Arising Out of the World War.** A Joint Resolution of the Congress, approved July 2, 1921, declared the war between the United States and Germany "to be at an end."[1] The Resolution announced in section 2 that there were expressly reserved to the United States and its nationals

> any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.[2]

The Resolution contained in section 5 a declaration announcing that all German and other enemy property, public and private, that on or after April 6, 1917, in the case of Germany, and December 7, 1917, in the case of Austria-Hungary, had come into the possession or control of, or had been the subject of a demand by the United States

> shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such times as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment,

[14] See, in this connection, American Electric and Manufacturing Co. Case, J. Ralston, Venezuelan Arbitrations of 1903, 35.

§ 295A. [1] U. S. Treaty Vol. III, 2596.

[2] *Id.*

See *infra*, § 299A; also *infra*, §§ 619–623A.

whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.[3]

A treaty Restoring Friendly Relations between the United States and Germany was concluded at Berlin on August 25, 1921.[4] It contained the undertaking of the latter to give to the United States all of the rights, privileges, indemnities, reparations or advantages specified in the Joint Resolution of July 2, 1921, including all of the rights and advantages stipulated for the benefit of the United States in the treaty of Versailles which it was declared that the United States should "fully enjoy notwithstanding the fact that such treaty has not been ratified by the United States." [5]

[3] *Id.*, 2597.

"It was clear, however, that something more than a joint resolution was necessary in order to safeguard American rights. While it was strictly true that a war could be terminated by the sole act of a single belligerent, if its enemy acquiesced, it was equally true that the imposing of special burdens upon that enemy, as for the satisfaction of claims, called for definite agreement. A joint reservation might reserve rights, but it could not create them. Again, while Germany had, through the Treaty of Versailles, made ample renunciation of numerous rights and interests in favour of the five Principal Allied and Associated powers which had borne the brunt of the effort that won the common victory, and had so made the United States a direct beneficiary, it was of first importance, if not essential in law, that the United States, if it did not elect to ratify the Treaty of Versailles, obtain direct confirmation by Germany of these renunciations.

"Secretary Hughes was keenly alive to this and accordingly set about to gain Germany's consent to a treaty which would serve both to heed the rights reserved in the joint resolution of July 2, 1921, and to confirm the renunciations which by the Treaty of Versailles Germany had yielded for the benefit of the United States as one of the five Principal Allied and Associated powers. He was disposed to utilize the Treaty of Versailles as the basis of negotiation, subjecting it to declarations and reservations designed to satisfy the Senate, and supplementing it with appropriate reference to the joint resolution. He so advised President Harding; and the President acquiesced. Senators Lodge and Kellogg and other Republican members of the Senate informed the Secretary of State, however, in the most definite way that an expurgated Treaty of Versailles could not possibly receive the requisite approval of that body. Still convinced that a treaty with Germany was essential, Secretary Hughes devised the plan of submitting to that country a fresh convention embodying the text of the joint resolution, and appending to it such parts of the Treaty of Versailles as were wanted. He followed this course. Accordingly, he offered to the German Government a simple text, consisting of a preamble and three articles, with the necessary and desired appendages. Germany acquiesced." (Sketch of Charles Evans Hughes as Secretary of State, by this author, in The American Secretaries of State and Their Diplomacy, X, 226–227.)

[4] U. S. Treaty Vol. III, 2596.

[5] Art. I. The rights and advantages stipulated in that treaty for the benefit of the United States, and which it was intended that the United States should have and enjoy, were declared to be those defined in "Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV." It was provided that in availing itself of these rights and advantages, the United States should do so in a manner consistent with "the rights accorded to Germany under such provisions." It was agreed that the United States should not be bound by Part I of the treaty of Versailles, or by any provisions thereof including those mentioned in paragraph 1 of Article II (of the treaty of August 25, 1921), relating to the Covenant of the League of Nations, and that it should not be bound by any action taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States should

An agreement signed at Berlin on August 10, 1922, provided for the establishment of a Mixed Commission to determine the amount to be paid by Germany in satisfaction of its financial obligations under the treaty of August 25, 1921.[6] That commission in the exercise of its function was thus concerned with the determination of the nature and scope of the fiscal burden as imposed by

---

expressly give its assent to such action. It was also declared that the United States assumed no obligations under or with respect to the provisions of "Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that treaty." It was agreed that while the United States was privileged to participate in the Reparations Commission, according to the terms of Part VIII of that treaty, and in any other commission established under the treaty or under any agreement supplemental thereto, the United States was not bound to participate in any such commission unless it should elect to do so.

The Senate of the United States advised and consented to the ratification of the treaty subject to the understanding, made a part of the resolution of ratification "that the United States shall not be represented or participate in any body, agency or commission, nor shall any person represent the United States as a member of any body, agency or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation"; and subject to the further understanding likewise made a part of the resolution of ratification, "that the rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles to which this Treaty refers." (U. S. Treaty Vol. III, 2599.) The congressional authorization to which the Senate resolution adverted had reference to the matter of participation by the United States in a body or commission in which it was authorized to participate "by this Treaty," that of August 25, 1921, and not to any subsequent arrangement which in harmony with the Treaty and possibly in pursuance of its purposes might prove to be the means through which the United States might make ultimate provision for the utilization of privileges conferred by the Treaty. Thus the United States concluded by executive agreement with Germany, on August 10, 1922, an arrangement for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of its financial obligations under the treaty of August 25, 1921. U. S. Treaty Vol. III, 2601. For a discussion of the agreement in the Senate, see *Congressional Record,* Sept. 21, 1922, Vol. 62, No. 238, 1473–1493.

[6] U. S. Treaty Vol. III, 2601. According to Art. I: "The commission shall pass upon the following categories of claims which are more particularly defined in the treaty of August 25, 1921, and in the treaty of Versailles:

"(1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights, and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914.

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons or to property, rights, and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war.

"(3) Debts owing to American citizens by the German Government or by German nationals."

Declared Mr. Houghton, American Ambassador at Berlin, in a communication of Aug. 10, 1922, to Dr. Wirth, Chancellor of the German Empire: "In accordance with the instructions that I have received from my Government, I am authorized by the President to state that he has no intention of pressing against Germany or of presenting to the commission established under the claims agreement any claims not covered by the treaty of August 25, 1921, or any claims falling within paragraphs 5 to 7, inclusive, of the annex following article 244 of the treaty of Versailles." (U. S. Treaty Vol. III, 2604.) These paragraphs made reference to pensions, the cost of assistance to prisoners of war and their families and dependents, and to allowances to the families and dependents of mobilized persons or persons serving with the forces. (*Id.,* 3423.)

See American Participation in German Reparation Payments, *infra,* § 299A.

In relation to American war claims against Austria and Hungary, respectively, see treaty Establishing Friendly Relations between the United States and Austria, of Aug. 24, 1921, U. S. Treaty Vol. III, 2493; treaty Establishing Friendly Relations between the United States and Hungary, of Aug. 29, 1921, *id.,* 2693; agreement between the United States and Austria and Hungary, of Nov. 26, 1924, for the determination of the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the aforesaid treaties, U. S. Treaty Vol. IV, 3928; Tripartite Claims Commission (United States, Austria, and Hungary), Final Report of Commissioner and Decisions and Opinions, Oct. 15, 1929.

treaty upon Germany, rather than with the legal aspect of acts on account of which responsibility was assumed.[7] Inasmuch as the language of the treaty was declared to be "that of the United States and framed for its benefit," it was early announced that the treaty would "be strictly construed against it." [8]

Section 5 of the Joint Resolution of the Congress of July 2, 1921, incorporated in the treaty with Germany of August 25, 1921, referred, as has been observed, to the assumption of an obligation by Germany to make suitable provision for the satisfaction of all claims against Germany, of all persons, wheresoever domiciled, owing permanent allegiance to the United States who had suffered through the acts of the German Government or its agents, "loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise." [9] The words "directly or indirectly" referred, according to the views of the Department of State, primarily to the nationality of the corporate or other entity in which American citizens might be interested and to the rights which might under the Treaty of Versailles be pressed against Germany in behalf of such entity were the State willing to act, rather than to the absence or remoteness of any causal connection between the conduct of Germany and particular losses that might be alleged. In a word, the language of the Joint Resolution as embraced in the treaty expressed no design to disregard the familiar rule that every complainant should prove his case, or to permit conjectural losses to take the place of those definitely established by convincing evidence, or to lessen the requirement that the causal connection between a respondent's acts and the damages alleged be conclusively shown.[10] Whether a particular claim fell within the scope of the obligation undertaken by Germany was to be tested by reference to the facts involved rather than to the nomenclature applied to the claim. The question in each case was thus a

[7] See Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions to June 20, 1925, and later volumes embracing those up to Dec. 31, 1932.

Declared the Commission, in the course of its third Administrative Decision: "The Commission is not here concerned with the quality of the act causing the damage. The terms of the Treaty fix and limit Germany's obligations to pay, and the Commission is not concerned with enquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law. It is probable that a large percentage of the financial obligations imposed by said paragraph 9 would not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace." (*Id.*, 75, 76.)

[8] See Opinion in the Lusitania Cases, *id.*, 17, 31, where it was added: "Treaty provisions must be so construed as to best conform to accepted principles of international law rather than in derogation of them. Penal clauses in treaties are odious and must be construed most strongly against those asserting them.

"The Treaty is one between two sovereign nations — a Treaty of Peace. There is no place in it for any vindictive or punitive provisions. Germany must make compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate, and complete. To this extent Germany will be held accountable. But this Commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none."

[9] U. S. Treaty Vol. III, 2597.

[10] See Mr. Hughes, Secy. of State, to Mr. Morris, United States Agency, Mixed Claims Commission, United States and Germany, April 4, 1923.

fairly simple one — whether the evidence proved a loss established by exact computation and reasonable definition, and whether that loss was attributable to the conduct of Germany as a proximate cause. Such proved to be the theory on which the claims commission reached its conclusions in its several adjudications.[11] Declared that body: "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. . . . All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" [12]

(4)

§ 295B. **The Sabotage Claims against Germany Growing Out of Explosions at Black Tom and Kingsland.** The Mixed Claims Commission, United States and Germany, under the Agreement of August 10, 1922, was confronted with the task of adjudicating upon certain claims charging Germany with responsibility for the consequences of particular explosions occurring on American soil when the United States was a neutral in the course of the World War. The action of the Commission is tersely set forth in the following recital of facts in a decision of the Supreme Court of the United States handed down on January 6, 1941.[1]

> The claims covered by the awards attacked by petitioners arose out of the destruction of property caused by explosions at Black Tom and Kingsland, New Jersey, in 1916 and 1917. These claims were dismissed by the Commission in 1930, and petitions for rehearing were denied in 1931 and 1932. In the following year the American agent sought to reopen the cases upon the ground that in its decision of 1930 the Commission had been misled by

[11] See Opinion in War-Risk Insurance Premium Claims, Nov. 1, 1923, Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions to June 20, 1925, 33; also, Opinions and Decision in Life-Insurance Claims, *id.*, 103.

See Hessel E. Yntema, "The Treaties with Germany and Compensation for War Damage," *Columbia Law Rev.*, XXIII, 511, and XXIV, 134; E. M. Borchard, "The Opinions of the Mixed Claims Commission, United States and Germany," *Am. J.*, XIX, 133, and XX, 69.

[12] Administrative Decision No. II, Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions to June 20, 1925, 5, 13.

§ 295B. [1] Z. & F. Assets Realization Corporation and American-Hawaiian Steamship Company *v.* Secretary of State, 311 U. S. 470, 481. The Court held that under the existing statutory law the certificate of the Secretary of State as to the awards made by the Commission must be deemed to be conclusive. The opinion of the Court was given by Chief Justice Hughes, who also said: "The Settlement of War Claims Act of 1928 created in the Treasury a 'German Special Deposit Account.' Section 2 provided that the Secretary of State should certify from time to time to the Secretary of the Treasury the awards of the Mixed Claims Commission, and the Secretary of the Treasury was directed to pay out of the amounts placed in account the principal of each award so certified, with interest as stated." (*Id.*, 481.) See also opinion by Mr. Black, with whom concurred Mr. Justice Douglas, *id.*, 490.

"fraudulent, incomplete, collusive and false evidence" on the part of witnesses for Germany. The German Government denied the power of the Commission to reopen and the Umpire, Mr. Justice Roberts, finding that there was a disagreement upon the question between the Commissioners, decided in December, 1933, that the Commission was competent to determine its own jurisdiction by the interpretation of the Agreement creating it. The Umpire further decided that, while the Commission was without power to reopen a case merely for the presentation of after-discovered evidence, the Commission was still sitting as a court and did have power to consider the charge that it had been misled by fraud and collusion, and for that purpose to reopen the cases in order that it might consider the further evidence tendered by the American agent, and that offered in reply on behalf of Germany, and either confirm the decisions theretofore made or alter them as justice and right might demand.

Thereafter, the German agent filed an answer denying the allegations of fraud and evidence was presented. After argument, the Commission, in June, 1936, rendered a decision, the German Commissioner concurring, by which the ruling of 1932 denying a rehearing was set aside, and the question whether there should be a rehearing was reserved for a hearing which should be separate and distinct from an argument on the merits unless Germany should consent to a different course.

Efforts to obtain a settlement of the claims were unsuccessful and, after much additional evidence had been introduced, the Commission, in January, 1939, heard extended arguments by the agents of the respective Governments. The American agent had requested that the Commission should not only set aside the original decision of 1930 but should also proceed to a final decision on the merits, as it was contended that the evidence presented to support the application for rehearing also established the responsibility of Germany for the destruction of the property as claimed. It also appears that the German Commissioner insisted that, before the motion for rehearing should be granted, the Commission should examine the proofs tendered by the United States to determine whether the claims had been made good. This, as stated by the Umpire, was upon the ground that even though the Commission had been misled by false and fraudulent testimony, that would be immaterial if, upon an independent consideration, the United States in its own cases had failed to sustain its burden of proof. The American Commissioner and the Umpire thereupon had agreed to go beyond what they thought the necessary function of the Commission in the circumstances and had proceeded to canvass with the German Commissioner the cases as made by the United States.

During the course of that investigation, on March 1, 1939, the German Commissioner withdrew from the Commission. At the time of his withdrawal, the two Commissioners, according to the contention of the American Commissioner and as found by the Umpire, were in disagreement upon the points in issue. On receiving notice of a meeting of the Commission to be held on June 15, 1939, the German agent said that he would not appear and the German Embassy advised the Secretary of State that, since the withdrawal of the German Commissioner, the Commission was incompetent to make decisions.

At the meeting held pursuant to the notice, the American Commissioner

filed a certificate of disagreement with an opinion sustaining the jurisdiction of the Commission. The Umpire thereupon decided that there did exist a disagreement between the two Commissioners, — a disagreement of which he was personally cognizant and which was also shown by the certificate and opinion of the American Commissioner; that the jurisdiction of the Commission was not ousted by the withdrawal of the German Commissioner "after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented"; that the United States "had proved its allegation that fraud in the evidence presented by Germany misled the Commission and affected its decision in favor of Germany"; and that upon the record as it then stood the cases for the claims were made out.

Thereupon, the American agent moved for awards in favor of the United States on behalf of the sabotage claimants. An order was entered setting aside the decision of 1930, and determining that the liability of Germany had been established and that, as it appeared that Germany did not intend to take part in further proceedings of the Commission, awards should be made upon the Commission's findings and opinion.

On October 3, 1939, the German Chargé d'Affaires addressed an elaborate communication to the Secretary of State making a detailed statement supplementary to a note of July 11, 1939, with respect to the alleged illegal acts of the Umpire, and protesting against all further measures by the Umpire, the American Commissioner and the American agent, which were aimed at securing awards in the Black Tom and Kingsland cases. The Secretary of State replied, on October 18, 1939, that it would be highly inappropriate for the Department to endeavor to determine the course of the proceedings of the Commission; that the Secretary had entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite the severe and, as he believed, "entirely unwarranted criticisms," and that he was constrained to invite attention to the fact "that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion."

Notice was given of a meeting of the Commission to be held on October 30, 1939, which the German Commissioner did not attend, and awards were then made in favor of the claimants. The Umpire stated that he had found the awards to be accurately and properly calculated and had joined the American Commissioner in signing them.

The awards were certified by the Secretary of State to the Secretary of the Treasury on October 31, 1939, pursuant to the Settlement of War Claims Act of 1928.

The foregoing facts are self-explanatory. They reveal a situation where a defending State in the course of an international adjudication was found guilty not only of internationally illegal conduct in causing acts of destruction of property within neutral territory, but also of fraudulent effort to pervert and thwart the administration of justice by the tribunal called upon the pass upon the propriety

of its conduct.[2] That the Mixed Claims Commission, in the circumstances, retained jurisdiction to re-open the cases, set aside a previous decision and pass upon the question concerning German governmental responsibility for the acts complained of, is believed to be unassailable.[3] As to the sufficiency of the evidence adduced in order to establish that responsibility no opinion is expressed.[4]

(5)

THE RELATION OF THE BELLIGERENT SOVEREIGN TO CERTAIN ACTS GIVING RISE TO COMPLAINT

(*a*)

§ 296. **Acts of Soldiers.** When a State becomes a belligerent and endeavors to subdue the enemy, it unleashes military forces which usually embrace a numerous soldiery. The members thereof, especially those of lowest rank, may by reason of the mental stimulus attributable to the fact of war, be inclined to deal ruthlessly with foreigners who are encountered in the course of operations in the field, or in the occupation of hostile territory, or in other connections not associated with the commission of hostilities. With or without the approval of officers, and both in and out of their presence, soldiers may subject alien life and property to treatment that the local law forbids and brands as illegal. Nevertheless, claims commissions, possibly influenced by the terms of conventions under which they were established, have frequently declared that the liability of a belligerent on account of the conduct of its soldiers is dependent upon whether their acts were committed in the presence or with the consent of officers,[1] as otherwise, according to Mr. Ralston, "no such relation of agency existed as would make a government liable."[2] Thus, in certain adjudicated cases the fact that soldiers were unaccompanied by officers,[3] or that the latter although aware of

[2] See Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims handed down June 15, 1939, and October 30, 1939, 310 and 324, respectively.

[3] See Lester H. Woolsey, "Litigation of the Sabotage Claims against Germany," *Am. J.*, XXXV, 282; also same writer, *id.*, XXXIII, 737; *id.*, XXXIV, 23; also W. H. Schuster, "International Arbitration in the Black Tom and Kingsland Cases," Master's Essay, Columbia University, 1941.

[4] See Rule of *Res Judicata, infra,* § 581. It is not, however, sought to be intimated that that evidence was insufficient.

§ 296. [1] See, for example, Webster Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3004; Dunbar & Belknap Case before same Commission, *id.*, 2998; Standish Case, before same Commission, *id.*, 3004; statement by Mr. Moore, as to various cases before same Commission, *id.*, 2996–2997; Jeannaud Case, French-American Commission, Convention of Jan. 15, 1880, *id.*, 3000; Terry & Angus Case, Mexican Claims Commission, Act of Congress, March 3, 1849, *id.*, 2993; Roberts Case, American-Venezuelan Commission, 1903, Ralston's Report, 142. See, also, Claim of Bernard Campbell against Haiti, For. Rel. 1895, II, 811–813, Moore, Dig., VI, 764; case of ill treatment of D. A. Backer by Haitian soldiers, For. Rel. 1907, II, 742–744; Brief of Messrs. Strobel and Cruz, in behalf of Respondent, in Case of C. D. Blodgett, No. 14, United States and Chilean Claims Commission under Convention of May 24, 1897, p. 12 and following.

[2] Ralston, revised ed., 396.

[3] Declares Professor Moore: "In numerous cases before the Commission under the Convention between the United States and Mexico of July 4, 1868, it was held by Sir Edward Thornton, as umpire, that the government was not liable for the acts of individual soldiers or of bodies of stragglers or marauding soldiers not under the command of an officer." Moore, Arbitrations, III, 2996–2997. Among the instances cited are the Trippler Case, Moore, Arbitra-

the commission of unlawful acts by their subordinates, were unable to enforce discipline, served to shield the belligerent sovereign from responsibility.[4]

Mr. Bayard, Secretary of State, declared in 1885, that the mere fact that an act might be committed without orders from superiors in command was indecisive of the question of liability.[5] He stated that a government might be responsible for the misconduct of soldiers in the field, or when acting, either constructively or actually under its authority, if their acts, although forbidden by the government, were in contravention of the rules of civilized warfare. If by this statement he appeared to enlarge the acknowledged scope of national responsibility, he limited it by the declaration that a State was not responsible for the "collateral misconduct of individual soldiers dictated by private malice."[6] It may be doubted whether in practice such a limitation could be generally relied upon without qualification.

The circumstance that officers, though aware of the commission of unlawful acts by enlisted men, were powerless to enforce discipline, has at times been regarded as affording an excuse for the excesses of their troops.[7]

Article III of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, after announcing that a belligerent party violating the provisions of the Regulations annexed to the Convention should, if the case so demanded, be liable to pay compensation, declared that such a belligerent should be "responsible for all acts committed by persons forming part of its armed forces."[8] Tested by this provision, the commission of any acts prohibited by the Regulations, such, for example, as the pillaging of a place taken by assault,[9] would establish the liability of the belligerent, and that irrespective of the inability of an officer to enforce discipline, or of his ignorance or prohibition of the acts committed.[10] Although such be deemed to be the extent of the obliga-

---

tions, 2997, and the Culberson Case, *id.*, 2997. See, also, Buentello Case before same Commission, *id.*, IV, 3670; Michel Case before same Commission, *id.*, 3670; Vesseron Case before same Commission, *id.*, III, 2975; Foster Case, Spanish Claims Commission, agreement of Feb. 12, 1871, *id.*, 2998; Henriquez Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 910. In Ralston, revised ed., 354, are cited the Edgerton Case, Reclamaciones Presentadas al Tribunal Anglo-Chileno, I, 126; also Bacigalupi Case before Chilean-American Claims Commission of 1897, No. 42, *id.*, 399.

[4] Antrey Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3672; see, also, Weil Case before same Commission, *id.*, 3671; Dresch Case, before same Commission, *id.*, 3669.

[5] Communication to Mr. Buck, Minister to Peru, No. 33, Oct. 27, 1885, For. Rel. 1885, 625, Moore, Dig., VI, 758; Same to Same, Aug. 24, 1886, MS. Inst. Peru, XVII, 231, Moore, Dig., VI, 758.

*Compare* Mr. Magoon, law officer, division of insular affairs, Feb. 6, 1901, Magoon's Reports, 338, Moore, Dig., VI, 758; also opinion of Gen. Davis, Judge-Advocate-General, U. S. A., and comments thereon by the French Ambassador and the Solicitor for the Department of State, concerning claim of Messrs. Laurent & Lambert *v.* The United States, for losses sustained during the Spanish-American War, For. Rel. 1907, I, 393-398.

[6] In this connection see, also, Case of the Castelains, French-American Claims Commission, Convention of June 15, 1880, Moore, Arbitrations, III, 2999.

[7] Thornton, Umpire in Vesseron Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2975; and in Antrey Case, before same Commission, *id.*, IV, 3672.

[8] Malloy's Treaties, II, 2278; Scott, Hague Peace Conferences, II, 371.

[9] Art. XXVIII.

[10] Higgins, Hague Peace Conferences, 260; Holland, Laws of War on Land, 19. See, also, extract from Halleck, Int. Law, San Francisco, 1861, Sec. 22, p. 442, quoted in Moore, Dig.,

tion imposed upon the United States or any other power as a belligerent, it may be doubted whether national responsibility for the wrongful acts committed by soldiers in time of peace would be measured by the same test.[11] It is probable that the obligation to make reparation for acts committed in such a season would be regarded as dependent upon the circumstance that the soldier was, at the time of his misconduct, engaged in the performance of his duties, or that his superior officers failed to use the means at their disposal to prevent what occurred or to discipline the offender.[12] Nevertheless, it must be constantly borne in mind that members of the military forces of a State, even in seasons of peace, are oftentimes sources of danger to alien life and property which they encounter. The placing of them by their sovereign in positions of easy contact with such life and property imposes upon it burdens of discipline and control that are proportional to the power, propensity and opportunity to commit lawless acts which the members of such forces must at times be deemed to possess. In some fairly recent cases growing out of acts of soldiers when the respondent State was not at war, claims commissions have encountered no difficulty in awarding damages where aliens were killed through the negligent acts of soldiers in the course of duty, or where officers and men united in the lawless killing of such individuals.[13]

The Department of State has recently declared: "In situations in which foreign military forces have occupied and are in control of a particular area their responsibility in the matter of protecting the property of aliens against acts of private individuals is not believed to be any greater than that which would have rested upon the regular civil authorities who were supplanted." Accordingly, it has declared that: "in claims of this character claimants should endeavor to

---

VI, 918. The same passage is contained in Sir G. Sherston Baker's 3 ed. of same work, London, 1908, II, 36–37.

The decision, in some of the earlier cases, such as that of Sir Edward Thornton in the Cooper Case, Mexican-American Commission, under Convention of July 4, 1868, Moore, Arbitrations, IV, 4039, or of Commissioner Wadsworth, in the Friery Case, before same Commission, *id.*, 4036, where no indemnity was allowed for pillaging by soldiers, was doubtless due to the belief that at that time, such acts were to be counted among the ordinary hazards of war assumed by aliens resident in belligerent territory.

[11] Mr. Hay, Secy. of State, to Mr. Hunter, Minister to Honduras, March 20, 1900, concerning the Case of Frank Pears, For. Rel. 1900, 685–689, also *id.*, 674–702, Moore, Dig., VI, 762–764. See, also, claim of Bernard Campbell *v.* Haiti, For. Rel. 1895, II, 811–813, *id.*, 1898, 397–398, Moore, Dig., VI, 764. *Compare* Case of Lewis L. Etzel, For. Rel. 1904, 168–176, Moore, Dig., VI, 765.

See, also, case of firing by Dominican officials in 1893 upon the schooner *Henry Crosby*, by mistake, For. Rel. 1895, I, 215–234, especially Mr. Uhl, Acting Secy. of State, to Messrs. Goodrich, Deady & Goodrich, April 10, 1894, *id.*, 229, Moore, Dig., VI, 760; also case of assault on American seamen in the course of a street brawl, at Santa Catharina, in 1894, For. Rel. 1895, I, 52–59, Moore, Dig., VI, 760.

[12] See, however, J. M. V. Díaz Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 651, where the United States was held "liable under international law" for the acts of unidentified sailors of the United States Navy who stole cocoanuts from a plantation on Casaya Island. See Mr. Hunt's comment, *id.*, 652.

[13] See, for example, De Falcón Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 140; Thomas H. Youmans Case, *id.*, 150; Charles S. Stephens Case, *id.*, 397; G. L. Solis Case, *id.*, 1929 Vol., 48; opinion of Nielsen, Commissioner, in Lillie S. Kling Case, *id.*, 1931 Vol., 36.

See correspondence between the United States and Great Britain in For. Rel. 1915, 414–423, concerning the killing of Walter Smith and wounding of Charles Dorsch, American citizens, by soldiers of the Canadian militia on Dec. 28, 1914.

establish either (*a*) that the authorities were put on notice with respect to, or reasonably should have anticipated the occurrence of, illegal acts of the nature complained of, and negligently failed to take adequate steps to prevent the acts; or (*b*) that the authorities negligently failed to take adequate steps to apprehend and punish the offenders." [14]

(*b*)

§ 297. **Acts of Private Individuals and Bandits.** A consequence of a state of war, and especially of the operations of belligerent forces, is the opportunity afforded individuals and bands of marauders unattached to any public service to perpetrate lawless acts upon defenseless persons.[1] For such acts the responsibility of a belligerent power appears to depend upon its failure to make diligent use of the means at its disposal to deter misconduct or to punish offenders. Unless neglectful in this regard, it is difficult to establish a legal obligation to make redress; for the actors can not be regarded as in any sense agents of the belligerent within whose domain they operate. While a belligerent must on principle exercise the same measure of diligence within any area under its control that is required, in times of peace, of a territorial sovereign, the engrossing and burdensome problem which oftentimes engages a military commander during the period when the bandit does his work doubtless has a bearing on the reasonableness of the steps taken to prevent or suppress.

[14] Statement [without date] for the General Information of American Nationals Desiring to Present International Pecuniary Claims for Losses or Damages Sustained in Spain, Paragraph 10 (*b*) and (*c*). It is added: "It should also be shown, if possible, that sufficient police or soldiers were available to prevent the acts and/or punish the offenders had the authorities been disposed to take steps to those ends."

§ 297. [1] Buentello Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3670.

Through a Special Claims Convention concluded with the United States Sept. 10, 1923, for the settlement of claims of American citizens arising from revolutionary acts in Mexico from Nov. 20, 1910, to May 31, 1920, Mexico agreed to the adjustment by arbitration before a claims commission of specified groups of claims. U. S. Treaty Vol. IV, 4445. It was declared in Art. II that the Mexican Government desired that the claims should be decided in accordance with the principles of justice and equity, because "Mexico wishes that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification and agrees, therefore, that it will be sufficient that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in Article III hereof." According to Art. III, the Commission was to examine and decide upon claims due to acts committed "by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable measures to suppress . . . bandits, or treated them with lenity or were in fault in other particulars." In the so-called Santa Isabel Cases, the Special Claims Commission dismissed seventeen claims arising out of banditry. See Opinions of Commissioners, special claims convention of Sept. 10, 1923, United States and Mexico, Washington, 1931, 1; also, dissenting opinion of Commissioner Perry, *id.*, 16.

See subdivision 4 of Article III of British-Mexican convention of Dec. 5, 1930, supplementary to the convention of Nov. 19, 1926, respecting British Pecuniary Claims in Mexico owing to Revolutionary Acts, Further Decisions and Opinions of Commissioners, thereunder, London, 1933, 9; also, Leonor Buckingham Case, *id.*, 323, 326, where it was declared by the Commission: "While admitting that the Government cannot be blamed because they did not prevent the murder or punish the murderers, the Commission hold that it is the duty of any Government to know the extent to which they can afford protection, and to warn subjects, as well as aliens, if they are unable to do so, leaving it to their judgment either, to remain at their own risk, or to withdraw from those isolated places, to where the hand of government does not reach."

(6)

## War Claims against Germany under the Treaty of Versailles

(*a*)

§ 298. **The General Theory of Reparation.**[1] By the terms of the treaty of peace of June 28, 1919, Germany accepted the responsibility of herself and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals had been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.[2] That State was thus obliged incidentally to undertake to make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general for all damage as defined in a particular Annex of the treaty.[3] The amount of the damage was to be determined by an Inter-Allied

§ 298. [1] See, in this connection, Carl Bergmann, The History of Reparations, London, 1927; G. Calmette, Recueil de Documents sur l'Histoire de la Question des Réparations (1919–5 Mai 1921), Paris, 1924; J. M. Keynes, The Economic Consequences of the Peace, London, 1920; Sir Andrew McFadyean, Reparation Reviewed, London, 1930; August Philips Jr., Economic Aspects of Reparations and Inter-Allied Debts, Leyden, 1930; Hjalmar Schacht, The End of Reparations, New York, 1931; United States Department of Commerce, The Reparation Problem, 1918–1924, Trade Information Bulletin No. 278, Washington, 1924; John W. Wheeler-Bennett and Hugh Latimer, Information on the Reparation Settlement, London, 1930; Sir John Fischer Williams, "The Legal Character of the Bank for International Settlements," *Am. J.*, XXIV, 665.

See also Philip Mason Burnett, Reparation at the Paris Peace Conference from the Standpoint of the American Delegation, 2 vols., New York, 1940.

[2] Art. 231.

[3] Art. 232. It was declared in Annex I (following Art. 244) that compensation might be claimed from Germany under Art. 232 in respect of the total damage under the following categories:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

"(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or of being forced to labour), wherever arising, and to the surviving dependents of such victims.

"(3) Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims.

"(4) Damage caused by any kind of maltreatment of prisoners of war.

"(5) As damage caused to the peoples of the Allied and Associated Powers, all pensions and compensation in the nature of pensions to naval and military victims of war (including members of the air force), whether mutilated, wounded, sick or invalided, and to the dependents of such victims, the amount due to the Allied and Associated Governments being calculated for each of them as being the capitalised cost of such pensions and compensation at the date of the coming into force of the present Treaty on the basis of the scales in force in France at such date.

"(6) The cost of assistance by the Governments of the Allied and Associated Powers to prisoners of war and to their families and dependents.

"(7) Allowances by the Governments of the Allied and Associated Powers to the families and dependents of mobilised persons or persons serving with the forces, the amount due to them for each calendar year in which hostilities occurred being calculated for each Government on the basis of the average scale for such payments in force in France during that year.

"(8) Damage caused to civilians by being forced by Germany or her allies to labour without just remuneration.

Commission to be called the Reparation Commission, for the constitution and powers of which elaborate provision was made.[4] The function of that body (which was not to be dissolved until all the amounts due from Germany and her allies, under the treaty or the decisions of the Commission, should have been discharged, and all sums received, or their equivalents, should have been distributed to the Powers interested) was not only to determine the amount of damage chargeable to Germany, but also to fix, according to the resources and capacity of that State, the time and form of payment.[5] It was recognized that the resources of Germany were not adequate, after taking into account permanent diminutions which would result from certain provisions of the treaty, to furnish complete reparation for the loss and damage for which that State was burdened with responsibility.[6] It was perceived that complete satisfaction of the obligation would necessarily consume much time, and require a degree of flexibility of treatment of the obligor which could best be applied through the instrumentality of the Commission. Upon that body were, therefore, conferred vast discretionary powers. It was declared also that the insufficiency of the resources of German territory rendered it imperative that the German Government should be called upon to exercise its functions to place within reach of the Allied and Associated Powers assets of various kinds outside of its domain and which that Government might assert the right to control and utilize for its own benefit.[7]

In establishing a plan of compensation for losses, it was insisted that Germany should make restitution of tangible things which had been seized when it was possible to identify them in territory belonging to Germany or her allies, and that without allowing credit for so doing on account of the general reparation due.[8] This principle operating as a check upon credits otherwise to be claimed

---

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

"(10) Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population."

[4] Art. 233. The provisions for the Reparation Commission referred to therein were set forth in Annex II (between Arts. 244 and 245). It may be noted that according to Section 10 of this Annex the Commission was to consider the claims and to give to the German Government a just opportunity to be heard, but not to take any part whatever in the decision of the Commission. A similar opportunity was to be afforded the allies of Germany, when the Commission considered that their interests were in question.

Paragraph 11 of the Annex declared that the Commission was not to be bound by any particular code or rules of law or by any particular rule of evidence or of procedure, but was to be guided by justice, equity and good faith. It was said that its decisions must follow the same principles and rules in all cases where they were applicable. It was, moreover, to establish rules relating to methods of proof of claims. It was empowered to act on any trustworthy modes of computation.

[5] Arts. 233 and 234.

[6] Art. 232.

[7] See Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace (accompanying letter of M. Clemenceau, President of the Peace Conference, to Count Brockdorff-Rantzau, President of the German Delegation, June 16, 1919), Misc. No. 4, 1919 [Cmd. 258], pp. 32–36, 47–49.

[8] Thus according to Art. 238, Germany was obliged to effect "restitution in cash of cash taken away, seized or sequestrated, and also restitution of animals, objects of every nature

was given numerous specific applications. These appeared to lack uniformity, by reason of the variety of the modes by which reparation was to be made.[9]

In fixing broadly the methods by which reparation should be effected and available assets utilized to that end, the Allied and Associated Powers compelled Germany to agree to pursue primarily the following courses: to pay at an early date, in gold (or in such other manner as the Reparation Commission might determine) a specified sum,[10] to be followed from time to time by other payments, with a view to satisfying the entire fiscal obligation within thirty years from May 1, 1921; [11] as a measure of partial reparation, to make direct application of her economic resources to replace merchant shipping and fishing boats lost or damaged through the war,[12] to make physical restoration of invaded areas,[13] to furnish coal and derivatives of coal,[14] to deliver, if required, dyestuffs and chemical drugs; [15] to possess itself, upon demand of the Reparation Commission within

---

and securities taken away, seized or sequestrated, in the cases in which it proves possible to identify them in territory belonging to Germany or her allies." The procedure for so doing was to be laid down by the Reparation Commission. See, also, Art. 243.

[9] Art. 243 announced certain credits to be allowed to Germany in respect of her reparation obligations.

The terms on which the numerous and varied transfers of property as such were to be made, commonly indicated whether credit was to result on account of reparation. Cessions of territory do not appear generally to have been regarded as furnishing a basis of credit.

See, in this connection, J. R. Clark, Jr., "Data on German Peace Treaty," presented to the Committee on Foreign Relations, United States Senate, Sen. Doc. No. 86, 66 Cong., 1 Sess., in which that author pointed out the design as to credit, with respect to each relevant Article of the treaty.

[10] Art. 235. It should be observed that out of such sum the expenses of the armies of occupation subsequent to the Armistice of November 11, 1918, were first to be met. It was provided also that such supplies of food and raw material as might be judged by the Governments of the Principal Allied and Associated Powers to be essential to enable Germany to meet her obligations for reparation might also, with the approval of those Governments, be paid out of the same sum. The balance was to be reckoned towards liquidation of the amounts due for reparation. In the same Article it was agreed that Germany should deposit further bonds as prescribed in paragraph 12 (*c*) of Annex II of Part VIII of the treaty.

[11] Art. 233. It was here announced that the findings of the Commission as to the amount of damage should be notified to the German Government on or before May 1, 1921, as representing the extent of that Government's obligations.

Agreement was made in Article 235 for the issuance of bonds by Germany to cover by way of guarantee and acknowledgment such part of its debt due on account of proved claims, as might not be paid in gold, or in ships, securities and commodities, or otherwise. See paragraph 12 of Annex II, Part VIII. This Annex contained elaborate provision for the plan by which Germany should, from time to time, under the direction of the Reparation Commission, issue further bonds by way of acknowledgment and security.

See Art. 237 with reference to the division by the Allied and Associated Governments of successive installments of moneys paid by Germany.

[12] Art. 236, and also Annex III of Part VIII. In this Annex Germany recognized the right of the Allied and Associated Powers to the replacement, ton for ton (gross tonnage) and class for class, of all merchant ships and fishing boats lost or damaged owing to the war. The German Government undertook "on behalf of themselves and so as to bind all other persons interested," to cede to the Allied and Associated Governments the property in all German merchant ships of 1600 tons gross and upwards, as reckoned in a specified manner of division. Germany undertook also, among other things, to cause to be built in German yards for the account of the Allied and Associated Governments an amount of tonnage to be laid down within a specified period of years and under the direction of the Reparation Commission.

[13] Annex IV of Part VIII, in which the plan of physical restoration of invaded areas was elaborated.

[14] Annex V, Part VIII.

[15] Annex VI, Part VIII. See, also, so-called Special Provisions embraced in Arts. 245, 246 and 247, with reference to the restoration to the French Government, to the King of the Hedjaz, and to Belgium, respectively, of certain tangible articles. By Art. 247, Germany

a fixed time, of rights and interests of German nationals in public utility undertakings or concessions operating in the territories of specified countries, and transfer the same, if acquired, to the Reparation Commission; [16] to deliver sums of gold deposited in Germany by Turkish authorities for purposes defined, embracing any title of Germany therein, and to transfer any sums in gold transferred to the German Government as a pledge or collateral security for loans to the Austro-Hungarian Government; [17] to transfer any claims which Germany might have to certain payments or repayments by the Governments of Austria, Hungary, Bulgaria or Turkey; [18] and to acquiesce generally in the utilization of the property of German nationals in territories of the Allied and Associated Powers, in satisfaction of claims of their nationals.[19]

The foregoing requirements, which were supplemented by numerous others providing for special undertakings in relation to particular matters,[20] indicate the scope of the general obligation assumed and the plan of its fulfillment. The treaty established the theory of liabilities, leaving for solution questions respecting the amount of damage sustained by the Allied and Associated Powers. In performing the task of estimating the extent of that damage, and of regulating the times and modes of making compensation for it, the Reparation Commission appears to have been designed to exercise an administrative rather than a judicial function.

(*b*)

§ 299. **Adjustment of Claims of Nationals of Allied and Associated Powers.** The treaty made provision that the nationals of Allied and Associated Powers should be entitled to compensation in respect of damage or injury in-

---

undertook also to furnish to the University of Louvain manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain.

[16] Art. 260. The countries specified were Russia, China, Turkey, Austria, Hungary and Bulgaria, as well as their possessions or dependencies, and also any territory formerly belonging to Germany or her allies, to be ceded by Germany or her allies to any Power, or to be administered by a Mandatory under the treaty.

It should be noted that Germany agreed to assume responsibility for indemnifying her nationals so dispossessed.

[17] Art. 259. In the same Article Germany undertook to transfer, either to Roumania or to the Principal Allied and Associated Powers, as the case might be, all monetary instruments, specie, securities and negotiable instruments, or goods, which she had received under the treaties of Bucharest and of Brest-Litovsk. According to this Article Germany recognized an obligation to make annually for the period of twelve years the payments in gold "for which provision is made in the German Treasury Bonds deposited by her from time to time in the name of the Council of the Administration of the Ottoman Public Debt as security for the second and subsequent issues of Turkish Government currency notes."

[18] Art. 261. Particular reference was here made to "any claims which may arise, now or hereafter, from the fulfillment of undertakings made by Germany during the war to those Governments."

[19] Art. 297 (*b*) and (*e*). By Article 297 (*i*) Germany undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States. See, also, Art. 252.

[20] See, for example, the provisions of Art. 232, whereby Germany, in accordance with pledges previously given, as to the complete restoration of Belgium, in addition to compensation for damage elsewhere provided for, as a consequence of a violation of the Treaty of 1839, undertook "to make reimbursement of all sums which Belgium has borrowed from the Allied and Associated Governments up to November 11, 1918, together with interest at the rate of five per cent. (5%) per annum on such sums."

flicted upon their property, rights or interests, including any company or association in which they were interested, in German territory as it existed August 1, 1914, by the application of exceptional war measures or measures of transfer.[1] It was declared that such claims should be investigated and the amount of compensation determined by the Mixed Arbitral Tribunal (provided for in Section VI of Part X), or by an arbitrator appointed by the Tribunal.[2] It seems important to observe that while such compensation was to be borne by Germany, it was agreed that it might be charged upon the property of German nationals within the territory or under the control of the claimant's State,[3] and that such property might be constituted as a pledge for enemy liabilities under conditions fixed by a later paragraph.[4] No distinction based upon the place of residence of German nationals whose property might be utilized in satisfaction of claims against Germany was here recognized. The treaty appeared to permit the same uses of the property of such nationals dwelling within the territory of an Allied or Associated Power as of that owned by such individuals residing in German territory, provided the property were in the control of a claimant State. Any rule of restraint was thus left to the domestic policy of the latter.

As a means of satisfying the claims of the owners of property who were nationals of Allied or Associated Powers "within whose territory legislative measures prescribing the general liquidation of enemy property, rights or interests were not applied before the signature of the Armistice," and whose property had been subjected to a measure of transfer in German territory, special provision was made. It was agreed that in such a case (following the arbitral procedure

§ 299. [1] Art. 297 (*e*). Such measures were defined in paragraphs 1 and 3 of the Annex following Art. 298.

[2] Art. 297 (*e*).

Concerning the adjudications before the several mixed claims commissions instituted by the treaties of peace (embracing that of Versailles), see *Recueil des Décisions des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix,* of which ten volumes were published, 1922–1930, under the direction of M. Alphand, and under the editorship of Gilbert Gidel.

See Rudolf Blühdorn, "*Le Fonctionnement et la Jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de Paris,*" *Recueil des Cours,* 1932, III, 137.

[3] Art. 297 (*b*), Treaty of Versailles.

[4] See paragraph 4 of Annex following Art. 298, containing the following important provision: "All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy powers, in so far as those claims are otherwise unsatisfied."

From the Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, accompanying M. Clemenceau's letter of June 16, 1919, Misc. No. 4 (1919) [Cmd. 258], p. 54, it appears that the foregoing provision respecting the assessment of claims by an arbitrator to be appointed by Mr. Gustave Ador or otherwise, had reference to the treatment of claims growing out of acts committed by the German Government between July 31, 1914, and the date at which the particular claimant State became a belligerent.

prescribed in other cases) the claimant, expressing a desire for restitution, should have his claim satisfied by the restitution of his property if it should still exist in specie.[5] If restitution could not be so effected, it was declared that private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices (provided for in the Annex to Section III of Part X) might be made, in order that the claimant might secure compensation for his injury by the grant of advantages or equivalents which he could agree to accept in the place of the property, rights or interests of which he had been deprived.[6]

It seems to have been the design of the contracting parties that the establishing of the nature and amount of a claim of a national of an Allied or Associated Power against Germany should, in the absence of agreement, require, as a condition precedent to its satisfaction, and regardless of the particular assets to be utilized for that purpose, a recourse to arbitration.[7]

(*c*)

§ 299A. **American Participation in German Reparation Payments.** It is not here sought to discuss the various modes by which attempt was made by its former enemies to cause Germany to meet its financial obligations under the Treaty of Versailles. The suggestions of Secretary Hughes in 1922, accentuating the importance of ascertaining Germany's capacity to pay and the invocation of the aid of non-political experts,[1] the occupation of the Ruhr by French and Belgian forces in 1923,[2] the subsequent decision in that year of the Reparation Commission to create two committees of experts, one of which was productive

[5] Art. 297 (*f*) and (*g*). It was declared in this connection, that in such case Germany should take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it might have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

[6] Art. 297 (*f*).

According to Art. 297 (*h*), it was provided that except in cases where restitutions in specie should have been made, the net proceeds of sales of enemy property, rights or interests wherever situated, carried out either by virtue of war legislation, or by application of this Article, and in general, all cash assets of enemies should be dealt with as follows:

"(1) As regards Powers adopting Section III [of Part X], and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.

"(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243." That Article dealt with the reckoning of credits to Germany in respect to her reparation obligations.

[7] Art. 297 (*e*), (*f*).

§ 299A. [1] See Address on Some Aspects of Our Foreign Policy, read at annual meeting of the American Historical Association at New Haven, Dec. 29, 1922, contained in Charles E. Hughes, The Pathway of Peace, New York, 1925, 32.

[2] See, in this connection, Arnold D. McNair, "The Legality of the Occupation of the Ruhr," *Brit. Y.B.*, 1924, V, 17; Arnold J. Toynbee, Survey of International Affairs, 1924 (London, 1926), 268–300.

of the so-called Dawes Plan of April 9, 1924,[3] the conference and agreement adopting that plan at London in July, 1924, and the conference at Paris productive of the agreement of January 14, 1925, in relation to the allocation of German reparation payments,[4] were outstanding among the relevant events of that time.

It seems important, however, to advert to the legal controversy that arose between the United States and Great Britain concerning the American claim to participate in the Dawes annuities in order to satisfy awards for damages, as handed down by the Mixed Claims Commission established under the agreement between the United States and Germany of August 10, 1922.[5] That claim was vigorously opposed by Great Britain. It contended in substance that by failing to ratify the Treaty of Versailles the United States had forfeited its right to reparation thereunder, and that no subsequent agreement between the United States and Germany could deprive a State such as Great Britain of its rights under the earlier arrangement. Moreover, it was declared that it had always been understood that American claims for reparation would be satisfied out of German property seized in the United States; and surprise was manifested that the United States sought to participate in the Dawes annuities.[6]

Secretary Hughes declared that it was both repugnant to equity and inadmissible in law to assert that the Allied powers as parties to the Treaty of Versailles could by virtue of that instrument assert a charge upon all the assets of Germany to the exclusion of the United States from the recovery of its just claims, and that as it had effectively participated in the war and contributed to the common victory, it was equally entitled with its co-belligerents as one of the Allied and Associated powers, to enforce those claims against Germany. He stated that the armistice agreement provided for reparation for damage done, with reservations that any subsequent concessions and claims by the United States and the Allies should remain unaffected. The British contention was in substance, he declared, that one or more of the Allied and Associated powers could fairly make a separate agreement with Germany by which they would be entitled, not merely to recover on their own claims, but also to deprive their co-belligerents of satisfaction. He pointed out that the Treaty of Versailles provided that it should come into force when ratified by Germany and three of the powers; and he maintained that if the treaty had for any reason been unac-

[3] See Reparation Commission Official *Communiqué* No. 224, of Nov. 30, 1923.
See Toynbee, Survey of International Affairs, 1924 (London, 1926), 340–359.

[4] Agreement Regarding the Distribution of the Dawes Annuities, Jan. 14, 1925, *Am. J.*, XIX, *Official Documents,* 63, American War Claims Against Germany, Sen. Doc. No. 173, 69 Cong., 2 Sess., 77.

[5] The views of Secretary Hughes were set forth in a memorandum of Nov. 15, 1924, handed by Ambassador Kellogg to the Secretary of State for Foreign Affairs, Nov. 19, 1924, in a note, same to same, Dec. 10, 1924, and in a note, same to same, Jan. 3, 1925. The British views were set forth in a note from the Secretary of State for Foreign Affairs to Ambassador Kellogg, Dec. 3, 1924, and in a note, same to same, Dec. 29, 1924. This correspondence is contained in Exhibit F of American War Claims Against Germany, Sen. Doc. No. 173, 69 Cong., 2 Sess., 45. See documents, For. Rel. 1924, II, 1–134.

[6] The discussion of the Anglo-American controversy which reproduces textually the author's statement on pages 387 to 392 in volume X of The American Secretaries of State and Their Diplomacy is here printed with the kind permission of the publisher thereof — Alfred A. Knopf, New York.

ceptable to Great Britain and had come into force without British ratification, it was impossible to believe that the British Government would have assented to the position that the ratifying powers — such, for example, as Italy, France, and Belgium — could have rightfully demanded the appropriation of all the available property of Germany and so leave Great Britain without any German asset out of which to satisfy its claims. That a treaty should not modify the obligations undertaken by one contracting party in favour of others did not, he declared, justify the view that other powers could by a previous agreement justly curtail the rights of third States. He adverted to the fact that, in consequence of the very terms of the Treaty of Versailles, the powers which ratified it definitely affirmed the liability of Germany to each of the Allied and Associated powers for the damages which each had suffered from the war, and that it was from damages of such a kind that the American claims against Germany arose. The right of the United States was not impaired, he maintained, by its failure to ratify that treaty. He declared, moreover, that his country had not sought by its treaty with Germany of August 25, 1921, to enforce its own claims at the expense of the nations with which it had been associated in the war. There was no room for doubt on this point.

The Secretary of State contended that nothing in the Treaty of Versailles was designed to incapacitate Germany from providing for the payment to the United States of the separate claims of itself and its citizens, and that the Dawes Report made it "clear" that the sums to be paid thereunder "comprise all amounts for which Germany may be liable to the Allied and Associated Powers for the costs arising out of the war, including reparation, restitution, all costs of all armies of occupation," et cetera, and that it was thus the intent of the Dawes Plan to provide comprehensively for all the payments that Germany could make. He declared that when it came to the notice of his Government that there was likelihood that consideration would be given to the inclusion of such payments by Germany as would exhaust her full capacity of payment, that Government directed attention to the claims of the United States, that there might be no question about their exclusion; and he adverted to Ambassador Kellogg's statements at the London conference in August, 1924.[7] That the Dawes Report contemplated that the funds in the hands of the agent-general of reparations should be charged with all the claims against Germany, including those of the United States, Secretary Hughes did not consider open to question.

Secretary Hughes referred to the treaty between the United States and Germany of August 25, 1921, and to the responsibility there undertaken by reference to the Treaty of Versailles, and also to the later relinquishment by the United States of claims for pensions, assistance to prisoners of war, their families and dependents, and allowances to families and dependents of mobilized

[7] He noted also the fact that the United States, not itself a participant in the conference at Spa in 1920, was not affected by the arrangements thereof, and had so advised the participating powers at the time, and that the Reparation Commission had adopted a resolution designed to indicate that the Spa agreement was not binding upon non-signatory States. See further discussion of this point in the British note of Dec. 29, 1924, and in the American note of Jan. 3, 1925.

persons, etc.[8] He declared, however, that its just claims for actual injuries to persons and property, and debts, the United States had no intention of giving up, and that he had expressed no intention of doing so in his New Haven speech; and that he had there referred to "general reparations," meaning thereby the claims which his country, as stated, was not pressing, rather than those classes of claims which were then in process of adjudication pursuant to the claims agreement with Germany which he had already negotiated. He adverted also to the clear equities supporting the American position which he understood were not disputed.

With respect to the suggestion that payment of the American claims be satisfied from German property which had come into the hands of the United States Government, he adverted to the freedom enjoyed by each government under the Treaty of Versailles, in dealing with such property as it might see fit; secondly, to the fact that some of the Allied powers, if not all, had released a part of such seized property as was in their hands; and, thirdly, to the circumstance that only in the event of the retention of such property, or the proceeds derived from the sale of it, was the amount of the value of the property or of the proceeds of sale to be credited against claims, and that the United States enjoyed the same freedom in that regard as the other powers, which, in its own case, was subject to the control of Congress.

Great Britain persisted in denying the soundness of the American claim. It admitted, however, that when more powers than one had claims against the same State, it would no doubt be contrary, "if not to established rules of international law, at any rate to the commonly accepted understanding of international intercourse," for a creditor power to conclude without the assent of other powers similarly situated, or without giving those powers an opportunity of equal advantage, a treaty with a debtor State which would have the effect of depriving the debtor of the capacity of making similar provision for the claims of the other creditors. It was contended that the Treaty of Versailles was not such a separate treaty, "made by one power with the aim or effect of getting an exclusive advantage," but rather a treaty negotiated in behalf of the United States and twenty-six other States, all of whom, except China, signed it. "The treaty," it was said, "gave to the powers who accepted it certain rights and imposed certain burdens on them. And powers which signed but did not ratify the treaty clearly forewent those rights and escaped those burdens of their own voluntary choice."[9] Secretary Hughes responded by saying that this argument appeared to be "that the United States was compelled to ratify the Treaty of Versailles in order to retain its rights; or that the Allied Powers could accomplish the result of securing all the assets of Germany for their exclusive benefit

[8] When the Secretary of State pointed out that the United States had seen fit voluntarily to limit its claims against Germany to categories of damages for injuries to persons and property and war debts, whereas its co-belligerents were demanding reparation payments to cover pensions, assistance to prisoners of war, their families and dependents, and allowances to families and dependents of mobilized persons, etc., and that the claims within these latter categories submitted by the Allied powers amounted to very large sums, he fortified his demand that the legal basis of the relatively modest claim of the United States be respected.

[9] See British note of Dec. 29, 1924.

by inviting the United States to join in a treaty containing unacceptable terms." He added: "The question is not one of assuming obligations under a treaty relative to the benefits it confers." He repeated his assertion that the Government of the United States was "unable to reach any other conclusion than that the Allied Powers have no right in law or equity to take for their own benefit all the payments that Germany can make and deny participation to the United States for its proper claims." [10]

Great Britain did not continue the controversy, and an amicable arrangement was made. The Paris agreement of January 14, 1925, for the distribution of the Dawes annuities, allocated to the United States a share in those annuities "in reimbursement of the costs of the United States Army of Occupation and for the purpose of satisfying the awards of the Mixed Claims Commission in pursuance of the Agreement between the United States and Germany of August 10th, 1922." [11]

A Report of the Committee of Experts (of which Mr. Owen D. Young was chairman) on the Settlement of the Reparation Problem, of June 7, 1929,[12] known as the Young Plan, as well as an agreement of the Powers concluded at The Hague, January 20, 1930, adopting with some modifications the Young Plan,[13] allocated to the United States a share of German reparations designed to cover "amounts payable on account of the cost of the Army of Occupation, as well as in satisfaction of the awards of the Mixed Claims Commission between the United States and Germany." [14] The United States, while regarding as satisfactory the share allotted to it under the Young Plan, was not, however, disposed to participate in the collecting and distributing machinery contemplated thereby, and entered into direct arrangement with Germany on June 23, 1930, in relation to payments to be made by it on account of the cost of the American Army of Occupation and on account of awards and interest thereon handed down by the Mixed Claims Commission.[15] Under that arrangement "Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichmarks per annum from April 1, 1930, to March 31, 1981." [16] Germany having become in arrears in payments under the Debt-

[10] See American note of Jan. 3, 1925.

[11] Art. III. For a text of the arrangement see *Am. J.*, XIX, *Official Documents*, 63, 66.

[12] *Am. J.*, XXIV, *Official Documents*, 81.

[13] *Am. J.*, XXIV, *Official Documents*, 259.

[14] Chandler P. Anderson, "Final Liquidation of German War Reparations," *Am. J.*, XXV, 97. That writer adds: "The plan did not apportion the share of the United States between these two accounts, this apportionment being left for the United States Government to determine for itself."

[15] *Am. J.*, XXV, *Official Documents*, 1.

This agreement took cognizance of the so-called Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, contemplating, among other things, the payment of American claims against Germany, Austria and Hungary. See, in this connection, E. M. Borchard, "The Settlement of War Claims Act of 1928," *Am. J.*, XXII, 373. See, also, Chandler P. Anderson, article cited, *Am. J.*, XXV, 97.

See American Claims Against Germany Arising Out of the World War, *supra*, § 295A.

[16] The language quoted is that contained in recitals in 48 Stat. 1267, 1268.

Funding Agreement, and having failed in the opinion of the Congress of the United States "to make suitable provision for the satisfaction" of American claims against Germany, a Joint Resolution approved June 27, 1934, amending the Settlement of War Claims Act of 1928, as amended, postponed, while Germany remained in arrears, all payments or transfers of property of various forms to German nationals as authorized by the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act, as amended.[17]

k

## The Relation of a State to Acts of Insurgents

(1)

§ 299B. **Insurgents as Agents of a State.** A State may act through, and bind itself by agencies of diverse kinds. Such instrumentalities doubtless embrace for certain purposes insurgent entities seeking by force to win the reins of government, and acquiring in the course of that effort control over an area which, however temporary, is for the time being exclusive and exerted in relation to foreign life and property therein. The circumstance that such control is short-lived and finally relinquished to what proves to be the government of the country does not necessarily enable the territorial sovereign to deny that the temporary controller of its domain may not act in its behalf and impose international obligations upon it. Thus in respect to certain matters of routine administration, and in others pertaining to governmental management or up-keep, arrangements of contractual character not shown to be disadvantageous to the State as such may prove to be binding upon it despite the failure of the contracting agency — the insurgent entity — to retain political control. Likewise, exercise of the taxing power by insurgents within the area controlled by them is not to be regarded as unbeneficial to the State or not binding upon it, when the collectors of taxes from aliens have lost their sway, and yielded it to a titular government.

Conversely, it might be logical to maintain that for the consequences of tortious conduct attributable to insurgents that were unsuccessful, the State was responsible at least for the period while they maintained their cause, and exercised de facto governmental control. It will be found, however, that the law of nations as reflected in the statements of those who bear witness to its requirements, permits the territorial sovereign to deny that the insurgent entity which was ultimately unsuccessful is to be deemed to have been the representative of the State, or to have been capable of imposing upon it responsibility for the consequences of tortious acts which the acknowledged government thereof proved to be unable to prevent. Instead of holding the State responsible for the consequences of the acts of those in actual, if temporary, control of its domain or of portions thereof, the State is perhaps arbitrarily associated with the titular

[17] 48 Stat. 1267. See *infra*, § 623A.
See Edwin Borchard, "Reprisals on Private Property," *Am. J.*, XXX, 108; same writer, in Introduction to James A. Gathings' International Law and American Treatment of Alien Enemy Property, 1940, ix–xiii.

government that maintains or regains its sway, and the propriety or sufficiency of the conduct of the former is tested by that of the latter. The result produces confusion of thought in determining whether in a given case an insurgent movement attains such success that it is to be regarded as not having been unsuccessful but as having become the government of the State concerned, despite its ultimate loss of power. In a word, if the test of State responsibility for the tortious acts of insurgents is made to depend upon the success or failure of the insurgent movement rather than upon the degree of control at any time exerted by it over a territorial area, there is left in abeyance the solution of the question whether in the particular case the insurgent movement was to be regarded as successful.

In the sections that follow, enunciations of the relevant law follow customary distinctions that reveal the broad gap to be seen between the requirements of logic and rules which practice has seemingly ordained.

(2)

§ 300. **Acts of Unsuccessful Insurgents.** For many purposes unsuccessful insurgents are not deemed to be the agents of the State whose authorities succeed in suppressing them. Thus, for the damages caused by such insurgents, the territorial sovereign is not generally regarded as necessarily responsible. This conclusion has received the support of courts of arbitration,[1] and has met with ap-

§ 300. [1] See, generally, cases and publicists cited in Ralston, revised ed., 345–355, but especially opinion of Ralston, Umpire in Sambiaggio Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 666, 679; Guastini Case before same Commission, *id.*, 730; Revesno Case, before same Commission, *id.*, 753; Guerrieri Case, before same Commission, *id.*, 753; Plumley, Umpire, in Aroa Mines Case, British-Venezuelan Commission, 1903, *id.*, 344, 350; same Umpire in Henriquez Case, Netherlands-Venezuelan Commission, 1903, *id.*, 896; opinion of Paúl, Commissioner, in Acquatella Case, Netherlands-Venezuelan Commission, 1903, *id.*, 487; opinion of Gutierrez-Otero, Umpire in Padrón Case, Spanish-Venezuelan Commission, 1903, *id.*, 923; Duffield, Umpire in Van Dissel Case, German-Venezuelan Commission, 1903, *id.*, 565, 568, 573; Bainbridge, Commissioner in Jarvis Case, American-Venezuelan Commission, 1903, *id.*, 145, where it was said that the Government was not liable to the legatees of certain bonds issued by the unsuccessful insurgents in payment of services rendered by the testator. The opinion of Duffield, Umpire in the Kummerow Case, German-Venezuelan Commission, 1903, *id.*, 526, 549, was based upon the interpretation of the protocol under which he acted, by which in his opinion, Venezuela assumed liability for the acts of revolutionists.

See, also, Schultz Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2973; Walsh Case, before same Commission, *id.*, 2978; Thornton, Umpire in Wyman Case, before same Commission, *id.*, 2978; same Umpire in Silva Case, before same Commission, *id.*, 2979; McGrady Case, Spanish Commission, Agreement of Feb. 12, 1871, *id.*, 2981; Hanna Case, British-American Claims Commission, treaty of May 8, 1871, *id.*, 2982, especially opinion of Frazer, Commissioner, *id.*, 2986; Laurie Case, before same Commission, *id.*, 2987; Stewart Case, before same Commission, *id.*, 2989; also Confederate Debt Cases of Barrett and Walker, before same Commission, *id.*, 2900 and 2901; Edgerton Case, British-Chilean Claims Commission, quoted in Ralston, revised ed., 354; Case of Rosa Gelbtrunk, Arbitration between the United States and Salvador, 1902, For. Rel. 1902, 877, 878.

See, also, Home Missionary Society Case, American and British Pecuniary Claims Arbitration, agreement of Aug. 18, 1910, Nielsen's Report, 423; G. L. Solis Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 48.

*Compare* Venezuelan Steam Transportation Company Case, Convention between the United States and Venezuela, of Jan. 12, 1892, Moore, Arbitrations, II, 1693, 1723; but see *dissenting* opinion of Andrade, Commissioner, *id.*, 1724; Case of the *Montijo*, Agreement between the United States and Colombia of Aug. 17, 1874, *id.*, 1421, 1427.

See especially Haig Silvanie, Responsibility of States for acts of Unsuccessful Insurgent Governments, New York, 1939.

proval in other quarters.[2] Notwithstanding some diversity of opinion expressed in the past, it appears now to be accepted also by the Department of State.[3] Thus, in 1911, it announced "that where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents."[4] The form of this statement leaves something to be desired; for it accentuates governmental responsibility when, as a matter of fact, State responsibility, as such, for the consequences of acts attributable to unsuccessful insurgents is the matter at issue. The assumption that the former is identical with the latter breeds confusion of thought and tends to divert inquiry from the precise question which may fairly be raised in every case, whether on the record the territorial sovereign should be deemed to have failed in its duties of protection or jurisdiction towards the alien who has sustained damages. If a State whose existing governmental agencies succeed in repressing an insurgent movement is burdened with responsibility for what may be called the tortious consequences thereof, it is, under the prevailing theory, because through those agencies (*a*) it "has failed to use promptly and with appropriate force its constituted authority" to oppose the revolutionists;[5] or (*b*) because it has condoned by some process their inter-

[2] See Art. 7 of Resolution adopted by the Institute of International Law at Lausanne in 1927, on the International Responsibility of States by Reason of Damage Caused on Their Territories to the Person and Property of Foreigners, *Annuaire,* XXXIII, Vol. III, 332.

"A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence. Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors." (Bases of Discussion No. 22 and No. 22 (*a*) respectively, Conference for the Codification of International Law, Bases of Discussion, III, Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V., 111 and 113.)

*Cf.* Arts. 12 and 13 of Harvard Draft Convention on Responsibility of States, *Am. J.,* XXIII, April, 1929, *Special Supplement,* 134.

See, in this connection, Eagleton, Responsibility of States, §§ 41–45.

[3] Mr. Seward, Secy. of State, to Mr. Smith, July 9, 1868, 79 MS. Dom. Let. 69, Moore, Dig., VI, 956; Same to Baron Gerolt, Prussian Minister, Jan. 9, 1866, MS. Notes to Prussian Legation, VII, 430, Moore, Dig., VI, 957; Mr. Davis, Acting Secy. of State, to Mr. Markbreit, Minister to Bolivia, No. 55, July 7, 1871, MS. Inst. Bolivia, I, 145, Moore, Dig., VI, 959; Mr. Bayard, Secy. of State, to Messrs. Busche, Clark & Lynde, April 9, 1885, S. Doc. 264, 57 Cong., 1 Sess., 10, Moore, Dig., VI, 961; Same to Mr. Sutphen, Jan. 6, 1888, 166 MS. Dom. Let. 509, Moore, Dig., VI, 961; Mr. Olney, Secy. of State, to Mr. Thompson, Minister to Brazil, No. 315, Jan. 29, 1896, MS. Inst. Brazil, XVIII, 171, Moore, Dig., VI, 966; Mr. Hay, Secy. of State, to Mr. Rush, May 18, 1899, 237, MS. Dom. Let. 171, Moore, Dig., VI, 960.

*Compare* statement of Mr. Brent, Chargé at Lima, to Mr. Fish, Secy. of State, No. 252, March 14, 1871, MS. Despatches from Peru, Moore, Dig., VI, 973; Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mexico, XIX, 18, Moore, Dig., VI, 974; Same to Same, No. 54, Dec. 16, 1873, MS. Inst. Mexico, XIX, 48, Moore, Dig., VI, 975; Same to Same, No. 241, July 15, 1875, MS. Inst. Mexico, XIX, 210, Moore, Dig., VI, 980.

See, also, Mr. Scruggs, Minister to Colombia, to Mr. Fish, Secy. of State, No. 166, May 18, 1876, concerning attitude of Colombia in accepting responsibility for certain acts of insurgents in 1875, MS. Despatches from Colombia, Moore, Dig., VI, 981.

[4] Mr. Adee, Acting Secy. of State, to Mr. Wilson, Ambassador to Mexico, Nov. 7, 1911, For. Rel. 1912, 946–947, in which attention was called to Moore, Dig., VI, 949 *et seq.* Also Mr. Wilson, Acting Secy. of State, to Mr. Wilson, American Ambassador to Mexico, April 8, 1912, For. Rel. 1912, 961.

[5] See Ralston, Umpire, in the Sambiaggio Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 666, 680; Home Missionary Society Case, American-British Pecuniary Claims Arbitration, agreement of Aug. 18, 1910, Nielsen's Report, 423; Iloilo Claims Case,

nationally illegal acts; or (*c*) because it has entered into a relationship whereby it has become the legal successor to those whose conduct it previously opposed.

A foreign State whose nationals are subjected to improper treatment by insurgents, may, during the course of the conflict, justly urge the territorial sovereign to bend every effort to accord adequate protection; [6] and vigorous protest will be forthcoming if it fails to render such protection as it is known to possess the ability to afford.[7] If after the suppression of the insurrection, claims for indemnity are referred to a court of arbitration, the claimant State has the burden of proving neglect on the part of the respondent.[8]

While the freedom of a State from responsibility for the consequences of tortious acts of insurgents which in the course of the conflict such State has through its existing governmental agencies been unable to control may be deemed to be attributable to the fact of quasi-belligerency rather than to the relation of the claimant State thereto, the latter may, by its conduct, admit that at the time of the commission of those acts the territorial sovereign lacked the power of prevention or suppression through its then-existing governmental agencies.[9] This is

---

*id.*, 403; G. L. Solis Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 48.

On Dec. 19, 1912, Secretary Knox, in a communication to the American Chargé d'Affaires in Mexico, declared that the United States could not admit "the existence of any such unqualified rule as that stated by the Mexican Government" to the effect that "when a government finds itself temporarily unable to repress within its territory all the punishable acts resulting from insurrection or civil war, it is not responsible for the damages which foreigners may suffer in person or property during the course of the campaign as a consequence of the measures that the government may find it necessary to take in order to recover its dominion." (For. Rel. 1912, 984.)

A State may, as a matter of grace, undertake to indemnify foreigners for losses caused by revolutionists. See, for example, Special Claims Convention between the United States and Mexico of Sept. 10, 1923, U. S. Treaty Vol. IV, 4445. A declaration by a State concerning its reasons or motive for indemnifying foreigners is not, however, necessarily decisive of the absence of a duty on its part to make redress. See claim of J. H. Hayball *v.* Peru, For. Rel. 1901, 427–430, Moore, Dig., VI, 990. When a State remunerates its own nationals, it may anticipate a demand that resident aliens be given similar treatment. See Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, No. 62, March 24, 1879, MS. Inst. Haiti, No. 188, II, Moore, Dig., VI, 960. A State may by treaty assume a special responsibility for acts committed within a given area, whosoever may be the actors. Report of Mr. Bayard, Secy. of State, to the President, Feb. 19, 1887, respecting the special obligation of Colombia towards the United States, arising from Art. XXXV of the treaty of 1846. H. Ex. Doc. 183, 49 Cong., 2 Sess., Moore, Dig., VI, 960.

[6] Mr. Olney, Secy. of State, to Mr. Taylor, Minister to Spain, Dec. 15, 1896, For. Rel. 1896, 704, Moore, Dig., VI, 968; Same to Messrs. Lauman & Kemp, Jan. 13, 1896, 207 MS. Dom. Let. 146, Moore, Dig., VI, 967.

[7] Mr. Sherman, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, July 6, 1897, For. Rel. 1897, 516, Moore, Dig., VI, 969; Mr. Adee, Acting Secy. of State, to same, July 29, 1897, For. Rel. 1897, 519, Moore, Dig., VI, 970; Mr. Olney, Secy. of State, to Mr. Terrell, Minister to Turkey, Oct. 17, and Oct. 28, 1896, For. Rel. 1896, 892, 893, Moore, Dig., VI, 965.

[8] Ralston, Umpire in Revesno Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 753; Henriquez Case, Netherlands-Venezuelan Commission, 1903, *id.*, 896. See, also, Mr. Uhl, Acting Secy. of State, to Mr. Springer, United States Vice-Consul-General at Havana, July 1, 1895, For. Rel. 1895, II, 1216, Moore, Dig., VI, 966.

In the Special Report of William E. Fuller, Assist. Atty.-Gen., with respect to principles laid down by the Spanish Treaty Claims Commission, it is said that the Commission made it clear to the claimants: "That in order to recover for damages done by insurgents it was necessary for them to allege and prove that at the time and place when and where the injury was done the Spanish authorities could, by due diligence, and should have prevented such injury." Fuller's Report, 25.

[9] Declared Commissioner Wadsworth, in Prats Case, Mexican-American Commission, Con-

true not only when the claimant State recognizes the insurgents as belligerents,[10] but also when it recognizes the existence of a status of insurgency.[11]

The effect of amnesty for acts of unsuccessful revolutionists upon the liability of the grantor State appears to depend upon the scope of the pardon given. The purpose of such a grant is to pardon the commission of acts incidental to revolution and directed against the grantor, and also to render the actors immune from prosecution. It may naturally embrace internationally illegal acts incidental to the conflict and committed for a public rather than a private end and against whomsoever directed.[12] The pardon of insurgents on account of acts of revolution does not necessarily condone the method by which they were accomplished; nor does it necessarily deprive the alien victim, if there be one, of any valuable right, inasmuch as the actors could not, even in the absence of a grant of amnesty, be held accountable to private suitors in the local courts for the commission of acts of a belligerent character incidental to the conflict.[13]

---

vention of July 4, 1868, Moore, Arbitrations, 2886, 2888: "Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that Government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers' sovereign. It resulted from the fact of belligerency itself, and whether recognized or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and so to speak, an *estoppel* as to that government."

[10] Dana's Wheaton, Note No. 15, *citing* Mr. Adams to Mr. Seward, June 11, 1861, Dip. Cor. 105, Moore, Dig., I, 165, 166. Concerning the conditions and effects of Recognition of Belligerency, see *supra*, § 47.

[11] Statement in Moore, Dig., I, 242–243, concerning the recognition of the state of insurgency or revolt as a distinctive condition by the United States in the case of the Cuban Insurrection of 1895–1898, and documents there cited, especially The Three Friends, 166 U. S. 63–64, 65–66.

"The United States recognized a state of insurgency as existing in Cuba at an early date. . . . The recognition of insurgency implied that in American opinion at least the insurgents were not *de facto* under the control of Spain, and it followed consequently that Spain could not be held liable to neutral citizens for their acts." (Elbert J. Benton, International Law and Diplomacy of the Spanish-American War, 34–37.)

"2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents. 3. But where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents. 4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, beyond the control of Spain, and so continued until such intervention and war took place. If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case." (Statement of Mr. Wm. E. Chandler, President of Spanish Treaty Claims Commission, Nov. 24, 1902, concurred in by Commissioners Diekema and Wood, Fuller's Report, 153, Moore, Dig., VI, 971.)

[12] Clause 4 of the Terms of Surrender of the Boer Forces in the Field (see Parliamentary Papers, South Africa, 1902, Cd. 1096, quoted in McNair's 4 ed. of Oppenheim, II, 439, Note 2) excludes from the amnesty "certain acts, contrary to usages of war, which have been notified by the Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities."

See, also, Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 241, July 15, 1875, regarding a reservation in favor of the claims of injured parties, in the pardon granted by Mexico to rebels whose conduct in forcing loans from American citizens at Monterey had become the subject of diplomatic discussion. MS. Inst. Mexico, XIX, 210, Moore, Dig., VI, 980.

[13] Declared Sir E. Thornton, Umpire, Mexican-American Commission, Convention of July 4, 1868, in the Devine Case: "It is urged that the Mexican government granted an amnesty

If, however, an amnesty embraces essentially lawless conduct on the part of unsuccessful insurgents or bandits or other disaffected persons, such as acts not to be regarded as normal incidents of the public endeavor of the insurgents to attain their end by force, condonation would be apparent. By such process the territorial sovereign would, moreover, accentuate its own remissness in voluntarily depriving itself of opportunity to perform its duties of jurisdiction imposed by international law in relation to the prosecution of the offenders,[14] and responsibility for damages sustained by aliens at their hands would appear to be obvious.[15]

Should the *de jure* government enter into an agreement with the revolutionists to coöperate in establishing a new government as the representative of the two opposing forces, it might be urged by a foreign claimant State that that government as the resultant of both parties, became the legal successor to both, and that, therefore, the territorial sovereign was not in a position to deny responsibility for the consequences of illegal acts attributable to the authorities of either. Such was substantially the position of Mr. Buck, American Minister to Peru, in claiming an indemnity in behalf of one Victor H. MacCord, an American citizen who had sustained ill-treatment at the hands of the revolutionary forces of General Caceres in 1885.[16]

---

to Carvajal and, therefore, made itself responsible for his acts. Other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by these rebels." Moore, Arbitrations, III, 2981.

It is said in Ralston, revised ed., 356: "It is to be noted as significant that, before the various commissions sitting to determine the liability of the United States growing out of the acts in connection with the Civil War, it seems never to have been urged that this country had assumed responsibility for the acts of the Confederacy because of having pardoned its leaders."

In the Case of the *Montijo*, agreement between the United States and Colombia of Aug. 17, 1874, Moore, Arbitrations, II, 1421, 1438, Mr. Bunch, Umpire, was of opinion that the effect of the amnesty took from the claimants a legal right to adjudicate their claim against the actors within the domestic courts. It may be observed that in this case the seizure of the *Montijo* was accomplished by certain persons allied with the revolutionary cause and for a public purpose. See, also, Mr. Fish, Secy. of State, to Mr. Hurlbut, June 21, 1871, For. Rel. 1871, 230, Moore, Arbitrations, II, 1423, note 1.

See discussion in Buena Tierra Mining Company Case, Further Decisions and Opinions of the Commissioners, conventions of Nov. 19, 1926, and Dec. 5, 1930, Great Britain and Mexico, 259.

[14] See F. R. West Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 404.

[15] In Ralston, revised ed., 537, it is said: "No case seems to have discussed a possible difference which might arise between the effects of an amnesty granted for the political offense of rebellion and one covering as well private offenses against individuals engaged in when the person charged was pursuing a rebellious course." See, also, McNair's 4 ed. of Oppenheim, II, 439.

[16] Communication to Mr. Alzamora, Peruvian Minister of For. Rel., Sept. 3, 1888, For. Rel. 1888, II, 1373, Moore, Dig., VI, 985–987. See, also, concerning the same case, Mr. Rives, Acting Secy. of State, to Mr. Buck, Minister to Peru, Oct. 8, 1888, For. Rel. 1888, II, 1377, Moore, Dig., VI, 987; and Mr. Olney, Secy. of State, to Mr. McKenzie, Minister to Peru, June 27, 1896, S. Doc. 7, 55 Cong., 1 Sess., 4–7, Moore, Dig., VI, 989; also further documents concerning same case, *id.*, 990.

In his message to Congress, Aug. 27, 1913, concerning relations with Mexico, President Wilson stated that he had instructed Mr. Lind, his personal representative, to urge the agreement of all parties in Mexico to abide by the results of a contemplated election and to cooperate in the most loyal way in organizing and supporting the administration to be chosen. (For. Rel. 1913, 820.)

(3)

§ 301. **Payment of Duties and Taxes to Insurgents.** The payment of customs duties or taxes by foreigners to insurgents controlling the territory where payment is demanded and collection made, renders unreasonable the subsequent exaction of payment by the titular government.[1] This is due to the fact that obedience to the command of the insurgent party in a place subject to its control cannot be regarded as unlawful.[2] The territorial sovereign is not permitted to deny that the insurgent government possessed of the power to collect within a particular area under its control may not bind the State as such. Thus, the Department of State declared in an instruction to the Ambassador in Mexico on May 8, 1929: "International law and custom governing this question is so clearly recognized that it is difficult to understand the seeming insistence of local Mexican authorities in running contrary thereto. In taking the position that taxes and customs paid to *de facto* authorities in control of an area (whether they be rebel authorities or authorities of a foreign country) must be considered as if they were paid to the regular authorities of a country, this Government is not invoking a principle that has not been recognized by itself." [3] This conclusion

§ 301. [1] Mr. Black, Secy. of State, to Lord Lyons, British Minister, Jan. 10, 1861, MS. Notes to Great Britain, VIII, 383, Moore, Dig., VI, 995. Following the foregoing communication in response to an inquiry made by the British Minister as to what position the United States would take regarding the action of the authorities of South Carolina in exacting duties during the Civil War, Mr. Moore adds: "It may be superfluous to say that no claim for the repayment of duties thus exacted was ever made by the United States." *Id.*, VI, 995. See, also, McLeod *v.* United States, 229 U. S. 416.

Mr. Hunter, Acting Secy. of State, to Mr. Scruggs, Minister to Colombia, Sept. 11, 1875, MS. Inst. Colombia, XVII, 2, Moore, Dig., VI, 995; Santa Clara Estates Company Case, British-Venezuelan Commission, 1903, Ralston's Report, 397; Guastini Case, Italian-Venezuelan Commission, 1903, *id.*, 730; case at Bluefields, For. Rel. 1900, 803–824, Moore, Dig., VI, 684–688.

In correspondence with the Colombian Minister in 1885, Mr. Bayard, Secy. of State, pointed out the unreasonableness of imposing upon foreigners who had paid imposts to rebel forces, the burden of proof that positive coercion was resorted to against them. Communication of Dec. 11, 1885, For. Rel. 1885, 281, Moore, Dig., VI, 997.

[2] Mr. Fish, Secy. of State, to Mr. Nelson, Minister to Mexico, Feb. 11, 1873, For. Rel. 1873, I, 654, Moore, Dig., I, 49; Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, June 1, 1885, For. Rel. 1885, 269, Moore, Dig., VI, 995; Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, Oct. 2, 1899, For. Rel. 1900, 810, 811; de Forge Case, French-American Claims Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, III, 2781, where the payment of duties was not deemed to be an act to aid and comfort the Confederate forces.

[3] Mr. Stimson, Secy. of State, to Mr. Morrow, Ambassador to Mexico, May 8, 1929, Hackworth, Dig., I, 141. Section 28, Vol. I, of the Digest is replete with instances where within recent years the Department of State has taken a like stand.

See also MacLeod *v.* United States, 229 U. S. 416, 428.

"The Huerta regime having been overthrown, General Carranza — after repeated requests by the United States for such assurances prior to the evacuation of Veracruz — issued a decree on November 8, 1914 stating that upon the reoccupation of Veracruz by the Mexican authorities no exaction would be made from the inhabitants of the port of taxes or any other contributions of a Federal character that might have been previously paid to the foreign authorities which temporarily occupied the port, and that, in order to be entitled to the privileges granted by that decree, it would be sufficient for the interested persons to present to the tax collector's office receipts showing that such payments were made to the authorities established during the American occupation of Veracruz. On the following day he issued a decree granting general amnesty to all persons who had served as employees in the several branches of the public administration that had exercised *de facto* control during the temporary occupation of Veracruz by the American forces." (Statement in Hackworth, Dig., I, 151.)

must inspire the constant inquiry whether in a variety of other situations that sovereign may not also be obliged to acknowledge the capacity of insurgents who maintain their cause to bind the State in respect to transactions with aliens that are not detrimental to its welfare.

(4)

§ 301A. **Routine and Kindred Administrative Acts.** In the course of administering an area under its control an insurgent governmental entity may enter into numerous transactions with aliens that bind the State, despite the ultimate failure of such entity to overthrow the titular government. Thus, it may sell postal money orders,[1] acquire property,[2] and even borrow money in aid of services that apparently enure to the benefit of the territorial sovereign,[3] and by such processes act for its principal as effectively as if it were the régime formally acknowledged and normally deemed to be capable of representing it for such purposes.[4]

The efficacy of insurgent agencies in this regard challenges the assertion that a State must always act through an instrumentality duly recognized on all sides to be such, as for example, a *de jure* government.[5] Again, it reveals a fact that is pregnant with meaning in the intercourse between members of the interna-

§ 301A. [1] See George W. Hopkins Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 42; George W. Cook Case, *id.*, 318; Francis J. Acosta Case, *id.*, 1929 Vol., 121; Esther Moffit Case, *id.*, 288; Singer Sewing Machine Company Case, *id.*, 123.

[2] See Peerless Motor Car Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 303; Lee A. Craw Case, *id.*, 1929 Vol., 1; National Paper and Type Company Case, *id.*, 3; Parsons Trading Company Case, *id.*, 135.

[3] In the M. J. García Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 146, the facts did not disclose a transaction of the type suggested in the text.

[4] The Department of State seems to have been of the opinion that the governmental régime operating in Mexico under General Huerta, was, under certain conditions, not without authority to make valid grants of immovable property to aliens, such as American citizens, which its successors when gaining control of the Government of that country should be obliged to acknowledge as lawful acts committed in behalf of and binding upon the Republic of Mexico. See Mr. Lansing, Acting Secy. of State, to Mr. Bevan, Nov. 3, 1914, For. Rel. 1914, 711, 716; same to Mr. de Oliveira, Oct. 16, 1914, Hackworth, Dig., I, 131, and other documents there cited.

In 1914, the Department of State indicated unwillingness to interfere with the exercise of consular acts in American territory by persons representative of the unrecognized constitutionalist party in Mexico, possessed of certain ports in that country, when those acts assumed the form of the certification of formal documents of vessels going to those ports from certain ports within the United States. See Mr. Bryan, Secy. of State, to Señor Riaño, July 31, 1914, Hackworth, Dig., I, 143.

[5] "According to a principle of the law of nations, at first denied theoretically in the dynastic interest by the diplomacy of European monarchies, applied, however, in fact in a series of cases today universally admitted, the capacity of a government to represent the State in its international relations depends in no degree whatever upon the legitimacy of its origin; so that foreign States no longer refuse to recognize governments *de facto*, and the usurper who exercises power in fact, with an express or tacit consent of the nation, acts and concludes validly in the name of the State treaties which the legitimate government, upon its restoration, is bound to respect." (Translation by J. B. Scott in his Hague Court Reports, second series, viii–ix, of award of Franco-Chilean Arbitral Tribunal, July 5, 1901, in relation to claim of Dreyfus frères & Cie. For the original text see *Tribunal Arbitral Franco-Chilien, Sentence*, Lausanne, 1901, 288, 290.) See, also, award in case of French Claims Against Peru, Oct. 11, 1921, Permanent Court of Arbitration at The Hague, J. B. Scott, Hague Court Reports, second series, 32.

tional society — that a State can not long retain foreign respect for the claim that a particular area is its own, if it denies responsibility for the consequences of all governmental action asserted therein by agencies which are in actual control thereof and which profess to act in its behalf. This assignment to the State of responsibility for the consequences of what is done by those possessed of, and exercising administrative control over portions of its domain is a necessary consequence of, as well as a means of testing, the soundness of its claim to supremacy over territory that it deems to be its own. It can not well admit that any governmental authority that is exercised therein in its behalf is alien to itself.[6]

It is not suggested, however, that an insurgent agency is possessed of unlimited powers, or that in a variety of situations the territorial sovereign may not fairly assert that it is not bound by what that agency purports to do in its behalf. The reasonableness of such an assertion would seemingly depend primarily upon whether that sovereign could maintain that the insurgent entity had sought to impose upon it an undertaking which it could fairly challenge as detrimental to itself. Moreover, the test of what was detrimental might, in relation to certain matters, be regarded as conclusively determined by the failure of the insurgents to maintain their cause. Thus, a contract for the purchase of munitions of war or an issue of bonds for the furtherance of the insurgent cause could, in consequence of the suppression of the insurgent movement, well be deemed to be adverse to the interests of the State as such.[7] Again, arrangements entered into by an insurgent régime pertaining to areas outside of its actual control could not be regarded as incidental to the routine administration thereof and thus might be fairly regarded by the State after the suppression of the insurgent movement as not binding upon itself. In general, if the equities of aliens growing out of transactions with unsuccessful insurgents outweigh those of the territorial sovereign against which claims are preferred, it is because the transactions did not constitute attempts to participate in the conflict for governmental power.

(5)

§ 302. **Acts of Successful Revolutionists.** A State is responsible for the acts of successful revolutionists, their acts being regarded as those of the govern-

[6] Where a revolutionary movement expresses the attempt of the inhabitants of a particular area to secede from what may be called the parent State, and to establish a new State whose territory is carved out of that of the parent State, it is obvious that governmental authority exercised by the revolutionary régime is opposed to, and never in behalf of, the territorial sovereign in so far as that sovereign is identified with the parent State. Thus, if the revolutionary movement is suppressed, the territorial sovereign may in numerous situations well deny the power of those opposing its authority as a State to bind it. In so doing it may accentuate the fact that the revolutionary régime never purported to act in its behalf.

[7] The Irish Free State, invoking the aid of a court of equity in New York, was unable to secure possession of funds subscribed for the purpose of establishing an independent Irish Republic, by persons to whom were issued certificates exchangeable, after recognition of the proposed Republic, for gold bonds. It was ordered that under specified conditions the funds be returned to the subscribers. See Irish Free State *v.* Guaranty Safe Deposit Co., 222 N. Y. Supp., 182; also, in this connection, Edwin D. Dickinson, "The Case of the Irish Republic's Funds," *Am. J.*, XXI, 747.

ment which they have established or of which they have attained control.[1] The fact of success deprives the territorial sovereign of opportunity to regard those acts as alien to itself or as having been committed by an agency that it may disown. The underlying principle has received wide recognition.[2]

## 1

## Contractual Claims against Foreign Governments

### (1)

§ 303. **The Practice of Withholding Interposition.** Ever since the days of Madison the United States has been reluctant to interpose in behalf of a citizen seeking redress from a foreign State on account of its disregard of the terms of a contract concluded with him. It has frequently been declared that unless the conduct of the contracting State was tortious, the citizen should be left to his own devices, save for the possible assistance derived from the good offices of his country lent for the purpose of encouraging the foreign State to give careful attention in a domestic sense to the equities of the case.[1] This practice has encouraged belief that the United States has developed a rule of procedure, peculiar to contractual claims and not applied by itself to those of different origin.[2] It has been contended also that national reluctance to interpose is based solely upon grounds of expediency.[3] It may be doubted whether either suggestion explains fully what has taken place. If cases in which interposition is commonly withheld possess also an element which, whenever present in claims of dif-

§ 302. [1] See F. K. Nielsen, International Law Applied to Reclamations, 32; Ralston, revised ed., §§ 615–617.

See United Dredging Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 394.

[2] Mr. Evarts, Secy. of State, to Mr. Foster, Minister to Mexico, No. 615, April 4, 1879, MS. Inst. Mexico, XIX, 556, Moore, Dig., VI, 991; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 84, Aug. 13, 1886, MS. Inst. Peru, XVII, 228, Moore, Dig., VI, 992; Mr. Hay, Secy. of State, to Mr. Dudley, Minister to Peru, Nov. 21, 1898, For. Rel. 1901, 430; Moore, Dig., VI, 993.

See, also, Dix Case, American-Venezuelan Commission, 1903, Ralston's Report, 7, 8; Heny Case, before same Commission, *id.*, 14, 22.

In the Bolívar Railway Company Case, British-Venezuelan Commission, 1903, Ralston's Report, 388, 394, it was said by Mr. Plumley, Umpire: "The nation is responsible for the obligations of a successful revolution from its beginning, because, in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result. . . . Success demonstrates that from the beginning it was registering the national will."

§ 303. [1] Mr. Madison, Secy. of State, to Mr. Livingston, Minister to France, Oct. 27, 1803, MS. Inst. U. S. Ministers, VI, 155, Moore, Dig., VI, 707; Collection of documents cited, *id.*, VI, 705–707; Mr. J. Q. Adams, Secy. of State, to Mr. Salmon, April 29, 1823, Am. State Pap., For. Rel., V, 403, Moore, Dig., VI, 708; Mr. Buchanan, Secy. of State, to Mr. Ten Eyck, Commissioner to Hawaii, Aug. 28, 1848, MS. Inst. Hawaii, II, 1, Moore, Dig., VI, 708; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 709; Mr. Fish, Secy. of State, to Mr. Muller, May 16, 1871, 89, MS. Dom. Let. 348, Moore, Dig., VI, 710; Mr. Bayard, Secy. of State, to Mr. Bispham, June 24, 1885, 156 MS. Dom. Let. 88, Moore, Dig., VI, 716.

[2] E. M. Borchard, "International Contractual Claims and their Settlement," *Society for Judicial Settlement of International Disputes*, No. 13, Baltimore, 1913, 4–6, 7–9, 10–11; same author, Diplomatic Protection, § 112; Memorandum of Law Officer of Department of State, Dec. 8, 1906, concerning wrongs done to American citizens by the Government of Venezuela, Senate Doc. No. 413, 60 Cong., 1 Sess., 109; R. Floyd Clarke, *Proceedings*, Am. Soc. of Int. Law, IV, 149.

[3] Clement L. Bouvé, *Proceedings*, Am. Soc. Int. Law, IV, 174, 181.

ferent origin, serves also to produce a like result, the treatment accorded the former would merely emphasize the existence of a principle of general applicability. Moreover, habitual unwillingness on the part of a State under well-defined circumstances to lend its aid to its own nationals burdened with contractual issues with foreign governments, may encourage the inference that a sense of justice rather than one of expediency impels restraint.[4]

It has been seen that the propriety of interposition depends primarily upon a violation of international law by the respondent State, and secondarily, upon its failure to offer a means of redress for its own delinquency. Whenever States make adequate provision for the adjudication of contractual claims against them before domestic tribunals, as they frequently do,[5] the latter requirement is wanting,[6] and, howsoever the breach of contract is regarded, the situation merely affords an illustration of the general principle respecting the duty of a claimant to exhaust his local remedies.[7]

It may be doubted, however, whether the mere breach of a promise by a contracting State with respect to an alien is generally looked upon as amounting to

[4] See F. S. Dunn, The Protection of Nationals, 1932, 163–169.

[5] "Local Remedies are provided generally in foreign countries for the settlement of contract claims founded upon contracts with the Government or its agencies." Department of State, Claims Circular of Oct. 1, 1924 (Revised), § 8.

[6] § 145 of the Judicial Code, 36 Stat. 1136, 28 U.S.C.A. § 250, conferred upon the Court of Claims a limited jurisdiction over contractual claims against the United States. That jurisdiction appears to have been somewhat restricted also by the Act of March 4, 1915, § 5, 38 Stat. 996, 28 U.S.C.A. § 251.

According to § 153 of the Judicial Code, 36 Stat. 1138, 28 U.S.C.A. § 259, the jurisdiction of the Court of Claims is not permitted to extend to any claim against the Government, growing out of or dependent upon any treaty stipulation "entered into with foreign nations or with the Indian tribes."

According to § 155 of the Judicial Code, 36 Stat. 1139, 28 U.S.C.A. 261: "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

See, also, par. 20, § 24, of the Judicial Code, 36 Stat. 1093, as amended by later enactments, 28 U.S.C.A. § 41 (20), giving concurrent jurisdiction, in certain classes of cases, to the United States District Courts.

See Duties of Jurisdiction, *supra*, § 267.

In the case of Eastern Extension Telegraph Co. *v.* United States, 231 U. S. 326, it was held that while the Act of March 3, 1887 (the Tucker Act), broadened the then existing jurisdiction of the Court of Claims, the Act was not necessarily repugnant to or inconsistent with the statutory limitations excluding from the jurisdiction of the Court claims arising from treaty. See, also, Eastern Extension Telegraph Co. *v.* United States, 251 U. S. 355, 357, 362.

Concerning the right of a British subject to sue in the Court of Claims by reason of the reciprocal treatment accorded American citizens in Great Britain, by a petition of right, see United States *v.* O'Keefe, 11 Wall. 178. See, also, documents cited in Moore, Dig., VI, 676–677, relative to the rights of Turkish and Russian subjects to sue in the Court of Claims; E. M. Borchard, Diplomatic Protection, § 70.

[7] Declared Mr. Bayard, Secy. of State, to Mr. Bispham, June 24, 1885: "When the alleged debtor sovereign declares that his courts are open to the pursuit of the claim, this by itself is a ground for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the Government of the United States remands all claims held abroad, as well as at home, to the action of that Court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary." (156 MS. Dom. Let. 88, Moore, Dig., VI, 716.) Obviously, the duty to withhold interposition until local remedies have been exhausted is always based on the assumption that the courts of the territorial sovereign have done nothing to forfeit the confidence of the outside world in their integrity or ability.

internationally illegal conduct, or as constituting the violation of a legal obligation towards the State of which he is a national. Nor does the motive which impels such action appear to suffice to attach to it a lawless character which it would not otherwise possess.[8] In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a State to keep such a promise, until at least there has been a refusal either to adjudicate locally the claim arising from the breach, or, following an adjudication, to heed the adverse decision of a domestic court.[9] Upon the happening of either of these events the internationally illegal conduct is regarded as first apparent. There is then seen a failure to respect a duty of jurisdiction which is distinct from the breach of the contract and subsequent to it in point of time.

(2)

§ 304. **Instances of Interposition.** Instances are numerous where the foreign State commits an act which not only violates its agreement, but also presents a tortious aspect, in evincing, for example, a wanton disregard of the duty to protect the person or property of the claimant. In such a situation, if justice is not obtainable through domestic channels, interposition finds justification because the conduct of the contracting State partakes of a character which is generally denounced as illegal, irrespective of the fact that it is also inconsistent with the contractual duty towards the claimant.[1] This is seen when the contract-

[8] The presence or absence of bad faith on the part of a State in disregarding the terms of a contract with an alien is unimportant except as a circumstance to be considered in determining whether the conduct of the State with respect to the alien constitutes, irrespective of the breach of contract, internationally illegal conduct.

[9] The Permanent Court of International Justice did not seemingly take a different view when, in its Eighth Judgment concerning the Factory at Chorzów, it declared: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." (Publications, Permanent Court of International Justice, Series A, No. 9, 21.) It may be observed that the Court was referring to the breach of an engagement between one State and another, such as might be registered in a convention or treaty, rather than to an engagement embodied in a contract with an alien individual. It did not purport to discuss the legal effect of the breach by a State of such a contract; and it had no occasion to intimate that such a breach constituted the violation of an international obligation on the part of such State towards the State of which the alien contracting party was a national.

According to Art. 8 (a) of the Harvard Draft Convention on the Responsibility of States, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 134: "A State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress." Declares Dr. Dunn, in this connection: "The first paragraph of this article seems to imply that (with the usual exception in regard to exhaustion of local remedies) all questions of non-performance of contractual obligations by a State directly involve the international responsibility of the State. No exception is made in regard to the character of non-performance. However, this broad rule is severely qualified in the Comment by the statement that 'the article implies, of course, an unlawful or wrongful non-performance.' Presumably this means 'unlawful' or 'wrongful' in the eyes of international law. But, if this is the case, then the rule becomes mere tautology, saying in effect that an unlawful non-performance of a contract by a State is unlawful; i.e., it involves the international responsibility of the State." (F. S. Dunn, The Protection of Nationals, 166.)

§ 304. [1] See, for example, Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 724–725; Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, relative to the claim of the New York & Bermudez Co. against Venezuela, For. Rel. 1908, 774, 793.

ing State, contrary to the terms of its agreement, forfeits a concession without judicial procedure,[2] or when it arbitrarily, and without regard for the decisions of its own courts grants away to others rights lawfully vested by contract in the concessionaire, thereby impairing or destroying the value of the concession.[3] Again, if the territorial sovereign does not hold itself amenable to suit in its own courts,[4] or unreasonably discriminates against the alien claimant in seeking access thereto,[5] or perverts its judicial system for purposes of oppression or for the purpose of obtaining a decision in its favor,[6] the gross failure to perform an obvious duty of jurisdiction explains the action of the State of the claimant. No principle peculiar to contractual claims is involved.

Again, a State may, in the exercise of its power as a sovereign, alter or destroy its contractual obligation, and so pursue a course in relation to its undertaking that is not only harmful to the alien party thereto, but also at variance with the theory on which the arrangement was concluded and with what that party had reason to anticipate.[7] Such action, manifesting in one sense a breach of the agree-

[2] See, for example, Mr. Cass, Secy. of State, to Mr. Lamar, Minister to Central America, No. 9, July 25, 1858, Moore, Dig., VI, 723; Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 724; Same to Same, No. 122, Aug. 12, 1887, MS. Inst. Venezuela, III, 578, Moore, Dig., VI, 725; Ozama Bridge Claim (Henry W. Thurston) against the Dominican Government, For. Rel. 1898, 274–291, Moore, Dig., VI, 729; Memorandum of W. L. Penfield, the Solicitor for the Dept. of State, concerning claims of Salvador Commercial Company against Salvador, For. Rel. 1902, 839, 843; opinion of a majority of the arbitrators in the same case under agreement with Salvador of Dec. 19, 1901, *id.*, 862, 871; Mr. Blaine, Secy. of State, to Mr. Loring, American Minister, Oct. 12, 1889, concerning the Delagoa Bay Railway Concession, For. Rel. 1902, 849, Moore, Dig., VI, 727–728; Mr. Olney, Secy. of State, to Mr. Gana, Chilean Minister, June 28, 1895, For. Rel. 1895, I, 83, Moore, Dig., VI, 728; Mr. Hay, Secy. of State, to Mr. Hunter, Nov. 4, 1898, concerning Claim of R. H. May *v.* Guatemala, For. Rel. 1900, 648, Moore, Dig., VI, 730, also award of the arbitrators in this case, under protocol with Guatemala, of Feb. 23, 1900, For. Rel. 1900, 659. See, also, telegram of Mr. Root, Secy. of State, to Mr. Fox, American Minister to Ecuador, June 15, 1907, concerning the difficulty between the Ecuadorean Government and the Guayaquil and Quito Ry. Company, an American corporation, For. Rel. 1907, I, 385.

[3] Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning the claim of the Orinoco Corporation against Venezuela, For. Rel. 1907, 774, 780. Although the Government of Venezuela agreed, Feb. 13, 1909, to adjust this claim by arbitration unless an amicable settlement were made with the company with the consent of the United States, an agreement for settlement was finally reached by diplomacy whereby the Venezuelan Government undertook to pay the sum of $385,000, one eighth in cash, and the balance in seven equal installments. *Am. J.*, III, 985, 987; For. Rel. 1909, 617.

See, also, the so-called Critchfield Claim (United States & Venezuela Co.) against Venezuela, arising from the destruction by increased taxation of the vested rights of the claimant contrary to the terms of its concession. For. Rel. 1908, 793–796. Respecting the agreement of Feb. 13, 1909, to adjust this claim by arbitration, and its ultimate settlement by diplomacy, see For. Rel. 1909, 617; *Am. J.*, III, 985–987.

[4] Mr. Evarts, Secy. of State, to Mr. Gibbs, Minister to Peru, Oct. 31, 1877, For. Rel. 1895, II, 1036, Moore, Dig., VI, 720.

[5] Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, Dec. 13, 1877, MS. Inst. Haiti, II, 121, Moore, Dig., VI, 724. See, also, Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, Sept. 11, 1888, For. Rel. 1888, I, 165, Moore, Dig., VI, 727.

[6] Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning claim of New York & Bermudez Co. against Venezuela, For. Rel. 1908, 774, 793; Same to Same, June 21, 1907, *id.*, 800, 803.

[7] Declared Chief Justice Hughes, in the course of the argument by Assistant Solicitor General MacLean in the case of Perry *v.* United States, in January, 1935: "Would you say, as a matter of constitutional law, that the Government could repudiate its international obligations?" He added: "Does not the validity of international laws depend upon the principle that a sovereign may bind itself by contract in borrowing money, and that such obligations are sustained as obligations of a sovereign in the tribunals of the world, because it is of the

ment and effected by it, constitutes also tortious conduct that possesses an internationally illegal quality.[8]

If redress is demanded on account of a violation of international law apart from, yet associated with, the breach of contract, the damages attributable to the foreign territorial sovereign ought logically to be measured by a delictual rather than by a contractual standard, that is, by the extent of the harm suffered by the claimant through the commission of internationally illegal conduct, rather than by the prospective benefits lost through the breach of the agreement.[9] It is to be observed, however, that when the United States interposes in behalf of a claimant who is able to show a breach of contract as well as internationally illegal conduct of which he has been the victim, the Department of State is disposed to seek adjustment of the entire controversy by arbitration,[10] and to clothe

---

essence of sovereignty to be able to contract? Otherwise, the sovereign might not be able to protect itself when its sovereignty is in jeopardy. It is of the essence of sovereignty that a nation may limit its powers." (*The United States Law Week,* Jan. 15, 1935, 24.) See, also, opinion of the Court, through Chief Justice Hughes, in the same case, Feb. 18, 1935, 294 U. S. 330, 353–354.

[8] "Cases of default which have aroused foreign governments to interpose appear to involve, as a rule, some exercise of governmental power, or failure to exercise such power, in a manner that definitely alters the status of the government as a credit risk.

"Most prominent in this class of cases are those in which a government has diverted revenues or other assets pledged to the security of a loan. Less often interposition has taken place where flagrant and long-continued mismanagement of the public finances has rendered a State unable to meet its external obligations. In both of these situations, the State has stepped out of its character as one of two equal parties to a contract, and has used or misused its governmental power to alter the situation created by the contract. Private lenders have no means of foreseeing and protecting themselves against such action in the terms of the contract. To the extent that a State is at liberty to use its governmental powers in this manner, the normal expectations created by a loan contract are defeated. A conscious or unconscious realization of this fact seems to be reflected in the attitudes of governments on the question of interposition on behalf of their citizens who hold defaulted bonds of foreign governments. The deliberate intrusion of governmental power to alter the situation between debtor and creditor is not compatible with the maintenance of the existing international economic system." (F. S. Dunn, The Protection of Nationals, 168.)

[9] "A purely delictual action is based upon detriment suffered by the plaintiff, and that detriment is the measure of damages. A purely contractual action, on the other hand, is based on breach of promise, whether accompanied by detriment or not, and the measure of damages is the benefit that would have resulted to the plaintiff from performance." John William Salmond, "The History of Contract," Select Essays in Anglo-American Legal History, III, 320, 327.

[10] See Illinois Central Railroad Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 15, 19.

The history of express assumpsit in private law affords an interesting parallel. In his masterly essay upon the subject (originally published in 1888, in *Harvard Law Review,* II, 1–18, 53–69, 377–380, reprinted in 1909, in Select Essays in Anglo-American Legal History, III, 259, and in 1913, in Ames, Essays on Legal History, 129), Professor Ames showed that the earliest cases of assumpsit were those where the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant, and that it was necessary to allege an undertaking by the latter which had been violated. Thus an assumpsit was laid in the declaration where the case was "against a ferryman who undertook to carry the plaintiff's horse over the river but who overloaded the boat, whereby the horse was drowned." *Citing* Y.B., 22 Ass. 94, pl. 41. It is said that for centuries the statement of the assumpsit was deemed essential in the count. "But the actions were not originally," declared the learned writer, "and are not to-day, regarded as actions of contract. They have always sounded in tort." The significance of the assumpsit is shown to be due to the primitive conception of legal liability. "The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. . . . If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk him-

the arbitral tribunal with jurisdiction to award damages both for the failure of the claimant to obtain the thing promised, and for the harm suffered through the internationally illegal conduct of the foreign State.[11]

---

self, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill." It is shown also that an express assumpsit was originally an essential part of the plaintiff's case in actions on the case against bailees for negligence in the custody of what was entrusted to them, but that with the lapse of time it was gradually dispensed with. Actions for deceit against the vendor of a chattel upon a false warranty likewise called for the allegation of an undertaking by the defendant, although in its origin the action was one of tort. The early struggle to maintain actions on the case for deceit both served the purpose of emphasizing the unimportance of proof of a misfeasance by the defendant where the plaintiff through the deceit of the defendant had been induced to part with his property, and also paved the way for the maintenance of actions for the breach of a parol promise, that is, for a pure non-feasance. Professor Ames pointed out that both in equity and at law "a remedial breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was," he added, "in several instances distinguished from contract. By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*. Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised."

The requirement of the United States to-day that a breach of contract must constitute also a tort in order to be regarded as internationally illegal conduct and as furnishing just cause for interposition resembles the attitude of the early English judges respecting the remedial breach of a parol promise. The tendency to devise means for the obtaining of redress for something more than the harm suffered through the tortious conduct of the foreign State, and to enable the claimant to secure compensation for the loss of the thing promised, suggests the struggles of jurists of the sixteenth century. It is as true of public contracts to which a State is a party as of those between private individuals, that a pure non-feasance shown by the breach of the agreement may deprive the promise of a substantial benefit which cannot be measured by damages fixed according to a delictual standard. Thus, as is observed in the text, effort is made to obtain by arbitration, adjudication of the contractual as well as delictual delinquency of a foreign State whenever the conduct of the latter is deemed to justify interposition, and to empower the tribunal to award damages for the direct consequences of the failure to fulfill the agreement. From this practice it would take but a single step to maintain that the breach of a contract concluded with an alien is capable of being regarded as itself a denial of justice. What probably restrains the United States from so doing, is recognition of the fact that in well-ordered countries opportunities for redress through judicial channels render more and more infrequent the necessity for the plea that justice cannot be obtained through the exhaustion of local remedies, rather than a belief that a breach of contract is not reprehensible or beyond the reasonable cognizance of the State of the promisee.

[11] See Adolph Deutz Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 213; also, dissenting opinion of Nielsen, Commissioner, in Dickson Car Wheel Company Case, *id.*, 1931 Vol., 175, 193, 202.

In the case of R. H. May *v.* Guatemala, submitted to arbitration under protocol of Feb. 23, 1900, it was agreed that the issues were in part whether the claimant was entitled to moneys under certain contracts between himself and the Government of Guatemala, as well as for damages alleged to have been caused him by military and civil authorities of that State. The learned Umpire, Mr. G. Jenner, allowed the claimant as a portion of his award, $41,588.83 gold, "being the estimated amount of profits he would have earned if he had been allowed to carry on the contract of April 5, 1898, until the conclusion of the term fixed by that instrument." For. Rel. 1900, 659, 674.

See position of the United States in 1897, concerning Ozama Bridge Claim *v.* The Dominican Republic and the report and decision of Mr. Alfred Noble, an engineer, to whom the question as to the value of the structure was referred, For. Rel. 1898, 274–291, Moore, Dig., VI, 729–730; Claim of John D. Metzger & Co. *v.* Haiti, protocol of agreement for arbitration, and award of Hon. William R. Day, Arbitrator, For. Rel. 1901, 262–276; Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning pending claims *v.* Venezuela, For. Rel. 1908, 774; agreement with Venezuela of Feb. 13, 1909, for adjustment by arbitration of certain claims of American citizens against that country, Malloy's Treaties, II, 1881; Delagoa Bay Railway Arbitration, especially protocol of June 13, 1891, Malloy's Treaties, II, 1460, and opinion of MM. Lyon-Caen and Renault in behalf of the claimants, Moore, Arbitrations, II, 1895–1896; Award of the Arbitrators, For. Rel., 1900, 903.

*Cf.* Mr. Knox, Secy. of State, to Mr. Russell, Minister to Persia, Dec. 1, 1911, respecting

Although courts of arbitration exercising jurisdiction with respect to contractual claims pursuant to appropriate conventions have not hesitated to assess damages on a contractual basis,[12] they have been unwilling to allow compensation for benefits of which the claimants were unable to prove that the breach of the obligation had served to deprive them.[13]

When internationally illegal conduct accompanies the breach of a contract the duty to withhold interposition is not necessarily to be disregarded. The cases oftentimes indicate, however, that the act deemed to be internationally illegal is itself either an abuse of the local judicial system, or a sure token that redress is not obtainable through domestic channels.[14] In such instances the propriety of interposition is not influenced by the contractual relationship between the aggrieved citizen and the foreign State; and justification is to be found in the applicability of those general principles of procedure which always project themselves whenever a State is called upon to espouse the cause of its nationals and to demand redress in their behalf.

(3)

§ 305. **The Calvo Clause.** The presence in a contract between a State of Latin America and a foreigner, such as an American citizen, of the so-called Calvo Clause,[1] providing in substance that any controversy arising from or connected with the agreement shall be decided by the local courts, and shall in no event be the cause of international reclamation, has not deterred the United States from interposition when such action has been deemed by it to be justifiable and necessary.[2] It does not admit that a national may by agreement with

---

the contractual claims of Mr. W. Morgan Shuster and his associates, against Persia, For. Rel. 1911, 685. See, also, Clement L. Bouvé, "Russia's Liability in Tort for Persia's Breach of Contract," *Am. J.*, VI, 389.

[12] Ralston, Umpire, in Martini Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 819, 843–845; Bainbridge, Commissioner, in de Garmendia Case, American-Venezuelan Commission, 1903, *id.*, 10, 12; also Memorandum of Sir N. J. Hannen, Arbitrator in the Cheek Case (Estate of Marion A. Cheek, deceased), against Siam, March 21, 1898, Moore, Arbitrations, V, 5069, 5071–5072.

[13] Opinion of Sir Henry Strong and Hon. Don M. Dickinson in Salvador Commercial Company Case *v.* Salvador, For. Rel. 1902, 862, 872; Bainbridge, Commissioner, in Rudloff Case, American-Venezuelan Commission, 1903, Ralston's Report, 183, 198; Ralston, Umpire, in Oliva Case, Italian-Venezuelan Commission, *id.*, 779–781.

[14] See, for example, Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning the claims, respectively, of the New York & Bermudez Co., and of the Orinoco Corporation against Venezuela, For. Rel. 1908, 774, 793, 796.

§ 305. [1] Charles Calvo, Int. Law, 5 ed., I, § 205. See, also, A. S. Hershey, "The Calvo and Drago Doctrines," *Am. J.*, I, 26; discussion in E. M. Borchard, Diplomatic Protection, §§ 371–373; Memorandum of the Solicitor for the Dept. of State, concerning wrongs done American citizens by the Government of Venezuela, Senate Doc. No. 413, 60 Cong., 1 Sess., 116.

See, also, Eagleton, Responsibility of States, 168–176; F. S. Dunn, The Protection of Nationals, 169–172; A. H. Feller, "Some Observations on the Calvo Clause," *Am. J.*, XXVII, 461; Ralston, revised ed., §§ 70–89, and cases there cited; L. M. Summers, "The Calvo Clause," *Virginia Law Rev.*, XIX, 459; A. V. Freeman, International Responsibility of States for Denial of Justice, 469–496.

[2] See, for example, Mr. Root, Secy. of State, to Mr. Russell, American Minister, concerning the Critchfield Claim (United States & Venezuela Co.), against Venezuela, Feb. 28, 1907, For. Rel. 1908, 774, 796.

"In general, no contract made by an individual to renounce the diplomatic remedy can have effect if its enforcement would result in any changes or modifications in the ordinary rules of international law. North American Dredging Co. (U. S.) *v.* Mexico, Opinions of

a foreign contracting State deprive his own sovereign of such right to interpose in his behalf as the law of nations appears, in the circumstances of the particular case, to confer upon it. That right is not deemed to be capable of impairment by him.[3] If the State subjects the foreigner with whom it contracts to internationally illegal conduct that is associated with the breach of its agreement with him and perhaps the outgrowth thereof, the provisions of such a clause are likely to be regarded as indecisive of the propriety of interposition.[4] If, however, the arrangement contemplates the withholding of diplomatic interposition in his behalf merely under circumstances when recourse to such procedure would be improper and justly resented by the contracting State, the agreement does not purport to impair any privilege which his sovereign may rightfully assert.[5]

The application of the foregoing principles has proved to be a difficult task for international tribunals. Failure to take heed of the character of the precise acts

---

Commissioners, September 8th, 1923, page 21." (Communication of the Government of the United States of May 22, 1929, to the Preparatory Committee for the Codification of International Law, Conference for the Codification of International Law, League of Nations Doc. No. C.75(a).M.69(a).1929.V, 22.)

[3] Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 188, Feb. 15, 1888, MS. Inst. Peru, XVII, 323, Moore, Dig., VI, 294; Same to Mr. Hall, Minister to Central America, March 27, 1888, For. Rel. 1888, I, 134–137, Moore, Dig., VI, 295; Mr. Adee, Acting Secy. of State, to Mr. Partridge, Minister to Venezuela, July 26, 1893, For. Rel. 1893, 734, Moore, Dig., VI, 299. See, also, dissenting opinion of Little, American Commissioner in Case of Henry Woodruff and that of Flannagan, Bradley & Co., No. 20 and No. 25. American-Venezuelan Commission, Dec. 5, 1885, Moore, Arbitrations, IV, 3566, Moore, Dig., VI, 303; Ralston, Umpire, in the Martini Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 840–841, Moore, Dig., VI, 308; Senate Doc. No. 413, 60 Cong., 1 Sess., 116.

[4] Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 725. Note the application of this principle by Plumley, Umpire, in Selwyn's Case, British-Venezuelan Commission, 1903, Ralston's Report, 322, Moore, Dig., VI, 308.

"Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void." (North American Dredging Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 21, 31.) See, also, Mexican Union Railway (Limited) Case, Decisions and Opinions of Commissioners, convention of Nov. 19, 1926, Great Britain and Mexico, 157, 162 and 164; award of Hon. William H. Taft, Sole Arbitrator, in case of Great Britain against Costa Rica, of Oct. 18, 1923, *Am. J.*, XVIII, 147, 159–160.

See responses of the several Governments to the Preparatory Committee for the Codification of International Law, Bases of Discussion III, Responsibility of States, League of Nations Doc. No. C.75.M.69.1929.V, 133–135.

[5] A contract providing that nothing relating to the agreement shall be made the subject of international reclamation until after the exhaustion of local judicial remedies, may be looked upon as declaratory of a sound principle of procedure when applied to a case where no internationally illegal conduct was apparent in the breach of the contract.

In a note of Sept. 2, 1938, from Mr. Hay, Mexican Minister of Foreign Relations to the American Ambassador at Mexico City, in relation to the existing controversy with the United States respecting the expropriation of agrarian properties owned by American citizens within the territory of Mexico, the views of Calvo were invoked seemingly in support of the theory that in modifications of the local law or institutions of greatest public interest foreigners enjoyed no special immunity, and by implication, could claim no benefit of an international standard. There was no reference to or necessary invocation of the so-called Calvo clause, although there was intimation of the traditional dislike on the part of Latin America of diplomatic interposition of powerful States in behalf of aggrieved nationals. (Dept. of State Press Release, No. 413, Sept. 3, 1938, *Am. J.*, XXXII, *Official Documents*, 201.)

See The Expropriation of Immovable Property belonging to Aliens, *supra*, § 217A.

on which a claim growing out of a contract was based, and the failure also to take cognizance of the design of the States at variance through the provisions of a *compromis,* to clothe a tribunal with jurisdiction to adjudicate upon the particular claim regardless of the presence of the Calvo clause in the arrangement between the respondent State and the individual with whom it contracted, and regardless also of whether the breach complained of might not amount to internationally illegal conduct, have united to beget certain fairly recent decisions that leave much to be desired.[6] A failure in each of these respects caused the General Claims Commission between the United States and Mexico, on March 31, 1926, to sustain a motion to dismiss the claim of North American Dredging Company of Texas arising from an alleged breach of contract by the Government of Mexico.[7]

Whether the design of the parties to a claims convention was to confer jurisdiction upon an arbitral tribunal to adjudicate upon the merits of controversies arising out of, or associated with, breaches of contractual arrangements containing a so-called Calvo clause, is a question of fact of which the proof is usually within reach. In seeking light thereon a tribunal must consider whether the particular convention was the fruition of a common effort of the contracting States to adjust by judicial process all pending contractual claims of the nationals of either against the other, regardless of the quality (in international law) of alleged breaches, and regardless also, of the disrespect shown by the claimants for their undertaking not to seek as aliens any privileges of diplomatic interposition. If the tribunal reaches an affirmative conclusion on this point, it may be led to the further conclusion that any jurisdictional obstacle in the form of a Calvo clause was by such process waived by the respondent State.[8] If, on the other hand, such a clause is to be heeded by the

[6] Nor have the tribunals been able, in the course of adjudications upon the Calvo clause, to resist the temptation to utter preachments to the States at variance, that were not germane to the task of interpretation.

[7] Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 21. The Commission sustained the application of the Calvo clause in a contract where the United States alleged the commission of internationally illegal conduct on the part of the respondent contracting State, and where the provisions of the convention providing for the arbitration appeared to support the jurisdiction which the tribunal concluded that it lacked. These facts which have engaged the critical comments of publicists, lessen the importance of the decision which was not responsive to what the record adduced. See A. H. Feller, "Some Observations on the Calvo Clause," *Am. J.,* XXVII, 461; dissenting opinion of Commissioner Nielsen in International Fisheries Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1931 Vol., 207, 225; dissenting opinion of Sir John Percival, British Commissioner, in Mexican Union Railway (Limited) Case, Decisions and Opinions of Commissioners, convention of Nov. 19, 1926, Great Britain and Mexico, 157, 167. *Cf.* E. M. Borchard, "Decisions of the Claims Commission, United States and Mexico," *Am. J.,* XX, 536, 538–540; A. V. Freeman, International Responsibility of States for Denial of Justice, 479–484.

See, also, Mexican Union Railway (Limited) Case, Decisions and Opinions of the Commissioners, convention of Nov. 19, 1926, Great Britain and Mexico, 157; International Fisheries Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1931 Vol., 207. These two decisions were in harmony with North American Dredging Company Case, *id.,* 1927 Vol., 21. Also Interoceanic Railway Co. Case, Further Decisions and Opinions of the Commissioners, 1933 Vol., 118.

[8] In harmony with this view see Orinoco Steamship Company Case, United States and Venezuela, convention of Feb. 13, 1909, J. B. Scott, Hague Court Reports, 228, *Am. J.,* V, 230, 233. Concerning the decision in its relation to the Calvo clause, see W. C. Dennis, "The Orinoco Steamship Company Case before The Hague Tribunal," *id.,* V, 35, 50–51.

tribunal before which it is invoked, that body must be satisfied that in the instant case it was not sought to employ the clause as a means of interfering with the exercise of a privilege of interposition on account of internationally illegal conduct growing out of, or associated with, the breach, and also that regardless of the nature of the contractual delinquency, there was no necessary implication to be derived from the particular claims convention of a waiver of the clause by the State for whose benefit it was incorporated in the contract.[9] Improvement in the quality of the awards of claims commissions that pertain to the matter, may be expected to be proportional to the faithfulness with which they take cognizance of these considerations. The demands of justice make it imperative that no rule of construction of claims conventions should grow up which may serve to lessen the zeal or obligation of interpreting commissions to seek out and be guided by evidence of the design of the contracting parties in agreeing as they did to the terms of the particular convention productive of an adjudication.

The incorporation of the Calvo clause in a public contract with alien parties has oftentimes been effected with no nice regard for international law and with the special object of thwarting diplomatic interposition under any conditions that might arise. Moreover, those parties acting with their eyes open have at times been willing to forego broadly the privilege of protection by their sovereign for the sake of gaining advantages accruing from desired concessions. The contracting State has, on its part, counted on the presence of the clause to stave off interposition in any contingency, while the alien parties have, on theirs, regarded the provisions of the arrangement worth the sacrifice of the aid of their country. Such considerations should, and doubtless do, in fact, cause the government of that country when its aid is invoked by those parties, to weigh carefully the

---

Also opinion of Ralston, Umpire, in the Martini Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 837, 840–841; opinion of Plumley, Umpire, in Selwyn's Case, British-Venezuelan Commission, 1903, *id.*, 322; Coro and La Vela Railway and Improvement Company Case, American-Venezuelan Commission, 1903, Morris' Report, 69; opinion of Barge, Umpire, in Rudloff Case before same Commission, Morris' Report, 431, Ralston's Report, 182.

*Compare* opinions of Barge, Umpire, in the following cases before the American-Venezuelan Commission, 1903; Henry Woodruff, Ralston's Report, 151, 158; Orinoco Steamship Company, *id.*, 83, 90–91; Geo. Turnbull, *id.*, 200, 239.

For an excellent discussion of the foregoing and other decisions, see Moore, Dig., VI, 301–309; also Ralston, revised ed., 58–72.

[9] It should be clear that the principle which denies to the individual State the right to modify or lessen by its own legislative or other action the character of obligations which, as laid down by international law, it owes to other countries, is necessarily applicable when effort is made by such State to impair existing foreign privileges of interposition. The legislation of some American Republics has, however, revealed frequent attempts to do so, and an endeavor, moreover, to modify both the international standard of tests of the propriety of State conduct, and the conditions when on account of contempt for them, recourse to interposition may be had. In theory, the futility of such efforts must be obvious as against aggrieved foreign States which cannot by such process be deprived of their existing rights and privileges, and which may be alert to resist interference with them. This is likewise true when a group of States of the western hemisphere acting in like fashion tries to modify the law, and even resorts to multi-partite conventions as a means of consolidating and strengthening common assertions. Such arrangements cannot of course diminish the rights of non-signatory States of any continent. For an able discussion of the matter which has inspired the composition of this foot-note, see A. V. Freeman, International Responsibility of States for Denial of Justice, 456–469.

character of any breach of the contract of which the complaint is made, and the reasonableness of leaving the claimants to their own devices. If it concludes that the normal requirement as to the exhaustion of local remedies should deter interposition, such a view may be attributable to the law applicable to the facts of the case, rather than to the presence in the contract of the clause which the claimants were willing to accept.

(4)

§ 306. **The Scope of Claims Conventions to Which the United States Has Been a Party.** The earliest agreements of the United States for the adjustment by arbitration of claims of American citizens did not embrace those arising from contracts with foreign governments. Art. VII of the Jay Treaty with Great Britain of November 19, 1794, provided for cases arising from the "irregular or illegal captures or condemnations of vessels and other property." [1] Art. XXI of the treaty with Spain of October 27, 1795, provided for the arbitration likewise of differences arising from losses sustained by American citizens in consequence of the taking of their vessels and cargoes by Spanish authorities during the war between France and Spain.[2] The claims convention with Spain of August 11, 1802, provided for the adjustment of claims arising from the "excesses committed during the late war, by individuals of either nation, con-

§ 306. [1] Malloy's Treaties, I, 596. The instructions of Mr. Randolph, Secy. of State, to Mr. Jay, show that the United States sought merely a means of redress respecting claims arising from acts deemed to have been internationally illegal because committed by British authorities pursuant to certain Orders in Council of 1793, in disregard of what were believed to have been the rights of the United States as a neutral during the war between France and England. Communication of May 6, 1794, Am. State Pap., For. Rel. I, 472; see also, Mr. Jay's representation to Lord Grenville, July 30, 1794, *id.*, 481; and the reply thereto of the latter, Aug. 1, 1794, *id.* It may be observed that the Article agreed upon contained the interesting provision that adjustment by arbitration should embrace "all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice." In his report to the Secretary of State of Nov. 19, 1794, accompanying the treaty, Mr. Jay declared that it was "very much to be regretted that a more summary method than the one indicated in the seventh Article could not have been devised and agreed upon for settling the capture cases." *Id.*, I, 503. Concerning the arbitration pursuant to this Article, see Moore, Compensation for Losses and Damages Caused by the Violation of Neutral Rights, and by the Failure to Perform Neutral Duties, Mixed Commission under Article VII of the Treaty between Great Britain and the United States of November 19, 1794, International Adjudications, Modern Series, IV.

See, also, Art. VI of the Jay Treaty, with reference to the provision made for the adjustment of claims of British subjects arising from the "operation of various lawful impediments since the peace," interfering with the recovery and lessening the value of debts contracted with American citizens. Malloy's Treaties, I, 594. Concerning the failure of the arbitration, and the final adjustment pursuant to the Convention of Jan. 8, 1802, see Moore, Arbitration of Claims for Compensation for Losses and Damages Resulting from Lawful Impediments to the Recovery of Pre-War Debts, Mixed Commission under Article VI of the Treaty between Great Britain and the United States of November 19, 1794, International Adjudications, Modern Series, III.

[2] Malloy's Treaties, II, 1648. Concerning the Arbitration, see Moore, Spanish Spoliations, 1795, International Adjudications, Modern Series, V, 1–152.

Mr. Pickering, Secy. of State, in instructions of Oct. 22, 1799, to the American plenipotentiaries to France, sought the adjustment by arbitration of pending claims embracing all those "for sums due to American citizens, by contracts with the French Government or its agents." Am. State Pap., For. Rel. II, 301, 303. By the Convention of April 30, 1803, For Payment of Sums Due by France to Citizens of the United States, arrangement was made for the payment of debts due by France before Sept. 30, 1800, to citizens of the United States. Malloy's Treaties, I, 513. Relative to this Convention, see J. C. B. Davis, "Notes," Treaty Vol. (1776–1887) 1306–1308.

trary to the law of nations or the treaty existing between the two countries." [3] By Art. IX of the treaty with Spain of February 22, 1819, known as the Florida Treaty, there was a mutual renunciation of claims, embracing those mentioned in the Convention of 1802, as well as others embraced within specified categories, and for the most part growing out of acts regarded by the claimant State as internationally illegal, and including also claims in which interposition had been solicited by aggrieved citizens of either State, and a demand for redress duly preferred upon the other subsequent to the date of the convention of 1802.[4] The United States undertook by Art. XI to make satisfaction to its own citizens for their claims so renounced to the amount of $5,000,000. The commission established for the purpose of passing upon the validity and amount of American claims, regarded those of contractual origin within the scope of its jurisdiction.[5] Art. I of the claims convention with Mexico of April 11, 1839, provided for the arbitration of "all claims of citizens of the United States upon the Mexican Government," wherein the interposition of the United States had been solicited prior to the signature of the convention.[6]

The Mexican claims commission established under the Act of Congress of March 3, 1849, to pass upon claims of American citizens against Mexico (which, pursuant to the Treaty of Guadalupe-Hidalgo, the United States itself undertook to pay to the amount of three and a quarter millions of dollars), was to be guided by the principles of an unratified convention of November 20, 1843.[7] Art. I of the latter embraced "all claims" of citizens of the United States. This commission, as well as that under the convention of 1839, assumed jurisdiction over contractual claims. The members of both commissions were evidently of opinion that in view of the jurisdiction conferred upon them, the right of a claimant to an award was not necessarily dependent upon proof that any internationally illegal act had been committed by the Mexican Government.[8]

Art. I of the claims convention with Great Britain of February 8, 1853, provided for the arbitration of "all claims on the part of corporations, companies, or private individuals," who were citizens or subjects respectively of the con-

[3] Malloy's Treaties, II, 1650. Concerning the failure of this convention and its annulment by Art. X of the treaty between the United States and Spain, of Feb. 22, 1819, see J. C. B. Davis, "Notes," Treaty Vol. (1776–1887) 1384–1385.

[4] Malloy's Treaties, II, 1654.

[5] See treatment of the claim of R. W. Meade, following the interpretation placed upon the treaty by Mr. J. Q. Adams, Secy. of State, Moore, Arbitrations, V, 4502–4504.

The Mexican Claims Commission, under Act of Congress of March 3, 1849, relied upon the position respecting contractual claims taken by the Commission under the Florida treaty. *Id.*, II, 1279.

[6] Malloy's Treaties, I, 1101. The provision of Art. I was apparently broader than that of the preamble of the Convention which referred to the desire of the contracting parties to terminate discussions respecting claims "arising from injuries to the persons and property of citizens of the United States."

[7] 9 Stat. 393. For the text of the treaty of Guadalupe-Hidalgo of Feb. 2, 1848, see Malloy's Treaties, I, 1107. Concerning the work of the Commission, see Moore, Arbitrations, II, 1249–1286.

[8] Among the cases decided by the Commission under the Convention of April 11, 1839, see that of the *Hermon*, Moore, Arbitrations, IV, 3425; also that of Dr. Geo. Hunter, *id.*, 3426. Among the cases decided by the Commission under the Act of Cong. of March 3, 1849, see that of Wm. S. Parrott, *id.*, 3429; that of Cox and Elkins, *id.*, 3430; case of Wm. S. Underhill, *id.*, 3433.

tracting States, and which had been presented to either Government for its interposition with the other after the Treaty of Ghent.[9] No case based upon a contract was submitted for adjudication. In one case of a quasi-contractual nature, compensation was awarded.[10] Art. I of the claims convention with New Granada (now Colombia) of September 10, 1857,[11] and likewise Art. I of that with Ecuador of November 25, 1862,[12] embraced "all claims on the part of corporations, companies or individuals, citizens of the United States." Claimants obtained favorable awards in contractual claims from both commissions.[13] Art. I of the claims convention with Peru of January 12, 1863, referred to "all claims of citizens" (subject to certain limitations) of either State against the government of the other.[14] According to Art. III the commissioners were to be guided by "principles of justice and equity," as well as those of international law and treaty stipulations. In one case arising from sums advanced for supplies, and for a bill of exchange, compensation was awarded the claimant.[15]

Art. I of the claims convention with Costa Rica, of July 2, 1860, provided for the adjustment by arbitration of "all claims of citizens of the United States, upon the Government of Costa Rica, arising from injuries to their persons, or damages to their property, under any form whatsoever, through the action of the authorities" of that Republic.[16] It is understood that the commission established pursuant to the convention allowed compensation in cases of contractual origin.[17]

Art. I of the claims conventions with Venezuela, of April 25, 1866,[18] and with Peru of December 4, 1868,[19] followed the broader language of the earlier con-

[9] Malloy's Treaties, I, 665. Concerning the work of the Commission established pursuant to the treaty, see Moore, Arbitrations, I, 391–425.

[10] Case of Hudson's Bay Co., No. 37, "for supplies furnished American volunteers raised in Oregon on the breaking out of hostilities with the Indians and expenditures incurred in the rescue of captives from the Indians prior to the organization of the Territorial Government." Moore, Arbitrations, I, 423, and IV, 3458.

[11] Malloy's Treaties, I, 319. Concerning the work of the Commission established pursuant to this convention, and that of the Commission under the Convention with Colombia of Feb. 10, 1864, *id.*, I, 321, to complete the unfinished work of the former, see Moore, Arbitrations, II, 1361–1420.

[12] Malloy's Treaties, I, 432. Concerning the work of the Commission established pursuant to this convention, see Moore, Arbitrations, II, 1569–1577.

[13] The American-New Granadian Commission allowed R. W. Gibbs $6952.60 on a Colombian bond or instrument. Report of the American Commissioner, Moore, Arbitrations, II, 1384, 1385. The American-Ecuadorean Commission awarded compensation to Abraham Johnson for balance due on shoes sold to the *de facto* government of General Franco in 1860. Report of Mr. Hassaurek, American Commissioner, *id.*, 1575.

[14] Malloy's Treaties, II, 1408. Concerning the work of the Commission established pursuant to the Convention, see Moore, Arbitrations, II, 1615–1638.

[15] Case of Thomas R. Eldredge, Moore, Arbitrations, IV, 3460.

[16] Malloy's Treaties, I, 346. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1551–1568.

[17] In making this statement reliance is placed upon the Brief of Mr. J. Hubley Ashton, American Agent, in the Case of the State Bank of Hartford, before the Mexican-American Commission, Convention of July 4, 1868, and mentioned by E. M. Borchard, in "International Contractual Claims and Their Settlement," 1913, note No. 42.

[18] Malloy's Treaties, II, 1856. The same language was employed in Art. II of the Convention of Dec. 5, 1885, which superseded that of April 25, 1866. *Id.*, II, 1860. Concerning the work of the commissions under these conventions, see Moore, Arbitrations, II, 1659–1692.

[19] Malloy's Treaties, II, 1411. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1639–1657.

ventions with New Granada and Ecuador; and both were similarly construed as embracing contractual claims.[20]

Art. I of the claims convention with Mexico, of July 4, 1868, provided for the arbitration of "claims on the part of corporations, companies, or private individuals, citizens" of either State "arising from injuries to their persons or property by authorities" of the other.[21] Dr. Francis Lieber, the first umpire of the commission, awarded compensation in various claims of contractual origin.[22] His successor, as umpire, Sir Edward Thornton, agreed that the terms of the convention sufficed to give jurisdiction in such cases.[23] He expressed the opinion, however, that where a contract was voluntarily concluded between the claimant and a government authority, it should be shown that "gross injustice has been done by the defendant" in order to justify an award against it.[24]

Art. XII of the Treaty of Washington with Great Britain, of May 8, 1871, provided for the arbitration of "all claims . . . arising out of acts committed against the persons or property" of citizens or subjects of the contracting States within a specified period of time, and exclusive of the so-called Alabama Claims.[25] One contractual claim against Great Britain was, on demurrer, unanimously disallowed.[26]

According to paragraph 5 of the agreement with Spain of February 11–12, 1871, for the adjustment by arbitration of certain claims of American citizens, it was expressly declared that the arbitrators should "not have jurisdiction of any demands growing out of contracts." [27]

Art. I of the claims convention with France of Jan. 15, 1880, for the adjustment by arbitration of claims of citizens of either country against the government of the other, referred to "all claims on the part of corporations, companies or private individuals, citizens of the United States [and conversely of France], arising out of acts committed against the persons or property" of such individuals, and subject to certain limitations.[28] The commission established under this convention exercised jurisdiction over contractual

[20] See the Case of Thomas J. Clark before the American-Peruvian Commission, Convention of Dec. 4, 1868, Moore, Arbitrations, II, 1651–1652. Also Case of Jacob Idler, before the American-Venezuelan Commission, Convention of Dec. 5, 1885, superseding that of April 25, 1866, Moore, Arbitrations, IV, 3491.

[21] Malloy's Treaties, I, 1128. Concerning the important and successful work of the Commission under this Convention, see Moore, Arbitrations, II, 1287–1359.

[22] See, for example, Case of Manasse & Co., Moore, Arbitrations, IV, 3462; Case of Iturria, *id.*, 3464. *Compare* Case of Thore de Lespes, *id.*, 3466.

[23] Case of Heirs of John M. De Witt, *id.*, 3466.

[24] Chas. H. Pond Case, *id.*, 3467.

[25] Malloy's Treaties, I, 700, 705. Concerning the work of the Commission under this treaty, see Moore, Arbitrations, I, 682–702. The Report of Robert S. Hale, Agent and Counsel of the United States, forms Vol. III of For. Rel. 1873.

[26] Case of W. W. Hubbell against Great Britain, No. 17, Hale's Report, For. Rel. 1873, III, 40, Moore, Arbitrations, IV, 3484. Among the grounds for demurrer it was alleged, first, that contractual claims were outside of the scope of the treaty, and secondly, that if they were within its scope, "the claimant could have no standing before the commission as an international tribunal until he had exhausted the remedies in all the municipal courts of Great Britain, and until justice had been denied him by such tribunals *in re minime dubia*."

[27] Malloy's Treaties, II, 1663.

[28] Malloy's Treaties, I, 535, 536. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1133–1184.

claims; in two cases of that character, the claims were disallowed following an adjudication on their merits.[29]

Art. II of the claims convention with Venezuela, of Dec. 5, 1885, like Art. I of that of April 25, 1866, which it superseded, referred to "all claims . . . of citizens of the United States," subject to certain limitations.[30] Jurisdiction over contractual claims was assumed by the commission.[31] Art. I of the claims convention with Chile of August 7, 1892, like Art. I of that with France, of January 15, 1880, referred, subject to certain limitations, to "all claims . . . of citizens, arising out of acts committed against the persons or property" of such individuals,[32] and the commission established pursuant to the convention likewise exercised jurisdiction over contractual claims.[33] Art. I of the claims convention with Venezuela, of February 17, 1903, made provision for the arbitration (subject to certain limitations) of "all claims" of American citizens.[34] The commission established thereunder was not reluctant to accept jurisdiction over contractual claims.[35]

The Special Agreement between the United States and Great Britain of August 18, 1910, for the submission to arbitration of outstanding pecuniary claims, made provision in Class IV of the schedule of claims appended thereto, for the reference of "claims based on contracts between the authorities of either government and the nationals of the other government."[36] The protocol with

[29] Case of S. L. M. Barlow, assignee, No. 18, Moore, Arbitrations, IV, 3486; and case of William H. Frear, No. 9, *id.*, 3488.

[30] Malloy's Treaties, II, 1860 and 1856. Concerning the work of the Commission under Convention of 1885, and as interpreted and extended in operation by Conventions of March 15, 1888, and Oct. 5, 1888, respectively, see Moore, Arbitrations, II, 1674–1692.

[31] In the important case of Jacob Idler, which grew out of contract, the Commission found a "denial of justice," in the effect of certain judicial decisions of the Venezuelan Courts, which the Government had invoked. See Moore, Arbitrations, IV, 3491, 3515–3524.

See, also, the Case of John Donnell's Executor, *id.*, 3545; Case of Beales, Nobles and Garrison, *id.*, 3548–3564 (disallowed); Case of Flannagan, Bradley, Clark & Co., *id.*, 3564 (disallowing claim because of failure of claimant to observe terms of agreement providing for the adjudication of issues respecting the contract before Venezuelan courts, and expressly declaring that no matter connected with the contract should be made the subject of international reclamation). See dissenting opinion of Little, Commissioner, in the last-named case, *id.*, 3566; Case of Thomas U. Walter, *id.*, 3567. *Compare* quasi-contractual claim of Richard O'Dwyer, which was disallowed, *id.*, 3568.

[32] Malloy's Treaties, I, 185. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1469–1484, and documents there cited.

[33] See decision on the demurrer of the United States in the case of R. L. Trumbull, No. 27, Moore, Arbitrations, IV, 3569, 3570.

[34] Malloy's Treaties, II, 1870.

[35] Case of Boulton, Bliss & Dallett, Morris' Report, 105, Ralston's Report, 26.

"Many cases of contract between foreigners and the government of Venezuela were received by the Venezuelan commissions of 1903 and acted upon without any objection being raised to their nature, and without any hesitancy on the part of the commissions, and this where such contracts were voluntarily entered into, and even, as we shall see, where they were merely implied." Ralston, revised ed., 75.

[36] U. S. Treaty Vol. III, 2619, 2625. According to paragraph III of the "Terms of Submission" it was provided that: "The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimants to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim." See, in this connection, American-British Pecuniary Claims Arbitration under Special Agreement of August 18, 1910, Report of Fred K. Nielsen, Washington, 1926.

Haiti for the establishment of a claims commission to pass upon all pecuniary claims against that Republic, signed October 3, 1919, made provision for adjudications upon four specified classes of fiscal obligations.[37]

Art. I (3) of the agreement with Germany, of August 10, 1922, providing for a mixed commission to determine the amount to be paid by Germany in satisfaction of its financial obligations towards the United States under the Treaty of Peace concluded on August 25, 1921, declared that the commission should pass upon "debts owing to American citizens by the German Government or by German nationals." [38] Like provision was contained in Art. I (3) of the tripartite agreement with Austria and Hungary for the determination of the amounts to be paid by those countries in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921.[39]

Art. I of the so-called General Claims Convention with Mexico of September 8, 1923, made broad provision for the adjudication of claims of nationals for losses or damages suffered by them or by their properties.[40] The General Claims Commission, on March 31, 1926, concluded that there was conferred upon it jurisdiction over contractual claims.[41]

The arrangement effected by exchange of notes with Great Britain, for the disposal of certain pecuniary claims arising out of World War I, signed on May 19, 1927, embraced in its operation the treatment of contractual as well as other claims.[42]

The broad terms of Art. I of the Claims Convention with Panama, of July 28, 1926, of which ratifications were exchanged October 3, 1931, in reference to

[37] U. S. Treaty Vol. III, 2678. See Walter S. Penfield, "The Haitian Claims Commission," *Am. J.*, XVII, 758.

[38] U. S. Treaty Vol. III, 2601; also, Agreement with Germany, effected by exchange of notes, Dec. 31, 1928, extending the jurisdiction of the Mixed Claims Commission, U. S. Treaty Vol. IV, 4213. See Report of Robert W. Bonynge, Agent of the United States before the Commission, Dec. 31, 1934, Washington, Government Printing Office, 1935, especially 82–110, in relation to the treatment of debts, and the order of the Mixed Claims Commission of May 7, 1925, announcing rules applicable to debts, bank deposits, bonds, etc.

[39] U. S. Treaty Vol. IV, 3928. See report of Edwin B. Parker, Sole Commissioner, Oct. 15, 1929, contained in Tripartite Claims Commission (United States, Austria, and Hungary), Final Report of Commissioner and Decisions and Opinions, Washington, Government Printing Office, 1933.

[40] U. S. Treaty Vol. IV, 4441. The duration of the General Claims Commission was extended by conventions with Mexico of Aug. 16, 1927, U. S. Treaty Vol. IV, 4453, Sept. 2, 1929, U. S. Treaty Vol. IV, 4458, and June 18, 1932, U. S. Treaty Vol. IV, 4460.

There may be noted in this connection Protocol concerning General Claims, of April 24, 1934, U. S. Treaty Vol. IV, 4489, and exchange of notes Feb. 1, 1935, *id.*, 4495.

The Special Claims Convention with Mexico for the settlement of claims of American citizens arising from revolutionary acts in Mexico from Nov. 20, 1910, to May 31, 1920, which was concluded on Sept. 10, 1923, U. S. Treaty Vol. IV, 4445, did not appear to contemplate the adjustment of contractual claims. See, also, convention with Mexico of April 24, 1934, concerning En Bloc Settlement of Special Claims, U. S. Treaty Vol. IV, 4487, and in this connection, Act of Congress approved June 19, 1934, 48 Stat. 1021, 1041–1042, to establish a commission for the settlement of the special claims comprehended within the terms of this convention. (*Cong. Rec.* April 1, 1935, Vol. LXXIX, 4955.)

[41] Illinois Central Railroad Company Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 15.

See Substitutes for International Adjudication, *infra*, § 309A.

[42] U. S. Treaty Vol. IV, 4256. See, in this connection, E. M. Borchard, "The Neutrality Claims Against Great Britain," *Am. J.*, XXI, 764.

the adjudication of claims of nationals "for losses or damages suffered by persons or their property," seemingly embraced contractual claims,[43] and appear to have been so regarded by the commission established in pursuance of the convention.[44]

From the language of the foregoing agreements of the United States, it must be apparent that it is disposed both to seek and permit the adjustment by arbitration of contractual claims of American citizens against foreign governments, as well as those of citizens of foreign States against itself. Arbitrators have, moreover, not hesitated to interpret broadly the scope of the jurisdiction conferred upon them. When jurisdiction has been accepted in a contractual case, the issue has usually been deemed to be whether a contractual obligation was violated by the respondent, and also whether, on the merits of the case, the contracting citizen was entitled to compensation. Thus commissions and umpires have rarely deemed the issue to be whether a breach of contract constituted a violation of international law.

(5)

§ 307. **Public Bonds.** A State which validly issues a bond formally agrees to pay a fixed sum in the shape of principal and interest at specified times to whatsoever person comes within the tenor of the contract. An alien may come therein by the purchase of such an instrument.[1] The formality of the undertaking, the precision of its terms, the absence of any duty on the part of the obligee to take any steps to secure payment other than to present the bond itself or its coupons, appear to place the obligee in a unique position with respect to the contracting State.

Dr. Luis M. Drago of the Argentine Republic, the distinguished author of the doctrine that bears his name,[2] urged that bonds constitute an exceptional class of obligations; first, because they are issued by the sovereign power of the State pursuant to legislation; secondly, because they are made payable to bearer; thirdly, because the purchaser buying the bonds in the open market acquires his rights as obligee without other formality or relation with the debtor government; and fourthly, because when payment is for any reason suspended, there is no means of appeal by judicial action or otherwise to the debtor State,

[43] U. S. Treaty Vol. IV, 4546.

[44] A. E. Brown Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 92; W. G. Chase Case, *id.*, 366.

The United States not infrequently agrees to the adjustment by arbitration of a particular contractual claim. See, for example, exchange of notes between the United States and Guatemala for the arbitration of the claim of P. W. Shufeldt, Nov. 2, 1929, Shufeldt Claim, Department of State, Arbitration Series No. 3, p. 9.

§ 307. [1] If the principles of private law applied by American Courts in the cases respecting bonds of municipal corporations afford guidance when the obligor is a State and the obligee an alien, the agreement signifies also that the obligor will set up no equitable defense against a purchaser for value and without notice, prior to any default in payment of the instrument. See John F. Dillon, Municipal Corporations, 5 ed., §§ 871 and 931, and authorities there cited, especially Mercer County *v.* Hackett, 1 Wall. 82.

[2] The so-called Drago Doctrine was expressed in a note from Dr. Drago, Minister of Foreign Relations of the Argentine Republic, to Señor Mérou, Argentine Minister at Washington, Dec. 29, 1902, For. Rel. 1903, 1–5.

inasmuch as the suspension of payment occurs by virtue of the sovereign authority of the State manifested *jure imperii*.[3]

It is not perceived how the process by which a State validly issues a bond, or the functions of government exercised in order to accomplish that end, affect the rights of the obligee or of his State in case of default. Nor does the broad tenor of the agreement, or the method whereby an alien lawfully enters into the contractual relationship with the obligor, offer a solid basis of distinction.

(*a*)

§ 308. **The Same.** The mere failure of a debtor State to perform its promise in respect to a foreign bondholder in relation to the payment of principal or interest — the bare nonfeasance — differs nowise from the failure of a State to perform its contractual obligations towards a promisee expressed in any other form, or concluded by any other process.[1] If a contractual delinquency is not necessarily to be regarded as internationally illegal conduct, the propriety of interposition as against the defaulting obligor State would depend upon whether, apart from the mere non-performance of its obligations, the obligor dealt with its covenants in such a way, as by alteration or impairment or repudiation thereof, as to be deemed to be guilty of conduct generally regarded as internationally illegal. If it did not do so, the fact of default would not in itself serve to excuse interposition; for no breach of an international duty towards the State of the obligee would be apparent. Moreover, the existence in such a case of an adequate local remedy for the benefit of the obligee would serve also to retard the propriety of such action.[2]

The obligor may, however, in the exercise of the same sovereign power which it exerted in the issuance of its bonds, as by appropriate legislative action, essay to change its covenants or to repudiate them.[3] If one may conclude, as does the Supreme Court of the United States, that a bond-issuing State is competent to enter into binding obligations that pledge its credit,[4] it can not modify or destroy them without having recourse to conduct which the State of the obligee may fairly regard as amounting to internationally illegal conduct and as constituting

[3] Luis M. Drago, "State Loans in Their Relation to International Policy," *Am. J.*, I, 692.

§ 308. [1] The covenants in a bond may, however, embrace some which with great particularity prescribe the application of penalties in case the obligor makes default in payment of the principal or interest, or proceeds to change or destroy obligations through which it has sought to pledge its credit.

[2] "The fact is that the right to sue on the bonds issued by States is generally allowed. Action in contract to recover principal or interest, due and unpaid, may be brought on the United States bonds in the Court of Claims, or a mandamus may issue to the Secretary of the Treasury, under existing law, to compel him to pay the interest on United States bonds due and unpaid." G. W. Scott, *Am. J.*, II, 78, 91.

See § 145 of the Judicial Code, 36 Stat. 1136, 28 U.S.C.A. § 250(1), indicating the scope of the jurisdiction of the Court of Claims.

[3] The United States Court of Claims is committed to the doctrine that in a suit on a contract against the United States, the court cannot pass upon the lawfulness of sovereign acts tending to change the contractual duty towards the promisee. Deming *v.* United States, 1 Ct. Cl. 190; Jones *v.* United States, 1 Ct. Cl. 383; Wilson *v.* United States, 11 Ct. Cl. 513. See, also, concerning these cases, G. W. Scott in *Am. J.*, II, 78, 91–92; also Edwin M. Borchard, "International Contractual Claims and Their Settlement," Baltimore, 1913, 52.

[4] See opinion of the Court through Chief Justice Hughes, in Perry *v.* United States, 294 U. S. 330, 350–354.

the breach of an international obligation towards itself. Moreover, modification or destruction is believed to be apparent when the obligor State, through the exercise of its sovereign power to regulate the value of money renders it impossible for the alien obligee to enjoy the benefits of payments in the particular currency (such as gold) which it agreed to pay.[5] Internationally illegal action on the part of the obligor imposes upon it an immediate duty to do justice in the premises, and points to the obligation to offer an adequate local remedy if diplomatic interposition is to be avoided. If for any reason, the character of the repudiating or amendatory legislation serves locally to render unavailable to the alien obligee remedies that might otherwise be within his reach, the obligor should endeavor to supplant them by others that are designed to protect him.[6] In a word, any conduct on the part of a State which serves either to alter or destroy its covenants registered in a bond owned by an alien obligee, and

---

Certain implications from such a conclusion are obvious. There is denied the right of the obligor to maintain that the obligee should be deemed to have anticipated that the obligor would, if its financial exigencies so demanded, endeavor to ease its fiscal burdens by modifying or destroying particular covenants expressed in its bond.

[5] In the case of Perry *v.* United States, 294 U. S. 330, Mr. Justice Stone, in his concurring opinion, declared that the gold clause in the government bonds called for the payment of value in money measured by a stated number of gold dollars of the standard defined in the clause; that while the Government's refusal to make the stipulated payment was a measure taken in the exercise of the constitutional power "to coin money" and to "regulate the value thereof," this circumstance did not disguise the fact that its action was to that extent "a repudiation of its undertaking." He added: "As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, I cannot escape the conclusion, announced for the Court, that in the situation now presented, the government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action." (*Id.*, 359.) Chief Justice Hughes, in the course of the opinion of the Court, denied that the Congress had authority to alter or destroy contractual obligations of the United States expressed in bonds through which it had pledged its credit; but he did not conclude that the action of the Congress in so regulating the currency as to prevent the bondholder from enjoying the benefits of gold payments promised in the bond and serving in fact to prevent the plaintiff obligee from establishing that he had suffered any actual damage (a circumstance which was deemed to deny authority to the Court of Claims to entertain an action) was necessarily amendatory or destructive of the contractual obligation. (*Id.*, 350–358.) It should be observed that in this case the obligee was not an alien.

In its Judgment No. 14, of July 12, 1929, in the Case of the Serbian Loans, involving the relations between a borrowing State (Serbia) and private persons (of French nationality), the Permanent Court of International Justice found occasion to declare: "When the holders of the Serbian loans, considering that their rights were being disregarded, appealed to the French Government, the latter intervened on their behalf with the Serb-Croat-Slovene Government. Diplomatic negotiations followed; but whatever took place during these negotiations, it is common ground that the Serb-Croat-Slovene Government did not reject the intervention of the French Government, but contended that the service of the loans was being effected by it in full conformity with the obligations resulting from the contracts." (Publications, Permanent Court of International Justice, Series A, Nos. 20/21, 18.) The judgment which was interpretative of the loan agreement, is perhaps of less significance than the circumstance that it proved possible to submit to the court, as the result of French interposition in behalf of its nationals, the issue concerning the rights of the obligees as holders of Serbian bonds. See, also, Judgment No. 15 in Case concerning the Payment in Gold of the Brazilian Federal Loans Issued in France, *id.*, 93.

See, also, Feist *v. Société Intercommunale Belge d'Électricité* [1934], A.C. 161.

[6] Dr. Drago asserts that where the obligor State by virtue of its sovereign authority suspends payment or modifies its agreement "there is not and cannot be any 'denial of justice' because not only does there not exist a tribunal competent to bring action against the debtor State, but it is impossible even hypothetically to conceive of such a tribunal." *Am. J.*, I, 692, 697. The absence of a local court clothed with authority to adjudicate upon the conduct of the sovereign obligor has no bearing upon the solution of the question whether that conduct was internationally illegal, and is chiefly pertinent as the remover of a barrier to interposition.

simultaneously also to remove from the jurisdiction of any domestic tribunal authority to pass upon the propriety of that conduct excuses immediate interposition by the State of the obligee, and justifies the demand of the latter that the matter be referred for adjustment by an international tribunal clothed with power to adjudicate upon the legality, in an international sense, of the acts of the obligor.[7] This is true regardless of lack of proof of bad faith on the part of the obligor in doing what it did.[8]

The alteration or destruction of its obligations set forth in a bond may assume various forms. An instance is apparent when the obligor State destroys or impairs the value of, or appropriates for its own uses, property from which the income was to be employed for the payment of principal or interest and which itself was sought to be hypothecated as a means of assuring such payment.[9] Impairment or destruction of the obligation is not, however, necessarily dependent upon the treatment sought to be applied to hypothecated assets. It may be apparent also when the breach by the obligor State assumes a confiscatory aspect revealed, for example, in the appropriation for its own uses of unmortgaged assets within its control which it covenanted in the terms of its bond to apply for other purposes.[10]

(6)

THE COLLECTION OF PUBLIC DEBTS BY FORCE

§ 309. **The Hague Convention of 1907 Respecting the Limitation of the Employment of Force.** The propriety of the use of force for the purpose of collecting contractual claims has of late years been widely discussed.

In December, 1902, Great Britain, Germany and Italy resorted to force against Venezuela by blockading certain ports of that country in order to secure recognition and the means of payment of pending claims, contractual as well as tortious.[1] By protocols signed in May, 1903, there was submitted to a tribunal

[7] The following were bond claims against Venezuela which were submitted to mixed commissions under conventions of 1902 and 1903: Compagnie Générale des Eaux de Caracas (where jurisdiction accepted), Belgian-Venezuelan Commission, 1903, Ralston's Report, 271; Ballistini Case (where claim disallowed for want of proof of ownership of bonds), French-Venezuelan Commission, 1902, *id.*, 503; Jarvis Case (where claim disallowed, because the bonds were issued in compensation of services in support of an unsuccessful revolution against the constituted government of a country with which the United States was at peace), American-Venezuelan Commission, 1903, *id.*, 145. In a note attached to the Ballistini Case, *id.*, 505, the compiler says: "In the Italian Commission [Boccardo Case, not reported] judgment was given on internal bonds on authority of Aspinwall Case, Moore, p. 3610." Concerning the foregoing cases, see G. W. Scott, in *Am. J.*, II, 83–84.

[8] As the defaulting State is generally ready to aver that, for reasons beyond its control, it has become insolvent, or at least unable to pay its indebtedness, any yielding to the plea that even the policy of the State of the obligee should depend upon the good faith of the obligor, offers opportunity and temptation to the dishonest debtor to escape the reasonable burden of its contract through false representations, the true nature of which it may become impossible to establish.

[9] Marquis of Salisbury, British Foreign Secretary, to Señor Pividal, Peruvian Minister, Nov. 26, 1879, Parl. Pap. Peru, No. 1 (1882), 16–17, Moore, Dig., VI, 724; Opinion of Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 130.

[10] The author is not satisfied with his statement in relation to this matter on page 563, vol. I, of the first edition of this work.

§ 309. [1] Concerning the claims of Germany, see Promemoria of the Imperial German Em-

from the Permanent Court of Arbitration at The Hague the issue whether the blockading Powers were entitled to preferential treatment in the payment of their claims against Venezuela, over the so-called non-blockading claimant Powers, among which was the United States. The Tribunal decided the issue in favor of the blockading Powers.[2] On December 29, 1902, shortly after the employment of force, Dr. Drago, Minister of Foreign Affairs of the Argentine Republic, in a note to Mr. Mérou, the Argentine Minister at Washington, for transmission to the Department of State, declared that

> the principle which she [the Argentine Republic] would like to see recognized is: that the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.[3]

Later, as has been observed, Dr. Drago sought to point out a distinction between the public loans of a State and other forms of its contractual obligations, for the purpose of securing approval of the idea that force should never be employed in behalf of foreign obligees against an obligor State.[4]

At the Second Hague Peace Conference, in 1907, General Horace Porter, a delegate of the United States, offered a proposition which became known as the Porter plan and which was, after amendment, accepted by the Conference and embodied in the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, in the following form:

> The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

---

bassy, Dec. 11, 1901, For. Rel. 1901, 192, Moore, Dig., VI, 586; also For. Rel. 1903, 429–431, Moore, Dig., VI, 589. Relative to the blockade, see *id.*, 424, 457–458, 801.

[2] For the text of the Award, see For. Rel. 1904, 506; J. B. Scott, Hague Court Reports, 56. See, also, Final Report of W. L. Penfield, Agent of the United States, For. Rel. 1904, 509.

[3] For. Rel. 1903, 1, 4. See, also, Memorandum by way of response accompanying a note from Mr. Hay, Secy. of State, to Mr. Mérou, the Argentine Minister at Washington, Feb. 17, 1903, *id.*, 5.

Concerning the Drago Doctrine, see Luis M. Drago, "State Loans in Their Relation to International Policy," *Am. J.*, I, 692; Amos S. Hershey, "The Calvo and Drago Doctrines," *id.*, I, 26; G. W. Scott, "International Law and the Drago Doctrine," *North Am. Rev.*, CLXXXVIII, 602 (1906); "The Hague Convention Restricting the Use of Force to Recover on Contract Claims," *Am. J.*, II, 78; Edwin M. Borchard, Diplomatic Protection, § 119; H. A. Moulin, *La Doctrine de Drago*, Paris (1908); Karl Strupp, "*Intervention in Finanzfragen*," *Frankfurter Abhandlungen zum Kriegsverhütungsrecht*, Leipzig, 1928, Part 7, §§ 16–20; S. Pérez Triana, *La Doctrina Drago, Colección de Documentos*, London, 1908; Alfredo N. Vivot, *La Doctrina Drago, Buenos Aires*, 1911; Sir John Fischer Williams, "International Law and International Financial Obligations Arising from Contract," Bibliotheca Visseriana, London, 1924, II, 13–45; Bibliography in McNair's 4 ed. of Oppenheim, I, 267; J. B. Scott, Hague Peace Conferences, I, 386, 392–400; A. Pearce Higgins, The Hague Peace Conferences (1909), 184–188, and bibliography.

"It may be noted that Drago protests only against the use of armed force on the collection of public debts and not directly against diplomatic interposition. Most of the writers who have discussed the question have failed to note this distinction, possibly because a denial of forcible measures deprives interposition of its most effective sanction." Edwin M. Borchard, Diplomatic Protection, 309.

[4] Luis M. Drago, "State Loans in Their Relation to International Policy," *Am. J.*, I, 692; also address of Dr. Drago before the First Sub-Commission of the First Commission of the Second Hague Peace Conference, July 18, 1907, *Deuxième Conférence Internationale*

> This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any "Compromis" from being agreed on, or, after the arbitration, fails to submit to the award.[5]

While this language restricts the use of armed force to the occasions specified, it is significant as a declaration that the employment of such means of obtaining justice may not be improper when the obligor State refuses to arbitrate, or prevents recourse to arbitration, or fails to submit to an award. The provision, on the other hand, that an offer of arbitration must precede such action on the part of the obligee State is token of the general recognition of the principle that an international judicial remedy which is always available should be exhausted before an appeal to armed force becomes justifiable. The convention simply takes into account the remediless condition of the obligee, and by facilitating if not pressing arbitration, attempts to substitute amicable adjustment by judicial means for non-amicable adjustment based upon the use of force. Moreover, "A debtor State is protected by the law until it puts itself outside the law — that is, outside of the three reasonable reservations." [6]

Thus it would appear that in the event of a controversy, a debtor State would, under the convention, have the right to demand that the State of the obligee enter into a reasonable agreement to arbitrate,[7] before the latter could justly resort to force, and having so agreed, to follow the procedure (as Art. II provides) expressed in Part IV, Chapter III, of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, especially in the matter of arranging the *compromis*.[8]

In making provision for the treatment of "contractual debts" it is believed that the convention gave expression to an agreement applicable to all forms of indebtedness of a State to an alien, embracing without distinction public loans evidenced by bonds; and that there was contemplated the adjustment of any issue arising from non-payment, whether or not resulting from a repudiation of its contract by an obligor State through the exercise of sovereign power.[9]

---

*de la Paix, Actes et Documents*, II, 246–251, an abstract of which is contained in J. B. Scott, Hague Peace Conferences, I, 405–411.

See Public Bonds, *supra*, § 307.

[5] Malloy's Treaties, II, 2254, J. B. Scott, Hague Peace Conferences, II, 357. See, also, address of General Porter, before the First Sub-Commission of the First Commission of the Second Hague Peace Conference, July 16, 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, II, 229. For the text of the Porter plan as first presented, *id.*, II, 916, J. B. Scott, Hague Peace Conferences, II, 400. See, also, Instructions to the American Delegates to the Second Hague Conference of 1907, May 31, 1907, For. Rel. 1907, II, 1128, 1133.

[6] G. W. Scott, "The Hague Convention Restricting the Use of Force to Recover on Contract Claims," *Am. J.*, II, 78, 80.

[7] See Resolution by the Senate declaring "that the United States approves this Convention with the understanding that recourse to the permanent court for the settlement of the differences referred to in said Convention can be had only by agreement thereto through general or special treaties of Arbitration heretofore or hereafter concluded between the parties in dispute." Malloy's Treaties, II, 2259.

[8] See, especially, Art. LIII of this convention, Malloy's Treaties, II, 2238. Also J. B. Scott, Hague Peace Conferences, I, 418–420.

[9] G. W. Scott, "The Hague Convention Restricting the Use of Force to Recover on Con-

m

§ 309A. **Substitutes for International Adjudication.** The United States as a claimant State has at times within recent years found it expedient to avoid contentious litigation before an international tribunal in large groups of cases where the basis of liability was apparent, and to endeavor by agreement with the respondent State to fix a rule or test by reference to which cases within such groups should be adjusted. This procedure was exemplified by arrangements developed by the American and German agents before the Mixed Claims Commission under the agreement of August 10, 1922,[1] and resulted in awards of a non-litigious character in harmony therewith.[2] This avoidance of conflict even before a tribunal authorized to adjudicate has borne fruit. It has encouraged the conclusion of agreements between the United States and other countries calling for the joint examination of claims and an endeavor to effect agreement through the joint efforts of competent agents as to the treatment to be applied to certain categories of claims, such, for example, as those enumerated in an existing claims convention, and confining arbitration to cases where such efforts might prove abortive.[3] It is the endeavor to agree to effect direct adjustment which distinguishes such arrangements from those which mark an effort to agree to have recourse to contentious litigation and which are likely to necessitate a belated award by a neutral umpire.[4]

Again, effort is increasingly made to obtain agreement by a respondent State to pay a fixed sum (possibly in installments) to cover all claims within a specified category, the amount being measured by the financial potentialities of the respondent State, the volume and condition of claims preferred against it by foreign powers generally, and other kindred considerations.[5] In the event of

---

tract Claims," *Am. J.*, II, 78, 90–94; J. B. Scott, The Hague Peace Conferences, I, 416–418; A. Pearce Higgins, The Hague Conferences, 194–196; Edwin M. Borchard, International Contractual Claims and Their Settlement, Baltimore, 1913, 52–53. See, also, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 553–561, especially the views expressed by General Porter, 558.

§ 309A. [1] U. S. Treaty Vol. III, 2601.

[2] See Report of Robert W. Bonynge, Agent of the United States before the Mixed Claims Commission, United States and Germany, Dec. 31, 1934, especially in relation to agreement for the settlement of claims of American nationals against the German Government arising out of mark balances in German banks and private debts owing in marks by German nationals, and which received the approval of the Commission, pp. 83–96.

[3] See protocol with exchange of notes relating thereto, between the United States and Mexico, of April 24, 1934, relative to claims presented to the General Claims Commission, established by the convention of Sept. 8, 1923, U. S. Executive Agreement Series, No. 57, also contained in U. S. Treaty Vol. IV, 4489.

See, also, arrangement between the United States and Spain, of Aug. 24, 1927, May 13, 1929, and June 20, 1929, for the informal consideration by representatives to be appointed by the two States of all outstanding diplomatic claims between them, U. S. Executive Agreement Series, No. 18.

[4] Yet the joint endeavor to appraise and agree to the treatment of particular categories of claims may not always prove completely successful. The operation of the scheme contemplated by the protocol with Mexico of April 24, 1934, in relation to claims pending before the General Claims Commission was perhaps an instance.

[5] See, for example, convention between the United States and Mexico, of April 24, 1934, covering the en bloc settlement of the claims presented by the Government of the United States to the Commission established by the special claims convention concluded Sept. 10, 1923, U. S. Treaty Vol. IV, 4487.

agreement on such a basis, the United States undertakes by appropriate means, such as through the medium of a domestic claims commission, to make equitable distribution to Americán claimants.[6] By a convention with Mexico signed at Washington on November 19, 1941, the Government of the United States agreed to accept the sum of $40,000,000.00 as the balance due from that of Mexico in full settlement of large groups of specified claims, certain others (set forth in Article II) not being extinguished.[7] The plan superseded the stipulations of the General Claims Convention signed on September 8, 1923, and those of the Protocol in relation to it, signed on April 24, 1934.[8]

"By an exchange of notes dated December 24, 1923, the Government of the United States and the Government of Turkey entered into an agreement which provided that a Commission should be designated to determine solutions which should be given to claims outstanding between the two Governments. A supplementary agreement was concluded by an exchange of notes dated February 17, 1927. As a result of subsequent exchanges of communications, the two Governments agreed, with a view to the amiable, expeditious and economic adjustment of the claims, that the Commission should in the first instance undertake a summary examination of the cases for the purpose of recommending to the two Governments a lump sum settlement." [9] Following negotiations begun in 1933 between commissioners of the two Governments, there came a Turkish offer of settlement which was rejected by the American Government. On October 13, 1934, commissioners signed an agreement, "recommending that the Government of Turkey should pay to the Government of the United States a sum of $1,300,000," [10] and this agreement was confirmed by a formal arrangement between the two Governments, of October 25, 1934, which was negotiated and signed in behalf of the United States by Mr. Fred K. Nielsen.[11] Pursuant to Acts of Congress,[12] examination was made of the claims against Turkey to determine the merits of each case; and opinions were duly prepared thereon, in order to enable the Government of the United States to make proper distribution of the sum which the Government of Turkey was obligated to pay.[13] Inasmuch as the merits of the claims of American citizens were to be determined "in accordance with rules and principles of international law controlling as to questions with respect to international responsibility on the part of Turkey," [14]

[6] See, for example, Act of June 19, 1934, to establish a commission for the settlement of the claims comprehended within the terms of the convention between the United States and Mexico, concluded April 24, 1934, 48 Stat. 1021, 1041–1042.

[7] U. S. Treaty Series, No. 980. Against the sum mentioned there was credited $3,000,000.00, representing payments made prior to the signing of the convention pursuant to an agreement in relation to agrarian claims in November, 1938, and also an additional $3,000,000.00 to be paid on the date of the exchange of ratifications. Art. IV.

[8] Art. III. For the domestic allocation of funds received from Mexico, appropriate legislation by the Congress was to follow in 1942.

[9] Nielsen's American-Turkish Claims Settlement, General Report, 7.

[10] *Id.*, Annex I, 45.

[11] *Id.*, Annex II, 47, U. S. Executive Agreement Series No. 73.

The payment of the sum agreed upon was to be made in thirteen annual installments of $100,000.

[12] Act of March 22, 1935, 49 Stat. 67, 76; Act of June 22, 1936, 49 Stat. 1597, 1633.

[13] It is understood that the several opinions were prepared by Mr. Nielsen.

[14] Case of Jehu Eborn Archbell, Nielsen's American-Turkish Claims Settlement, Opinions, 151.

the several opinions were, accordingly, enunciatory of what those rules and principles were deemed to ordain.[15]

The tendency to seek agreement as to bases of responsibility rather than bases of contentious litigation, as well as the tendency also to seek and accept what delinquent States find it possible under the exigencies confronting them to agree to pay, in preference to struggles to obtain favorable arbitral awards of which the ultimate payment may be problematical, is the significant feature of contemporaneous negotiations. It shows the readiness of States, and notably of the United States as a typical claimant, to take full cognizance of realities that mark the vicissitudes in the lives of respondent countries. If their fiscal burden is thus lightened, their acknowledgment of responsibility for the consequences of internationally illegal conduct is at least in some cases accentuated.

## 4

## EXTRADITION

### a

§ 310. **Preliminary.** Extradition was defined by Chief Justice Fuller in the case of *Terlinden* v. *Ames* to be:

> The surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him demands the surrender.[1]

[15] See *id.*, General Report, Classification of Cases, 22–23.

§ 310. [1] 184 U. S. 270, 289; also, Moore, Extradition, I, § 1, *citing* Billot, *Traité de l'Extradition*, 1.

" 'Extradition' is the formal surrender of a person by a State to another State for prosecution or punishment." Art. 1 (a) of Harvard Draft Convention on Extradition, *Am. J.*, XXIX, *Supplement*, 21.

See, generally, documents in Hackworth, Dig., IV, Chap. XII; John Bassett Moore, Third Assistant Secretary of State, Report on Extradition, with returns of all cases from August 9, 1842, to January 1, 1890, Washington, 1890; same author, Extradition and Interstate Rendition, 2 vols., Boston, 1891; Moore, Dig., IV, 239–424; same author, The Difficulties of Extradition (reprinted from publications of Academy of Political Science, I, No. 4), New York, 1911; Samuel Thayer Spear, Law of Extradition, International and Interstate, 2 ed., Albany, 1884; John G. Hawley, Law and Practice of International Extradition, Chicago, 1893; Extradition of Fugitives from the United States in Foreign Jurisdiction (Extract from book of instructions to court officials), issued by the Attorney-General, June 1, 1916.

See, also, Biron and Chalmers, Law and Practice of Extradition, London, 1903; A. Billot, *Traité de l'Extradition*, Paris, 1874; Ludovic Beauchet, *Traité de l'Extradition*, Paris, 1899; Paul Bernard, *Traité Théorique et Pratique de l'Extradition*, 2 vols., Paris, 1890; Maurice Bourquin, "*Crimes et Délits contre la Sûreté des États Étrangers*," *Recueil des Cours*, 1927, XVI, 117, 191–214; Sir Edward Clarke, Law of Extradition, 4 ed. (Prepared by that author and E. Percival Clarke), London, 1903; Pasquale Fiore, *Traité de Droit Pénal International et de l'Extradition*, French translation by Antoine, 2 vols., Paris, 1880; Sir Francis T. Piggott, Extradition, London, 1910; Baron Albéric Rolin, "*Quelques Questions relative. à l'Extradition*," *Recueil des Cours*, 1923, I, 177; J. Saint-Aubin, *L'Extradition et le Droit, Extradition-nel Théorique et Appliqué*, 2 vols., Paris, 1913; Maurice Violet, *La Procédure d'Extradition Spécialement dans le Pays de Refuge*, Paris, 1898.

*Proceedings*, American Society of International Law, III, 95–165; Draft on Extradition prepared by Delegates to the International Commission of Jurists at Rio de Janeiro, For. Rel.

The extradition of a fugitive from justice signifies that the State within whose domain he is found, believes it to be preferable that he should be prosecuted by the country where the offense was committed than remain unpunished or even be prosecuted under the laws of the place of asylum.[2] Inasmuch as in the United States and England crime is regarded as territorial, and the wrongdoer usually punishable solely in the place where his offense occurred, failure on the part of either of them to surrender a fugitive to the foreign country within whose territory he committed a crime, would result in his immunity from prosecution.[3] Where the laws of the State of asylum permit the prosecution of its own nationals, who may have committed offenses on foreign soil, the surrender of such an individual indicates even stronger preference for the prosecution of the wrongdoer at the place where his criminal acts took place. Such preference on the part of the State of asylum always indicates that it regards with respect the administration of justice of the country demanding the fugitive, and also that it itself denounces as illegal and punishable the commission within its own domain of acts such as are laid at the door of the fugitive. Respect for the administration of justice in foreign countries sufficient to encourage States to conclude treaties of extradition is the result of a highly organized society of nations, the intercourse between whose members has become intimate and friendly. The habit of extradition marks the abatement of distrust which long retarded the surrender of fugitives and oftentimes served to thwart the operation of existing treaties.[4]

The process of extradition, which is a response to the request of a foreign State for the surrender to itself of a fugitive from its justice for prosecution pursuant to its laws, is to be differentiated from that of deportation, which is a mere manifestation of domestic policy marking the effort of a State to cause the removal from its domain of one who has unlawfully entered or remained therein; and it is likewise to be differentiated from that of expulsion which betokens the endeavor of a State to rid itself of an alien whose continued presence within its territory is deemed to be highly detrimental to its welfare. The United States is properly averse to efforts made by a foreign State to cause it to resort to

---

1912, 37–39; Resolutions adopted by the Institute of International Law in 1880, *Annuaire*, V, 127, J. B. Scott, Resolutions, 42; Resolutions adopted by the same body in 1892, *Annuaire*, XII, 182, J. B. Scott, Resolutions, 102.

See Harvard Draft Convention on Extradition, extensive bibliography, and appendices, with comment by Charles K. Burdick, Reporter, including the following documents: Extraditable Offenses in United States Treaties, 1900–1930; Extraditable Offenses in Treaties Concluded by States Other Than the United States; Multipartite Extradition Conventions; Drafts and Projects; Typical Bipartite Treaties of Recent Date; and Selected Extradition Statutes. These documents are printed in *Am. J.*, January and April, 1935, XXIX, *Supplement*, 241–434. See, also, Report of the Sub-Committee (Mr. Brierly and M. de Visscher) on Extradition, to the Committee of Experts for the Progressive Codification of International Law, Nov. 17, 1925, *Am. J.*, XX, *Special Supplement*, 243.

[2] Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890, For. Rel. 1890, 559, 566, Moore, Dig., IV, 290, 296.

[3] Statement in Moore, Dig., IV, 287.

See also in this connection, For. Rel. 1913, 38.

[4] Moore, Extradition, I, § 8; also Biron & Chalmers, Extradition, 1–14.

deportation proceedings as a means of enabling the latter to get within its clutches one who is a fugitive from its justice.[5]

As a reasonable exercise of its exclusive right of jurisdiction within its own domain, a State is believed to violate no legal duty, in declining, in the absence of treaty, to surrender a fugitive found within its territory to any foreign demanding Government. Such is the position taken by the judicial and political departments of the United States.[6] Nevertheless the necessity for extradition among States is so evident, and the conclusion of treaties to that end so habitual, that the persistent refusal of a member of the family of nations to enter into any extradition convention with any other member might be looked upon as betokening unfriendly conduct.[7]

By way of response to the common need of international coöperation in the suppression of crime — a need which has become acute owing to the facilities for escape which existing means of communication and transit increasingly afford to fugitives from justice — a Draft Convention on Extradition designed for general acceptance with possible reservations, was prepared by the Harvard Research in International Law in 1935.[8] "General acceptance of a single extradition convention would very largely obviate the necessity for separate treaties on extradition, thus greatly simplifying the international relationships in this field."[9] In becoming a party to the extradition convention signed December 26, 1933, at the Seventh International Conference of American States at Montevideo, the United States acknowledged the practical value of a multi-partite arrangement.[10]

[5] See Circular Letter of March 19, 1907, to the officers and employees of the Immigration Service, quoted by Mr. Straus, Secy. of Commerce and Labor, to Mr. Root, Secy. of State, Jan. 4, 1908, Hackworth, Dig., III, 720.

"The immigration laws of the United States provide for the exclusion or deportation of aliens who have been convicted of or who admit the commission of certain classes of crimes in foreign countries. These laws are separate and distinct from the laws and treaties relating to extradition. They are not enacted for the benefit of foreign governments or for the purpose of bringing fugitives to justice; rather, they are for the protection of the United States. However, requests are sometimes made by governments for the deportation by other governments of fugitives from justice, and occasionally steps are taken — especially in the absence of an extradition treaty — to deport such persons." (Statement in Hackworth, Dig., IV, 30.)

[6] "The principles of international law recognize no right to extradition apart from treaty." (Stone, J., in opinion of the Court, in Factor *v.* Laubenheimer, 290 U. S. 276, 287.) See, also, United States *v.* Rauscher, 119 U. S. 407, 411–412; also the learned opinion of Tilghman, C. J., in Commonwealth *v.* Deacon, 10 S. & R., 125; In the Matter of Metzger, 5 How. 176, 188.

Mr. Webster, Secy. of State, to Mr. d'Argaïz, June 21, 1842, Webster's Works, VI, 399, 405, quoted in Moore, Dig., IV, 246; Mr. Buchanan, Secy. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., IV, 246; Memorandum of Instructions of Mr. Jefferson, Secy. of State, March 22, 1792, entitled "Heads of Consideration on the Establishment of Conventions between the United States and their Neighbors for the Mutual Delivery of Fugitives from Justice," Am. State Pap., For. Rel., I, 258.

[7] Moore, Extradition, I, § 14.

[8] *Am. J.*, XXIX, *Supplement*, 1935, 21.

[9] Comment of Charles K. Burdick, Reporter, *id.*, 51.

[10] U. S. Treaty Vol. IV, 4800.

b

## Extradition without Treaty

(1)

§ 311. **Refusal by the United States.** The almost unvarying practice of the United States has been to decline to surrender fugitive criminals save in pursuance of treaty.[1] It has been frequently declared that the Executive lacks the power under such circumstances to cause the arrest and surrender of the individual.[2] Declared the Supreme Court of the United States in 1936, through Chief Justice Hughes: "Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents." [3] That tribunal was, moreover, correct in its declaration somewhat earlier, that "the principles of international law recognize no right to extradition apart from treaty." [4]

(2)

§ 312. **Requests on Grounds of Courtesy.** In view of its practice in refusing to surrender fugitives to foreign States with which extradition treaties have not been concluded, the United States does not demand from such countries the surrender of persons who there seek asylum after having escaped from places under American control.[1] The United States has not infrequently in the past, under such circumstances, requested the surrender of a fugitive, on grounds of

§ 311. [1] Mr. Bayard, Secy. of State, to Mr. Davie, May 29, 1886, 160 MS. Dom. Let. 354, Moore, Dig., IV, 252; Terlinden *v.* Ames, 184 U. S. 270, 289, *citing* Moore, Extradition, I, 21; United States *v.* Rauscher, 119 U. S. 407.

[2] Mr. Jefferson, Secy. of State, to the President, Nov. 7, 1791, MSS. Department of State, Moore, Extradition, I, 22; Wirt, Atty. Gen., 1 Ops. Attys. Gen., 509, 521; Legaré, Atty. Gen., 3 Ops. Attys. Gen., 661; Report of Mr. Frelinghuysen, Secy. of State, to the President, Feb. 13, 1884, S. Ex. Doc. 98, 48 Cong., 1 Sess., Moore, Dig., IV, 251; Mr. Gresham, Secy. of State, to Mr. Sousa Roza, June 5, 1895, MS. Notes to Portugal, VII, 171, Moore, Dig., IV, 252; Mr. Olney, Secy. of State, to Mr. Ransom, Minister to Mexico, Dec. 13, 1895, For. Rel. 1895, II, 1008, Moore, Dig., IV, 252; Mr. Day, Secy. of State, to Mr. Viso, May 26, 1898, MS. Notes to Argentine Legation, VII, 29, Moore, Dig., IV, 252. Also in this connection, Mr. Seward, Secy. of State, to Mr. Wilson, Chairman of House Committee of the Judiciary, June 24, 1864, Dip. Cor. 1864, IV, 35; Mr. Hughes, Secy. of State, to Mr. Alfaro, Panamanian Minister at Washington, June 12, 1923, For. Rel. 1923, II, 704, 705.

See Case of Arguelles, who was surrendered in 1864 to Spain by executive order. Moore, Extradition, I, § 27.

The immigration laws of the United States, providing for the deportation of fugitives who have been convicted of crime, are regarded as inapplicable in cases where the individual is merely charged with the commission of an offense. Mr. Bacon, Acting Secy. of State, to the Swiss Minister, March 16, 1907, For. Rel. 1907, II, 1044. See, also, Moore, Dig., IV, 259.

See, in this connection, Delivery without Extradition Case, Germany, Reichsgericht in Criminal Matters, 1922, *Annual Dig.*, Williams and Lauterpacht, 1919–1922, Case No. 185.

[3] Valentine *v.* U. S. *ex rel.* Neidecker, 299 U. S. 5, 18.

[4] Factor *v.* Laubenheimer, 290 U. S. 276, 287.

See also documents in Hackworth, Dig., IV, §§ 306–307.

§ 312. [1] Mr. Fish, Secy. of State, to Mr. Adee, Chargé, Nov. 3, 1876, MS. Inst. Spain, XVIII, 17, Moore, Dig., IV, 255; Report of Mr. Bayard, Secy. of State, to the President, on McGarigle's Case, Sept. 14, 1887, 17 MS. Rept. Book, 13, Moore, Dig., IV, 256; Mr. Hay,

courtesy, making clear at the same time its own inability to reciprocate in granting similar favors.[2] It is not understood, however, that at the present time, the Department of State is disposed to make such requests, even on such terms.[3]

c

## Treaties of the United States

(1)

§ 313. **Policy.** The extradition conventions of the United States, from the Jay Treaty concluded with Great Britain November 19, 1794, down to the present time have, in almost every case, contained the requirement that the surrender of a fugitive should be conditioned upon the production and presentation to the country of asylum of such evidence of criminality as would, according to the law of the place where the accused might be found, justify his apprehension and commitment for trial.[1] This implies, therefore, that the conduct of the

---

Secy. of State, to the Governor of Porto Rico, June 19, 1900, 245 MS. Dom. Let. 649, Moore, Dig., IV, 257.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Gosling, Dec. 18, 1884, 153 MS. Dom. Let. 459, Moore, Dig., IV, 255; Mr. Olney, Secy. of State, to Mr. Moody, March 7, 1896, 208 MS. Dom. Let. 386, Moore, Dig., IV, 256; also documents relating to extradition of Horace G. McKinley, granted by China in 1907, For. Rel. 1908, 129; documents relating to extradition of William Adler et al., from Honduras in 1908, For. Rel. 1908, 470; documents relating to the detention of the *Goldsboro* and extradition of Francis G. Bailey *et al.*, from Honduras in 1908, For. Rel. 1908, 474.

Also Mr. Bacon, Acting Secy. of State, to Mr. Ryan, Oct. 16, 1907, Hackworth, Dig., IV, 15.

In connection with the extradition of Paul Stensland from Morocco in 1906 as an act of grace, it is to be observed that the Government of that country declared that it regarded the authority of the American Minister over his own countrymen, "as supreme and unquestionable." (Mr. Gummeré, American Minister, to the Secretary of State, Sept. 6, 1906, For. Rel. 1906, II, 1161, 1163.)

Opposing the policy of requesting the extradition of fugitives as a favor, see Cushing, Atty. Gen., 6 Ops. Attys. Gen., 85, Moore, Dig., IV, 254; Mr. Hill, Acting Secy. of State, to Mr. Warner, Oct. 6, 1899, 240 Dom. Let. 407, Moore, Dig., IV, 257.

Among cases where extradition has been granted as an act of grace, may be noted that of V. Nalbandian (Bulgaria), For. Rel. 1910, 122–128; C. Vandenberg (Honduras), *id.*, 646; Joseph and Jacob Goldberg (Austria-Hungary), For. Rel. 1911, 10–11. See, also, case of the extradition and deportation of an individual from Costa Rica to the United States as an act of courtesy in 1913, For. Rel. 1913, 330–332.

[3] It is not suggested, however, that the United States may not enquire of a foreign State with which no extradition treaty has been concluded, and to whose territory there is reason to believe that a fugitive from American justice is destined, whether it will be disposed to prevent the fugitive from entering its domain, and of deporting him if he is found therein.

§ 313. [1] An exception is noted in the convention with Uruguay, March 11, 1905, Malloy's Treaties, II, 1825. Notwithstanding the singular omission, it is not believed that the contracting parties contemplated any departure from the existing practice, or a lessening of the requirement respecting the sufficiency of evidence to be presented by a demanding government. Arts. IV and V justify this conclusion.

In his work on extradition, § 77, Professor Moore adverts to the fact that Thomas Pinckney, in his negotiations that resulted in the treaty with Spain of October 27, 1795 (which contained no provisions relative to extradition), declined to accede to the Spanish suggestion that transgressors should be surrendered "upon a single demand"; and that he proposed, on the other hand, that any demand should be "supported by testimony of the commission of the crime which should be sufficient in the country to which the fugitive has flown to cause him to be arrested and brought before the tribunals of justice if the crime had there been committed," *citing* despatches from Madrid, Vol. VI, MSS. Department of State.

According to Art. III of the extradition treaty with Germany of July 12, 1930, persons shall be delivered up pursuant to the provisions thereof "who shall have been charged with

accused must have been such as to violate the criminal laws of the country of asylum.

The Supreme Court of the United States did not hesitate to declare in a unanimous opinion through Chief Justice Fuller in 1903, that

> The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 with Great Britain embodies that principle in terms. The offence must be "made criminal by the laws of both countries." [2]

Some nineteen years later the same tribunal in a unanimous opinion through Mr. Justice Brandeis appeared to reiterate the same views, and took occasion also to declare that the phrase "such evidence of criminality" as used in the treaty with Great Britain of August 9, 1842, referred "to the scope of the evidence or its sufficiency to block out those elements essential to a conviction." [3] Six members of the Supreme Court found it possible, however, to conclude in 1933, that the treaty with Great Britain of 1842, as supplemented by the convention of 1889, called for an interpretation that imposed upon the United States the duty to regard as an extraditable offense a crime not punishable by the law of Illinois where the accused was apprehended.[4]

It may be observed that the principle of double criminality was maintained in the extradition convention concluded at the Seventh International Conference of American States at Montevideo, December 26, 1933,[5] and was exemplified in the Harvard Draft Convention on Extradition of 1935.[6]

The general requirement respecting evidence of criminality necessitates, furthermore, a decision by some authority in the country of asylum as to whether

---

or convicted of any of the following crimes or offenses, but only if they are punishable as crimes or offenses by the laws of both countries applicable to the case." U. S. Treaty Vol. IV, 4216, 4217.

[2] Wright *v.* Henkel, 190 U. S. 40, 58.

See Art. 11 of Resolutions on Extradition, adopted by the Institute of International Law at Oxford, Sept. 9, 1880, J. B. Scott, Resolutions, 42, 43, *Annuaire*, V, 127, 128.

[3] Collins *v.* Loisel, 259 U. S. 309, 317. At page 312, he said: "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."

[4] Factor *v.* Laubenheimer, 290 U. S. 276. From the opinion of the Court, through Mr Justice Stone, Mr. Justice Butler, with whom concurred Mr. Justice Brandeis and Mr. Justice Roberts, expressed dissent in an elaborate opinion.

For a criticism of the decision, see Manley O. Hudson, "The Factor Case and Double Criminality in Extradition," *Am. J.*, XXVIII, 274. *Compare,* E. M. Borchard, "The Factor Extradition Case," *id.*, 742.

See, also, Villareal *v.* Hammond, 74 F.(2) 503.

See documents in Hackworth, Dig., IV, § 315.

[5] U. S. Treaty Vol. IV, 4800.

[6] According to Art. 2 thereof it is required "first, that the act, which is the basis of requisition, shall be such as to meet the same test of punishability in the requested State as in the requesting State; and second, that a law making such act so punishable must be in force in that part of the requested State in which the person claimed is apprehended." (Comment by the Reporter, *Am. J.*, XXIX, *Supplement,* 81.)

See, also, Art. II of extradition convention signed at Washington, Feb. 7, 1923, at the Conference on Central American Affairs, Appendix VI to Proceedings of the Conference, Washington, 1923, Hudson, Int. Legislation, No. 82.

the evidence presented justifies the apprehension and commitment of the accused for trial according to the local law. This involves the exercise of an essentially judicial function.

Although the early treaties of the United States made no provision respecting procedure, and although no Act of Congress offered guidance, the weight of opinion sanctioned the view that judicial rather than executive authority should, in the first instance, pass upon the sufficiency of the evidence presented.[7] An Act of Congress of 1848, supplemented by later legislation, has since that time provided for the performance of the judicial function by the judicial rather than the executive branch of the Government of the United States. The extradition treaties subsequent thereto have been regarded as having been concluded with reference to and in harmony with the statutory law.[8]

(2)

§ 314. **Offenses Generally.** Since the earliest agreements with England of 1794 and 1842, and with France of 1843 and 1845, there has been a constant and natural increase in the number of offenses made extraditable. Numerous treaties of the twentieth century, such as those with Germany of July 12, 1930,[1] and with Great Britain of December 22, 1931,[2] were doubtless deemed to be fully responsive to the elaborate and intricate needs of the time when they were negotiated. Among the offenses specified in the former were "crimes or offenses against the bankruptcy laws," as well as "crimes or offenses against the laws for the suppression of the traffic in narcotics."[3] Among offenses made extraditable in some recent treaties may be noted "fraudulent bankruptcy,"[4] "infractions of the customs laws or ordinances which may constitute crimes,"[5] "procuration,"[6] and "use of the mails for fraudulent purposes."[7] In the more recent conventions the offenses declared to be extraditable are described with greater precision and comprehensiveness than in the earlier agreements.[8]

A system which calls for the specification with exactness of extraditable offenses in bi-partite or other conventions demands constant revision and en-

[7] Matter of Metzger, 5 How. 176, 188–189, where the Supreme Court of the United States in 1847 approved the action of the President in referring to the judgment of a judicial representative the evidence offered by the French diplomatic officer to secure the extradition of an individual charged with forgery under treaty with France of November 9, 1843. Also case of Nash under Art. XXVII of the Jay Treaty, November 19, 1794, Wharton's State Trials, 392.

[8] Mr. Bayard, Secy. of State, to Mr. Romero, Mexican Minister, Feb. 19, 1889, For. Rel. 1889, 620–621, Moore, Dig., IV, 273.

§ 314. [1] U. S. Treaty Vol. IV, 4216.

[2] U. S. Treaty Vol. IV, 4274.

[3] Art. III, (27) and (28). According to (13) of the same article, "Blackmail or extortion by unlawful means" was made an extraditable offense.

[4] Art. I, supplementary extradition treaty with Finland, of May 17, 1934, U. S. Treaty Vol. IV, 4151.

[5] Art. I, supplementary extradition convention with Honduras, of Feb. 21, 1927, *id.*, 4305.

[6] As defined in Art. III (10), treaty with Great Britain, of December 22, 1931, *id.*, 4275.

[7] Art. II (20), treaty of extradition with Liechtenstein, of May 20, 1936, *id.*, 4421.

[8] For a list of extraditable offenses in treaties of the United States between 1900 and 1930, see Harvard Draft Convention on Extradition, Appendix II(A), *Am. J.*, XXIX, *Supplement*, 243.

largement of the texts in order to make them fully responsive to the changing conditions of the international life. Numerous supplementary treaties to which the United States is a party are illustrative of this fact.[9] A different and simpler system is exemplified in the convention signed at Montevideo, on December 26, 1933, at the Seventh International Conference of American States, through which it is provided that the act for which extradition is sought "constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year." [10]

(3)

POLITICAL OFFENSES

(*a*)

§ 315. **Development of the Rule.** Long before the establishment of international law or of any system of extradition, fugitives were frequently surrendered to the monarchs from whose control they had fled. Surrender was usually induced by the power of the sovereign making the demand. The treatment that might await the fugitive was no deterrent. Hence the return of political offenders bore no resemblance to the modern practice of extradition and was based on a different theory.[1] Consistently with the growth of the idea that no fugitive should be surrendered unless his acts were regarded as criminal at the place of asylum as well as in the country from which he had fled, and with a reluctance to surrender a fugitive who might be exposed to summary and arbitrary treatment if restored to the clutches of the demanding government, the principle of granting asylum to political offenders became general. In some States enjoying liberal laws and constitutional government, the acts of an individual participating in and incidental to a revolutionary movement abroad could not always be regarded as morally wrongful, notwithstanding local laws respecting treason. It seemed inequitable that the fate of a revolutionist, who had sought refuge in a foreign land, should hang upon the success or failure of the uprising in which he had been a participant.[2]

[9] See, for example, Supplementary Extradition Treaty with Lithuania, of May 17, 1934, U. S. Treaty Vol. IV, 4434.

[10] Art. 1(*b*), U. S. Treaty Vol. IV, 4800, 4801.

According to Art. 2 of the Harvard Draft Convention on Extradition, a requested State is obliged to extradite a person claimed (except as otherwise provided) for an act "(a) For which the law of the requesting State, in force when the act was committed, provides a possible penalty of death or deprivation of liberty for a period of two years or more; and (b) For which the law, in force in that part of the territory of the requested State in which the person claimed is apprehended, provides a possible penalty of death or deprivation of liberty for a period of two years or more, which would be applicable if the act were there committed." (*Am. J.*, XXIX, *Supplement*, 21.)

See, also, Art. I of extradition convention signed at Washington, Feb. 7, 1923, at the Conference on Central American Affairs, Appendix VI to Proceedings of the Conference, Washington, 1923, Hudson, Int. Legislation, No. 82.

§ 315. [1] Albéric Rolin, *Les infractions politiques, Rev. Droit Int.*, 1 *sér.*, XV, 417; Moore, Extradition, Chap. VIII, also *id.*, §§ 5 and 6; W. B. Lawrence, *Albany Law J.*, XIV, 85; Biron & Chalmers, 7–12; Bibliography in Clunet, *Tables Générales*, I, 790–792, 978; Lora L. Deere, "Political Offenses in the Law and Practice of Extradition," *Am. J.*, XXVII, 247; Art. 5 of Harvard Draft Convention on Extradition, and comment thereon, *Am. J.*, XXIX, *Supplement*, 107; documents in Hackworth, Dig., IV, § 316.

[2] Oppenheim, 2 ed., I, § 338.

Thus the very circumstances which rendered the modern practice of extradition practicable and habitual, served likewise to check and discourage the surrender of the political fugitive. The municipal laws of certain States, such as Belgium, Switzerland and Great Britain, emphasized the principle involved and weakened the efforts of Russia to disregard it.[3]

(*b*)

§ 316. **Reservation in Treaties of the United States. Assassination of the Head of a State.** In almost all the extradition treaties to which the United States has been a party there is a provision expressly declaring that persons charged with the commission of political offenses shall not be surrendered. "The treaties to which the United States is a party are mandatory on this point, although in a negative form." [1] With respect to those very few conventions containing no such provision, it is not believed that the contracting parties contemplated the extradition of political offenders.[2]

Without attempting to define the term "political offense," or to enumerate all the occasions when an act may be said to possess such a character, the effort is made to observe the circumstances when a fugitive within the United States, whose surrender has been sought by a foreign government, has been regarded by

[3] *Id.*, I, §§ 333–340.

Although Art. IV of the extradition treaty between Russia and Spain of March 9, 1877, contained a reservation respecting political offenses, that of April 24, 1888, between the same States, made no similar provision, and added to the list of extraditable offenses in Art. II that of *lése majesté* with respect to the sovereign or members of his family. *Tratados de España,* VII, 221; *id.*, IX, 329.

In the course of the illuminating comment on Art. 5 of the Harvard Draft Convention on Extradition it is declared: "Extradition treaties concluded in the past hundred years, with few exceptions, and all multipartite conventions and drafts contain a provision exempting, in mandatory or in permissive form and subject to various limitations, political offenses from their operation. A great number of the national extradition statutes similarly provide for the non-extradition of persons accused of offenses of a political character." (*Am. J.*, XXIX, *Supplement,* 108.)

See, in this connection, communication of Dr. Arturo Logroño, Secy. of State for Foreign Affairs of the Dominican Republic, to the Cuban Chargé d'Affaires *ad interim* at Santo Domingo, Sept. 8, 1934, declining to accede to the Cuban request of Aug. 6, 1934, for the provisional arrest of the Cuban citizen, Ex-President Gerardo Machado y Morales, *Listin Diario,* Sept. 20, 1934.

§ 316. [1] Comment on Art. 5 of Harvard Draft Convention on Extradition, *Am. J.*, XXIX, *Supplement,* 109.

See, for example, Art. 3 of the extradition treaty with Greece of May 6, 1931, U. S. Treaty Vol. IV, 4290, 4292. *Cf.* form of Art. 4 of extradition treaty with Germany of July 12, 1930, *id.*, 4216.

See also Art. 2 of the extradition convention with Great Britain of July 12, 1889, Malloy's Treaties, I, 741, and Art. 6 of the extradition treaty with that country of Dec. 22, 1931, U. S. Treaty Vol. IV, 4276; and also in this connection *In re* Lincoln, 228 Fed. 70, 73–74.

[2] Declared Mr. Fish, Secy. of State, in a communication to Mr. Hoffman, May 22, 1876: "Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation." For. Rel. 1876, 233, 237, Moore, Dig., IV, 334.

See message of President Tyler, Aug. 11, 1842, submitting treaty with Great Britain of that year to the Senate, Senate Ex. Docs., 27 Cong., 3 Sess., Vol. I, Doc. 2, p. 22, quoted in Moore, Extradition, I, § 152; *id.*, I, § 206. Also Mr. Wilson, Acting Secy. of State, to the American Ambassador to Mexico, Oct. 3, 1912, For. Rel. 1912, 850.

the executive or judicial department of the former as a political offender within the meaning of a treaty provision, and therefore discharged from custody. In every case the following elements have been present: [3]

(1) There has been an uprising of revolutionary origin and purpose against the demanding government. In some cases the uprising has been of vast dimensions, such as that which swept over the Baltic provinces of Russia in 1906; [4] in others it has been of insignificant proportions, as in the case of Cazo,[5] and in that of the San Ignacio raid.[6] In one case, that of Lynchehoun, the act of the accused was incidental to a popular movement to "overthrow landlordism" in Ireland, as a means of securing reform in legislation, a change in the governing classes, and possibly independence from English parliamentary rule.[7] It has been regarded as sufficient if there were in fact a party seeking governmental control, however lacking in military or civil organization.[8]

[3] The American cases considered are the following: The Mexican revolutionists of 1880, For. Rel. 1880, 787–788, Moore, Extradition, I, § 216; Case of Francisco J. Cazo, Mexico, Moore, Extradition, I, § 217, and MSS. there cited not contained in published documents of the United States; the Salvadorean Refugees, *In re* Ezeta, 62 Fed. 972; J. B. Moore, in *Am. Law R.*, XXIX, 1; For. Rel. 1894, 563–576; the San Ignacio raid, Mexico, Ornelas *v.* Ruiz, 161 U. S. 502; For. Rel. 1897, 405–416, Moore, Dig., IV, 336–349; Case of James Lynchehoun, Great Britain, proceedings in the Case of James Lynchehoun containing text of decision by Commissioner Charles W. Moores, Indianapolis, 1903; Case of Christian Rudovitz, Russia, 1909, Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador, Jan. 26, 1909, Dept. of State, file 16649/9, Serial No. 121; printed Statement and Argument, and Abstract of testimony submitted to the Secy. of State in behalf of the accused, January, 1909; Case of Pouren, Russia (Case of Jan Janoff Pouren, New York, 1909), 1909.

See, also, Case of McKenzie, Moore, Extradition, I, § 211, whose extradition was sought by Canada in 1837 from the authorities of the State of New York, and refused by the latter because, as the acts charged against the accused were regarded as political, they were embraced within the provisions of the New York statute excepting treason from the crimes on account of the commission of which a fugitive might be surrendered by the governor to a foreign State. Also the St. Albans raid case in 1864, in which a Canadian court ordered the discharge of certain prisoners whose extradition was sought by the United States. Moore, Extradition, I, § 215, and documents there cited.

See *dictum* in Giletti *v.* Commissioner of Immigration, 35 F. (2) 687, 689.

An English case frequently cited by American authorities is that of *Re* Castioni, 1891, 1 Q. B. 149. See, also, *re* Meunier, 1894, 2 Q. B. 415; *re* Arton, 1896, 1 Q. B. 108; the Swiss Case of Wassilieff, 1908, *Entscheidungen des Schweizerischen Bundesgerichtes,* XXXIV, pt. I, 533, and comments thereon by Julian W. Mack, 1909, *Proceedings,* Am. Soc., III, 144, 153.

[4] Abstract of testimony in the Rudovitz case submitted to the Secy. of State in behalf of the accused, January, 1909.

[5] Moore, Extradition, I, § 217.

See, also, *In re* Camporini, Switzerland, Federal Court, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 164; *In re* Vogt, Switzerland, Federal Court, 1924, *id.*, Case No. 165; *In re* Ragni, Switzerland, Federal Court, 1923, *id.*, Case No. 166; Spanish-German Extradition Treaty Case, First Senate in Criminal Matters of the German Reichsgericht, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 234; *In re* Korosi, Italian Criminal Court of Cassation, 1925, *id.*, Case No. 235; *In re* Don Oscar Mariaca Pando, Supreme Court of the Argentine Republic, *id.*, Case No. 236; Pavan Case, Swiss Federal Court, 1928, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 239; Noblot Case, Swiss Federal Court, 1928, *id.*, Case No. 240.

[6] Statement of facts in Ornelas *v.* Ruiz, 161 U. S. 502, 510–511. See, also, J. Reuben Clark, Jr., *Proceedings,* Am. Soc., III, 95, 120.

[7] Opinion of Commissioner Moores, Proceedings in Case of James Lynchehoun, 124–130.

[8] Declared J. R. Clark, Jr., 1909, *Proceedings,* Am. Soc. of Int. Law, III, 95, 120: "It would also appear from these Russian cases that the party to which the fugitive belongs need not, in order to be considered revolutionary, be warlike, that is, it need not at the moment have an armed force in the field or be engaged in military operations.

"And it would seem, further, that such a party need not have control of any of the actual governmental machinery even in the district in which the acts complained of occurred. It would appear to be sufficient if it were an actual party, its operations as well as its organiza-

(2) The accused has been connected with the movement. In no case has there been serious question as to his relation to the uprising.[9]

(3) Either the acts charged against the accused have been deemed incidental to the movement,[10] or the evidence has failed to show that acts committed in the course of the uprising which might possibly not be justly regarded as incidental thereto, were in fact committed by the accused.

While the connection between certain acts, however much to be deplored, such as the killing of spies or the burning of houses, with a political disturbance has oftentimes been apparent, the relation thereto of other acts such as robbery committed simultaneously has been less easy to determine.[11] When the political

---

tion being secret. It should, however, be noted that in the Russian cases it appeared that although the Russian Government was in actual control of the governmental offices of the revolutionary provinces, the revolutionists maintained among themselves a more or less effective organization and attempted, at least, to govern the members of their own party and to punish those inimical to it."

It seems clear that in the absence of an uprising, acts of violence, whether for the purpose of inciting revolution, or spreading anarchy, would not be regarded as political offenses under the treaties of the United States. J. B. Moore in *Am. Law Rev.*, XXIX, 16–17, *citing re* Meunier, 1894, 2 Q. B. 415, 419. As the anarchistic theory precludes the idea of government, an avowed anarchist would find difficulty in shielding himself from the consequences of his acts by asserting a connection with any movement, the object of which was to gain control of a government for the purpose of exercising governmental functions.

[9] Declared Denman, J., in *Re* Castioni, (1891) 1 Q. B. 149, 159: "The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as a part of the political movement and rising in which he was taking part." Cited with approval by Morrow, J., *In re* Ezeta, 62 Fed. 972, 999; also by Secy. Sherman in the Guerra Case (San Ignacio raid), and by Secy. Root in the Rudovitz Case.

[10] With respect to the Rudovitz Case Mr. Root, Secy. of State, declared in a communication to Baron Rosen, Russian Ambassador, Jan. 26, 1909:

"In reply I have the honor to say that an attentive reading of the evidence offered at the hearing before the extradition magistrate goes to show, — that on the night of January 3, 1906, a party of some sixteen armed men, masked and disguised, came to the little village of Benen on the estate of Benen and, having gained entrance into certain houses of the village, killed a man (Christian Leshinsky), his wife (Trina Leshinsky), and their married daughter (Wilhelmina Kinze); that they also robbed the Kinze woman and her husband (Theodor Kinze) before killing her; and that some time during the occurrence they set fire to the house in which they had found and killed the mother, Trina. It does not appear that the men implicated in the affair gave at the time any reason for the killing of Christian and Trina Leshinsky, though they are said to have declared that they killed the Kinze woman because she was a 'spy.'

"The testimony of the accused given before the extradition commissioner goes to establish that the accused was a member of the Benen group of the Social Democratic Labor party, one of the several revolutionary parties in Russia; that later he joined the Zhagarn group of that party; that at a regular meeting of the Zhagarn group, the death of the Leshinskys and Mrs. Kinze and the burning of the premises, were voted as revolutionary acts and measures; and that the accused participated in the business before this meeting. Other witnesses corroborated his testimony that the aim, purpose, and work of the Social Democratic Labor party were revolutionary and that the death of the persons above named was ordered by one of the organizations of that party. Although there was some discrepancy in the evidence as to just which local organization passed the original death decree, this has appeared to be immaterial in view of the evidence to the fundamental fact that some organization of this revolutionary party did actually decree that the persons named should be put to death. The witnesses testifying to these matters were not impeached and the demanding Government introduced no evidence to controvert their testimony.

"In view of these facts and circumstances the Department after a mature and careful consideration of the evidence so adduced in this case, finds itself forced to the conclusion that the offenses of killing and burning with which the accused is charged are clearly political in their nature." File No. 16649/9, Serial No. 121, Hackworth, Dig., IV, 49.

[11] Thus in the Rudovitz Case it was urged by counsel for the demanding government in argument before the committing magistrate, that the prisoner should be held to answer to

purpose and nature of an expedition have been recognized, there has been a tendency on the part of the United States, in the absence of conclusive evidence to the contrary, to regard acts of plunder as incidental to the contest. Such an inference has been reasonable when the evidence has failed to disclose that an expedition had a twofold purpose, namely, the private enrichment of the participants, as well as the accomplishment of an essentially public purpose. It has been admitted, however, that in the course of an uprising, wanton acts of robbery might be committed for purely private ends, and so render the actors extraditable on such a charge.[12] In certain cases, the evidence has failed to show that the accused himself committed such acts, and the United States has declined, under those circumstances, to impute to the prisoner, himself a participant in a political uprising, responsibility for an extraditable offense committed by a comrade.[13]

When the political nature of an uprising has been recognized, the connection of the accused therewith established, and the conduct charged against him regarded as incidental thereto, it has been deemed immaterial whether the act committed was such as might under normal circumstances be looked upon as a common crime, such as murder or arson; [14] whether the accused bore malice towards his victim; [15] whether the individual against whose person or property the act was directed, was a member of the civil or military branch of the government sought to be overthrown.[16]

---

the charge of robbery, in case he could not be held on any other, on the ground that the acts of robbery were not, in the judgment of counsel, connected with or incidental to the uprising in the Baltic provinces. See printed Statement and Argument in behalf of the accused, p. 10. See, also, Mr. Romero, Mexican Minister, to Mr. Sherman, Secy. of State, Nov. 15, 1897, For. Rel. 1897, 406, Moore, Dig., IV, 337.

[12] Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, For. Rel. 1897, 408, 414, Moore, Dig., IV, 340, 347.

[13] *Id.;* also Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador, Jan. 26, 1909, in which it was said. "The robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and can not be treated as a separate offense, certainly not as a separate offense by this man without some specific identification of him with that particular act, and of this there is no evidence whatever. Therefore, none of these offenses is such as will afford a proper and sufficient ground for the extradition of the accused to Russia." File 16649/9, Serial No. 121, Hackworth, Dig., IV, 49.

[14] The decisive point has always been the nature of the expedition and the relation thereto of the actor and of the acts chargeable to him, rather than the nature of what was done. This has been true even when the case arose under the treaty with Mexico of 1861, reserving from its application offenses of a "purely political character." Mr. Sherman, Secy. of State, to Mr. Romero, Dec. 17, 1897, For. Rel. 1897, 408, Moore, Dig., IV, 340. *Compare,* in this connection, articles adopted by the Institute of International Law, Sept. 8, 1892, *Annuaire,* XII, 182; report of Albéric Rolin relative thereto, *id.,* 156; Frederic R. Coudert, 1909, *Proceedings,* Am. Soc., III, 124, 143.

[15] Towards Mrs. Kinze, a victim of the expedition in the Rudovitz Case, there was felt the deepest malice by those who brought about her death. See, also, J. B. Moore, in *Am. Law Rev.,* XXIX, 1, 17.

[16] J. R. Clark, Jr., 1909, *Proceedings,* Am. Soc. of Int. Law, III, 95, 120, who, after stating that this point is settled by the recent Russian cases (of Rudovitz and Pouren), declared that: "Moreover, it would appear from the cases that it is not necessary that the uprising, if it actually exists, should be of any considerable extent or that it give particular promise of being successful. This seems to be established by the case of Guerra, in which, if the transactions in which Guerra took part be divorced from the attending circumstances, the expedition in which he was engaged resembles raids of a marauding band rather than an armed expedition of a warlike party, and this same observation applies with equal force to the activities of Cazo, the defendant in an earlier case."

(i)

§ 317. **The Same.** As the assassination of an individual may occur under circumstances such as to render the actor immune from extradition as a political offender, numerous treaties of the United States have in varying form provided that an act of such a kind, directed against the life of the sovereign or head of a foreign State, or a member of his family, should not be deemed to be of a political character.[1] No cases have yet arisen where pursuant to such a provision the United States has been called upon to surrender an assassin whose victim belonged to one of the classes enumerated.[2]

It is not unreasonable that the parties to extradition conventions should endeavor to exempt from their operation persons accused of the commission of particular acts or of acts committed under particular circumstances. It is unfortunate, however, that that endeavor should express itself in a reservation commonly couched in the vague term "political offenses" or the equivalent thereof — a term usually regarded by the parties themselves as too broad to be safely employed without qualification. For that reason the treaties constantly register, in varying form, an exception to an exception to the conventional duty to extradite.[3] Doubtless the sense in which the parties employ the reserving phrase may

§ 317. [1] See, for example, Art. III, treaty with Russia, March 16, 1887, Malloy's Treaties, II, 1528; Art. IV, treaty with Belgium, Oct. 26, 1901, *id.*, I, 106; Art. IV, treaty with Guatemala, Feb. 27, 1903, *id.*, I, 881; Art. III, treaty with Spain, June 15, 1904, *id.*, II, 1714; Art. III, treaty with El Salvador, April 18, 1911, U. S. Treaty Vol. III, 2820; Art. III, treaty with Austria, Jan. 31, 1930, U. S. Treaty Vol. IV, 3946, 3948; Art. III, treaty with Greece, May 6, 1931, *id.*, 4290, 4292.

It may be noted that the relevant articles of the treaty with Great Britain of December 22, 1931, U. S. Treaty Vol. IV, 4274, and with Germany of July 12, 1930, *id.*, 4216, contain no such provision. Art. IV of the treaty with Germany declares, however, that "a willful crime against human life except in battle or an open combat, shall in no case be deemed a crime of a political character, or an act connected with crimes or offenses of such a character."

See Art. 3 (*e*) of extradition treaty of Dec. 26, 1933, concluded at the Seventh International Conference of American States, *id.*, 4800, 4802.

Concerning the so-called *attentat* clause in the Belgian Law of 1856, see Oppenheim, 2 ed., I, § 335.

See, also, Julian W. Mack, 1909, *Proceedings, Am. Soc. Int. Law,* III, 144, 151–152, *citing* the Swiss cases of Jaffai, *Entscheidungen des Schweizerischen Bundesgerichtes,* XXVII, 52, and of Malatesta, *id.,* XVII, 450; also § 852 (2) of the Russian Law on Extradition, sanctioned by the Czar Dec. 15, 1911, *Rev. Droit Int., 2 sér.,* XIV, 187, 188.

[2] Concerning correspondence with Great Britain in 1865, and the Papal States in 1866, respecting the surrender to the United States of persons involved in the assassination of President Lincoln, see Moore, Extradition, I, § 208, p. 308, note No. 4, *citing* Dip. Cor. 1865, Part I, 386; *id.,* Part II, 142; *id.,* 1866, Part II, 121–125. See also Moore, Dig., IV, 352–353.

[3] "The various tests laid down in treaties, not for the purpose of defining, but excluding from, the category of non-extraditable political offenses or acts connected therewith may be classified as follows: (1) Treaties incorporating the so-called theory of predominance, or the Swiss theory, according to which an offense is not a non-extraditable political offense if — although committed in furtherance of a political objective — the common crime element predominates. (2) Treaties incorporating, in various forms, the so-called *attentat* or Belgian clause, according to which murder or attempt at life of the head of a State, or a member of his family (sometimes enumerated), or sometimes of a member of the government, shall not be considered a political offense. (3) Treaties incorporating what may be called the "unqualified" *attentat* clause, according to which murder or attempt at life in general — that is to say, without reference to head of a State or of a government — is not a political offense unless committed in "open battle." (4) Treaties providing that anarchism or communistic activity does not constitute a political offense." (Comment on Art. 5, Harvard Draft Convention on Extradition, *Am. J.,* XXIX, *Supplement,* 114–115.)

[4] According to Art. 5 of the Harvard Draft Convention on Extradition: "(a) A requested

ultimately be ascertained if sufficient effort be made by those who are burdened with the task; but the task is not lightened by the customary form of the linguistic token of design, and is likely to be heavier in consequence of it. For that reason, it would appear to be preferable to express desired limitations in terms that refer to particular acts that are not to be deemed to constitute extraditable offenses, rather than in terms that test the non-extraditable quality of an act by reference to a descriptive phrase of vague content and significance. If abandonment of the use of the term "political offenses" served to tax the resourcefulness of draftsmen who seek a simpler substitute, it would at least beget a textual clarity that existing conventions fail to reveal, and so bring the formal setting of arrangements for extradition into closer response to the designs of their authors. In the absence of evidence of a readiness to abandon the phrase, the making of fresh conventions still exemplifies the continuance of the old effort to clothe a really dangerous term with a garb that will satisfy the style of thinking at the time of negotiation. The very nature of the effort accounts for the wide diversity of opinion concerning what should be guarded against as well as the form which requisite protection should assume.

(*c*)

§ 318. **Burden of Proof.** American authority indicates clearly that when evidence offered before a committing magistrate tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove the contrary.[1] Furthermore, it becomes the duty of the magistrate to pass upon the evidence presented as to the political character of the acts committed.[2] From his decision there is no appeal save to

---

State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offense. (b) As it is used in this Convention, the term 'political offense' includes treason, sedition and espionage, whether committed by one or more persons; it includes any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offenses having a political objective." (*Am. J.*, XXIX, *Supplement*, 22.)

§ 318. [1] See Morrow, J., *In re* Ezeta, 62 Fed. 972, 999, quoting with approval recommendation of International American Congress of 1890; Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, For. Rel. 1897, 408, 413, 414, Moore, Dig., IV, 340, 346; Commissioner Moores, Proceedings, Lynchehoun Case, 124–125. *See*, also, Julian W. Mack, 1909, *Proceedings*, Am. Soc. of Int. Law, III, 144, 153–155; and *compare* J. R. Clark, Jr., *id.*, 96–102.

[2] Such was the position taken by Judge Morrow, in the Ezeta Case, and by Commissioners Moores and Foote, respectively, in the Lynchehoun and Rudovitz cases.

According to Art. 3 of the extradition treaty with Greece of May 6, 1931: "The State applied to, or courts of such State, shall decide whether the crime or offense is of a political character." (U. S. Treaty Vol. IV, 4290, 4292.)

"In each specific case where a demand for extradition is made by a foreign country and the person demanded claims to be a political refugee, there is always a question of fact raised as to whether the assertion of political character is true or not. This question under the laws of the United States is to be decided judicially in the first instance by a United States commissioner acting as a magistrate and proceeding upon evidence taken under oath, and in the second instance, by the Secretary of State, reviewing the decision of the commissioner upon the evidence. If the question of fact is determined in favor of the person demanded, the law forbids his extradition and protects him in his right of asylum. If the question of fact is decided against the person demanded, his extradition is required by law because there is

the Secretary of State.[3] In all cases, whatsoever be the nature of the defense, he exercises the right to review the decision of a magistrate committing the prisoner to await extradition.[4]

In a case before the United States District Court for the Eastern District of New York, in 1915, the accused, at the end of the hearing asked an adjournment in order to produce evidence that he was being extradited for political reasons; and he offered as a reason why extradition should not be granted, that the so-called criminal charges had not been urged against him until after certain matters of a political nature, particularly incited by publications of his in the United States, had led the Government of Great Britain to desire his punishment and to seek to interfere with his further public utterances.[5] He invoked the benefit of the existing extradition convention with Great Britain of July 12, 1889, exempting from its operation political offenders, or persons whose requisition for surrender was sought with a view to imposing a penalty for an offense of a political character. The tribunal was of opinion that this question could not or should not be disposed of by the court. It declared in this connection:

> If it be shown that the acts charged as crime indicate a *political* offense, and not a *criminal* one, as known to the jurisdiction holding the hearing, then certainly the court could not find that there was probable cause as to the commission of a crime. This would involve considering whether the offense as charged is political or criminal. But it is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the request is made in good faith. Such matters should be left to the Department of State.[6]

On the precise issue raised by the accused the court was warranted in making the response that it did.

(*d*)

§ 318A. **Military Offenses.** The bi-partite extradition treaties to which the United States is a party contain no reservations in relation to military offenses which, according to the Harvard Draft Convention on Extradition, have reference to an act punishable "only as a violation of a military law or regulation, and which would not be punishable as a violation of a civil law or regulation if the military law or regulation did not apply."[1] That a requested State may decline to extradite a person claimed if his extradition is sought for such an act,

---

no right of asylum in his case." (Mr. Root, Secy. of State, to the President, Jan. 16, 1909, quoted by Mr. Lansing, Secy. of State, in a communication to Mr. Francis, American Ambassador at Petrograd, June 12, 1917, For. Rel., 1918, Russia, Vol. I, 114, 115.)

[3] Ornelas *v.* Ruiz, 161 U. S. 502. The situation would be otherwise, however, in the fanciful case where, irrespective of the testimony offered, it should appear from the allegations of the complaint that extradition of the accused was sought in order to prosecute him for a political offense, and the decision of the committing magistrate was adverse to the contentions of the prisoner.

[4] See J. R. Clark, Jr., 1909, *Proceedings,* Am. Soc. Int. Law, III, 95, 114-118.

[5] *In re* Lincoln, 228 Fed. 70.

[6] *Id.,* 74.

§ 318A. [1] Art. 6 (b).

or with a view to prosecuting or punishing him for such an act is acknowledged in that convention.[2] The United States did, however, accept the provision of the extradition treaty concluded at the Seventh International Conference of American States, on December 26, 1933, declaring that extradition would not be granted "when the offense is purely military or directed against religion." [3]

(4)

NATIONALS

(*a*)

§ 319. **Of the Country of Refuge.** In negotiating extradition treaties the United States has oftentimes sought the omission of a common provision exempting a contracting party from the duty to surrender its own nationals.[1] The attempt has, however, rarely been successful; in most instances the United States has been obliged to accept the restriction.[2] It did so, for example, in the

[2] Art. 6 (a).

In his comment on this article, Mr. Burdick, the Reporter, declared: "No such provision is found in treaties to which the United States, Great Britain or France is a party. But these countries are among those which have up to the present time entered only into treaties containing lists of offenses, and which, by not including military offenses among those which are extraditable, exclude such offenses by implication. The list treaties which do not include military offenses, and the no-list treaties which expressly exclude military offenses constitute a very large majority of the extradition treaties entered into since the World War." (*Am. J.*, XXIX, *Supplement,* 121.)

[3] Art. 3 (*f*). The United States did not, however, accept paragraph (*d*) of the same article which provided that extradition will not be granted "when the accused must appear before any extraordinary tribunal or court of the demanding State (*tribunal o juzgado de excepción del Estado requiriente*). Military courts will not be considered as such tribunals."

§ 319. [1] Mr. Fish, Secy. of State, to Mr. Delfosse, Belgian Minister, Aug. 11, 1873, For. Rel. 1873, I, 84; Mr. Gresham, Secy. of State, to Mr. Bartleman, No. 110, June 11, 1894, MS. Inst. Venezuela, IV, 304, Moore, Dig., IV, 288; Mr. Olney, Secy. of State, to Mr. Ransom, Minister to Mexico, Dec. 13, 1895, For. Rel. 1895, II, 1008, 1009, Moore, Dig., IV, 289.

See United States *v.* Robbins, decided by Judge Bee, 1799, Fed. Cas. No. 16,175.

Declared Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890: "But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment and the moral effect of retribution most needed. There, also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition." For. Rel. 1890, 559, 566, Moore, Dig., IV, 290, 296. See, also, admirable statement in Moore, Dig., IV, 287; Report of the Sub-Committee on Extradition (Mr. Brierly and M. de Visscher) to the Committee of Experts for the Progressive Codification of International Law, 1925, *Am. J.*, XX, *Special Supplement,* 243, 244.

[2] The existing treaties with Great Britain and Italy contain no restriction. The convention with France of Nov. 9, 1843, was similarly free, and likewise that with Switzerland of Nov. 25, 1850. Later conventions, however, with France of Jan. 6, 1909, and with Switzerland of May 14, 1900, expressly removed any obligation to surrender citizens. According to Art. III of the treaty with the Argentine Republic of Sept. 26, 1896, Art. VII of that with Japan of April 29, 1886, and Art. IV of that with Mexico of Feb. 22, 1899, it is provided in differing form that while the contracting parties are not bound to surrender their respective citizens, each party ("the executive authority of each," in the Mexican treaty) shall have the power to deliver them up, if in its discretion it should be deemed proper to do so.

case of the treaty with Germany of July 12, 1930.[3] It did not accept, however, the provision of the Montevideo convention of 1933, emanating from the Seventh International Conference of American States, that when the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State determine; and that if the accused is not surrendered the latter State shall bring action against him for the crime of which he is accused, if such crime meets the conditions established in a previous article.[4] With respect to treaties containing no restriction, such as those with Switzerland of November 25, 1850, and with Italy of March 23, 1868, the United States has uniformly contended that by reason of the general terms employed, the contracting parties undertook to surrender their respective nationals.[5] The highest court of Switzerland acquiesced in 1891, in the American interpretation of a treaty with that State, as it appeared that such was the clear understanding of the parties when the agreement was concluded.[6] Italy, however, has always asserted that its treaty of 1868, with the United States imposed no duty on the former to surrender its own subjects. It has emphasized the fact that by the Italian penal code in force at the time of the negotiation of the treaty, and ever since in force, "the extradition of a citizen is not admissible." [7] The United States, on the other hand, has contended that the circumstances attending the negotiation indicate a different understanding by both parties. Notwithstanding the divergence of views, the United States has not treated the Italian practice as a breach of the contractual obligation requiring abrogation of the treaty. While it has ceased generally to make requisition for

---

See Case of Mattie D. Rich, an American citizen, arising under the Mexican treaty, For. Rel. 1899, 497–501, Moore, Dig., IV, 303; also Case of Yoshitaro Abe, a Japanese subject extradited from Japan to Hawaii, For. Rel. 1908, 512–515.

[3] Art. II, U. S. Treaty Vol. IV, 4216, 4217. According to Art. VIII of the treaty with Greece of May 6, 1931: "Under the stipulations of this Treaty, neither of the High Contracting Parties shall be bound to deliver up its own citizens, except in cases where such citizenship has been obtained after the perpetration of the crime for which extradition is sought. The State appealed to shall decide whether the person claimed is its own citizen." (*Id.*, 4290, 4293.)

[4] Art. 2, U. S. Treaty Vol. IV, 4800, 4801. *Cf.* Art. 4, Central American Extradition Convention, signed at Washington, Feb. 7, 1923, Hudson, Int. Legislation, No. 82.

Art. 7 of the Harvard Draft Convention on Extradition does not permit a requested State to decline to extradite a person because he is a national of that State.

[5] See Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890, For. Rel. 1890, 559, Moore, Dig., IV, 290.

[6] Case of Piguet, 1891, *Entscheidungen des Schweizerischen Bundesgerichtes,* XVII, 85–91. A translation of the major portion of the opinion is contained in Moore, Dig., IV, 298–300.

[7] Baron Fava, Italian Minister, to Mr. Blaine, Secy. of State, April 20, 1890, For. Rel. 1890, 555.

"Although the convention of 1868 between the United States and Italy . . . does not reserve to the two Governments the right to refuse to surrender their nationals who are fugitives from the justice of the other country, Italy has consistently refused to surrender its nationals to the United States. It does, however, under its law prosecute in Italy Italian subjects found there who are charged with the commission of crime abroad. In such cases the State in which the crime was committed, or the Federal Government, if a Federal offense is involved, furnishes all available evidence to the Italian authorities. Generally this evidence is in the form of affidavits; occasionally, however, additional evidence is sought by means of letters rogatory." (Statement in Hackworth, Dig., IV, 221–222.) See generally documents in Hackworth, Dig., IV, § 344.

Italian subjects, it has not regarded itself as free from the obligation of surrendering its own citizens. On the theory, therefore, that in such matters extradition treaties need not be reciprocal in their operation, Mr. Knox, Secretary of State, in 1910 decided that the United States should surrender to Italy one Charlton, an American citizen, charged with the commission of murder in the territory of that State,[8] and the Supreme Court of the United States, in consequence thereof, declared it to be its duty to recognize the obligation to surrender the accused "as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition." [9]

It may be observed that in 1924, the Government of the United States rejected a suggestion from that of France that Article 5 of the existing extradition treaty of January 6, 1909,[10] be so amended as to contemplate the prosecution and punishment by the contracting parties of their respective nationals on account of offenses committed abroad.[11] It should be noted also that in 1936, the Supreme Court of the United States adverted to the fact that the treaty was "explicit in the denial of any obligation to surrender citizens of the asylum State — 'Neither of the contracting Parties shall be bound to deliver up its own citizens.' " [12]

(*b*)

§ 320. **Of a Third Country. Competing Requests.** According to the treaties of the United States, the fact that a fugitive whose surrender is demanded by a contracting party is a national of a third State is not made an obstacle to extradition.[1] The common provision respecting the situation where the surrender of one person is sought by several states simultaneously, never creates a preference in favor of a demanding country to which the fugitive may owe allegiance.[2]

[8] Memorandum of Mr. Knox, Secy. of State, Dec. 9, 1910, *re* Porter Charlton, For. Rel. 1910, 654. See, also, *Ex parte* Charlton, 185 Fed. 880, 886–887.

[9] Charlton *v.* Kelly, 229 U. S. 447, 476.

See also Mr. Adee, Acting Secy. of State, to Governor Deneen of Illinois, March 22, 1907, Hackworth, Dig., II, 204.

[10] U. S. Treaty Vol. III, 2582.

[11] Mr. Hughes, Secy. of State, to Ambassador Jusserand, Jan. 21, 1924, Hackworth, Dig., II, 181. See also documents *id.*, IV, 56–59.

[12] Valentine *v.* U. S. *ex rel.* Neidecker, 299 U. S. 5, 10. See comments on this case in Lauterpacht's *Annual Dig.*, 1935–1937, note, p. 359.

Concerning discussions with the Mexican Government relative to Art. IV of the extradition convention with Mexico of Feb. 22, 1899, declaring that "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so," see documents in Hackworth, Dig., IV, 59–62.

§ 320. [1] It is usually provided that extradition shall be granted to the State whose demand is first received, provided that the government from which extradition is sought is not bound by treaty to give preference otherwise. See, for example, Art. XI of the treaty with Peru, Nov. 28, 1899, Malloy's Treaties, II, 1448. According to Art. VIII of the treaty with Uruguay, March 11, 1905, the fugitive is to be surrendered to that State in which he shall have committed the gravest crime, Malloy's Treaties, II, 1828. *Compare* Art. X, treaty with France, Jan. 6, 1909, U. S. Treaty Vol. III, 2583.

See, also, Mr. Marcy, Secy. of State, to Mr. Gadsden, Minister to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII, 54, Moore, Dig., IV, 305.

[2] In some treaties to which the United States is a party, such as that with Venezuela of Jan. 19 and 21, 1922, U. S. Treaty Vol. IV, 4672, it is provided that the accused shall be delivered to the State whose demand is first received. In a few instances, as in the treaty with

This emphasizes the unimportance of his nationality except in so far as he may be a national of the State of refuge.[3]

The United States does not question the right of a foreign State to surrender to another an American citizen whose extradition from the former has been demanded.[4] This is true even where the State of refuge, according to its own laws, habitually surrenders fugitives in the absence of extradition treaties, upon a stipulation of reciprocity to a demanding government.[5] The energies of the Department of State appear to be confined to the effort to secure for the accused the enjoyment of all rights which are applicable to extradition cases in the country where the fugitive is apprehended, and upon which the demand for surrender is made.[6]

---

Great Britain of Dec. 22, 1931, *id.*, 4274, the same rule is applied "unless such claim is waived." In the treaty with Germany of July 12, 1930, *id.*, 4216, "the surrendering government shall be free to choose to which request it will give preference." In some treaties, the duty to honor the request of the State whose demand is first received is subject to the condition, expressed, for example, in the agreement with Peru of Nov. 28, 1899, Malloy's Treaties, II, 1445, "that the government from which extradition is sought is not bound by treaty to give preference otherwise." The same idea is expressed in slightly different form in the treaty with Czechoslovakia of July 2, 1925, U. S. Treaty Vol. IV, 4059, 4062. According to the treaty with Uruguay of March 11, 1905, Malloy's Treaties, II, 1825, the accused "shall be delivered to the government of the country in which he shall have committed the gravest crime; provided that the government from which extradition is sought is not bound by treaty to give preference otherwise." *Cf.* Art. 10, of convention with France of Jan. 6, 1909, U. S. Treaty Vol. III, 2580, 2583.

According to Art. 7 of the extradition convention of Dec. 26, 1933, signed at Montevideo at the Seventh International Conference of American States: "When the extradition of a person is sought by several States for the same offense, preference will be given to the State in whose territory said offense was committed. If he is sought for several offenses, preference will be given to the State within whose bounds shall have been committed the offense which has the greatest penalty according to the law of the surrendering State. If the case is one of different acts which the State from which extradition is sought esteems of equal gravity, the preference will be determined by the priority of the request."

See, in this connection Art. 8 of Harvard Draft Convention on Extradition, and comment thereon; also documents in Hackworth, Dig., IV, § 319.

[3] As the treaty with Mexico (Feb. 22, 1899) contemplates the surrender of American citizens, under circumstances specified in Art. IV, and also provides in Art. XII for the subsequent surrender to a third Power, of a person who has been given up, an American citizen surrendered by the United States to Mexico, might, under the conditions specified, be later surrendered by Mexico to a third State.

According to Art. IX of the extradition convention with Colombia of May 7, 1888: "In case a person, who is equally a foreigner in the United States of America and in the Republic of Colombia, takes refuge in either country, after having committed any of the foregoing crimes, within one or the other jurisdiction, extradition can be accorded only after the Government, or its Representative, of which the criminal is a citizen or subject, has been duly informed, and afforded an opportunity to file objections to the extradition." (Malloy's Treaties, Vol. I, 325.) See documents in Hackworth, Dig., IV, 65–66.

[4] Moore, Extradition, I, § 143; Mr. Uhl, Acting Secy. of State, to Mrs. Jewitt, April 13, 1894, 196 MS. Dom. Let. 350, Moore, Dig., IV, 306.

Declared Mr. Bacon, Acting Secy. of State, to Ambassador White, April 3, 1907: "Precisely the same rule obtains in the United States where the surrender of citizens or subjects of a third government is demanded. The diplomatic representative of such government has sometimes made representations to this department with a view to the protection of its national; but the department has always considered that his legitimate functions are limited to safeguarding the fugitive's rights by observing the course of the proceedings so as to satisfy himself that all the forms of law have been complied with before extradition is granted." For. Rel. 1907, I, 425.

[5] See documents relative to the extradition of F. L. Jacobs, an American citizen, to the Argentine Republic from France. For. Rel. 1907, I, 411–430.

[6] Mr. Wilson, Third Assist. Secy. of State, to Mr. Jacobs, May 25, 1907, For. Rel. 1907, I, 428.

The circumstance that a person whose extradition is sought is an enemy of the demanding State, has not deterred the United States, when a neutral, from surrendering him to such State. Nor has it been acknowledged by the United States that the existence of war modified its obligation under an existing treaty, or that its neutrality was compromised by carrying out its provisions.[7]

(5)

§ 321. **Irregular Recovery of Fugitive.** Oftentimes by processes bearing no resemblance to extradition, the fugitive is returned to the country from which he has fled and is there sought to be prosecuted criminally. Thus he may be abducted from foreign territory by agents of the State of prosecution. In such event the State whose territory has been invaded may demand the return of the individual, or the extradition of those who removed him from its domain.[1] When the fugitive is taken from the State of refuge by its own citizens or by persons under its control, and by them placed within the territory of the State from which he has fled, there is no reason for interposition on the part of the former.[2] In an important case, that of the British Indian Savarkar, which became the subject of adjudication before a Tribunal assembled at the Hague, it was held that the arrest and restoration to the British mail steamer *Morea* at Marseilles July 7, 1910, by a French police officer, of the fugitive who had escaped from that vessel where he was in custody while en route to India for prosecution on account of political offenses, did not impose upon the British Government a duty to restore him to France. It was declared that while it appeared that the French officer was not aware of the nature of the charges against the prisoner, and so made a mistake in giving him up, there was, nevertheless, no bad faith on the part of the British authorities who participated in the matter, and no violation of the sovereignty of France; and that under the circumstances there was no rule of international law imposing a duty upon Great Britain to surrender Savarkar.[3]

[7] See documents in Hackworth, Dig., IV, 66–69, especially Mr. Moore, Counselor of the Dept. of State, to the German Chargé d'Affaires ad interim, May 9, 1940, *id.*, 66; Mr. Berle, Assist. Secy. of State to the German Chargé d'Affaires, June 20, 1940, *id.*, 67.

§ 321. [1] Moore, Dig., IV, 330, *citing* Instructions of the Department of State to the American Minister at Madrid, Aug. 18, Sept. 12, Sept. 16, and Dec. 8, 1891, and March 24, 1892, MS. Inst. Spain, XXI, 54, 65, 91; also despatch No. 216, of March 5, 1892, from the American legation at Madrid, 124 MS. Despatches, from Spain; also Mr. Foster, Secy. of State, to Mr. Washburn, Minister to Switzerland, July 27, 1892, For. Rel. 1894, 649, 650, Moore, Dig., IV, 330. *Compare* Mr. Seward, Secy. of State, to Lord Lyons, British Minister, June 6, 1863, MS. Notes to Great Britain, X, 67, Moore, Dig., IV, 329.

See G. Colunje Case, American and Panamanian General Claims Arbitration, Hunt's Report, Department of State, Arbitration Series No. 6, 746.

[2] Mr. Adams, Secy. of State, to Mr. Jackson, Jan. 24, 1822, 19 MS. Dom. Let. 248, Moore, Dig., IV, 328; also facts in *Ex parte* Wilson, 140 S. W. 98.

In the Case of Antonio Martinez, kidnapped in Mexico by a Mexican, brought into the United States and prosecuted in California, the Department of State was of the opinion that after having surrendered to Mexico one Felix, the kidnaper, the United States was under no obligation to comply with the demand of Mexico for the surrender of Martinez as well. It was observed that as the latter was being prosecuted by the State of California, the Federal Government felt itself unable to secure his release from custody. For. Rel. 1906, II, 1121–1122.

[3] Award, Savarkar Case, Feb. 24, 1911, in J. B. Scott, Hague Court Reports, 276, also in *Am. J.*, V, 520. See also editorial comment, *id.*, V, 208; McNair's 4 ed. of Oppenheim, I, § 337, and periodical literature there cited.

Whatever be the right of the State from which he has been withdrawn, the prisoner is not entitled to his release from custody merely by reason of the irregular process by which he was brought into the State of prosecution.[4]

(6)

LIMITATIONS AS TO TRIAL

(*a*)

**§ 322. Offenses Other Than Those for Which Accused Was Extradited.** The Supreme Court of the United States, in 1886, announced the principle that:

> A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.[1]

The decision was based primarily upon existing statutes of the United States. These the Court declared might be regarded as a "Congressional construction of the purpose and meaning of extradition treaties," such as the one under consideration; but whether so or not, the Acts of Congress were said to be conclusive upon the judiciary as to the rights conferred upon persons brought from a foreign country into the United States, under extradition proceedings.[2] The Court also expressed its own view as to the interpretation of the treaty of 1842 with Great Britain, declaring it to be "very clear" that it was not intended that the agreement was to be used for any purpose other than to secure the trial of the person extradited for one of the offenses enumerated in the treaty.[3]

The decision was contrary to the position taken by Mr. Fish, Secretary of State, in the Winslow case in 1876.[4] It not only confirmed British opinion as

[4] Ker *v.* Illinois, 119 U. S. 436; *Ex parte* Wilson, 140 S. W. 98; Mr. Bacon, Acting Secy. of State, to the Mexican Chargé, June 22, 1906, For. Rel. 1906, II, 1121.

See also United States *v.* Unverzagt, 299 Fed. 1015; People *ex rel.* Stilwell *v.* Hanley, 207 N.Y.S. 176; *Ex parte* Campbell, 1 F. Supp. 899. See documents in Hackworth, Dig., IV, § 345.

§ 322. [1] United States *v.* Rauscher, 119 U. S. 407, 430. The prisoner having been surrendered by Great Britain, pursuant to the treaty of 1842, on a charge of the murder of one Janssen on the high seas, was indicted and tried under § 5347 Rev. Stat. charging him with cruel and unusual punishment of the same man. This offense was not embraced in the group of cases made extraditable by the treaty, which, moreover, contained no express provision relative to the prosecution of a person surrendered for any offense other than one specified in the agreement. The case came before the Supreme Court of the United States on a certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York, arising after verdict of guilty and before judgment, on a motion in arrest of judgment.

Concerning the Rauscher Case and for a summary of the judicial history of the subject in the United States, see Moore, Dig., IV, 310–311; also Moore, Extradition, I, § 187, pp. 276–280.

[2] 119 U. S. 407, 423–424. See, also, opinion of Gray, J., concurring, *id.*, 433.

[3] *Id.*, 420.

[4] Mr. Fish, Secy. of State, to Mr. Hoffman, Mar. 31, 1876, For. Rel. 1876, 210, 215. Concerning the Winslow case, see For. Rel. 1876, 204–309, Appendix A, 615–633; Moore, Extradition, I, § 150; Moore, Dig., IV, 306–309, and documents there cited. Concerning case of one Lawrence, see Moore, Extradition, I, § 151.

to the interpretation of the treaty of 1842, but also served, in the minds of English judges, to meet the requirements of the British Extradition Act of 1870.[5]

The treaties of the United States commonly provide for the protection of the accused against prosecution for an offense committed prior to his surrender and other than that for which he was extradited.[6] Such provisions lack uniformity in scope and in form. Some seem to prohibit the prosecution of the accused for any offense other than that for which he was surrendered.[7] Frequently the restriction is limited. Thus the fugitive, according to some conventions, may still be prosecuted if he has had an opportunity to return to the country from which he was surrendered,[8] or if he has been given a month's grace after trial, conviction or pardon, in which to leave the country to which he was surrendered.[9] In one treaty, the restriction as to prosecution is not applicable when the accused person "fails to leave the territory of the Party to which he was surrendered within the period of three months after the date of inflicting upon him the penalty for the crime or offence for which he was delivered, or after the date of his being advised of his acquittal or of the fact that his case has been dismissed." [10] Sometimes the consent of the accused suffices to permit his prosecution or punishment for an offense committed before the demand of extradition other than that for which his surrender has been granted.[11] In some instances,

[5] Report of proceedings in England in Case of Alice Woodhall, Moore, Extradition, I, § 166.

Respecting the application of the principle announced in the Rauscher Case, in relation to certain treaties, see Cosgrove *v.* Winney, 174 U. S. 64; *In re* Rowe, 77 Fed. 161; Cohn *v.* Jones, 100 Fed. 639; Johnson *v.* Browne, 205 U. S. 309; Collins *v.* O'Neil, 214 U. S. 113; also Moore, Dig., IV, 312–318, and documents there cited; Frederick Van Dyne, in Cyc. of Law and Procedure, XIX, 81–82. See also United States *v.* Greene, 146 Fed. 766, Hackworth, Dig., IV, 237.

[6] See statement in Hackworth, Dig., IV, 232.

[7] See, for example, Art. IV, treaty with Portugal, May 7, 1908, Malloy's Treaties, II, 1472; Art. IV, treaty with Latvia, Oct. 16, 1923, U. S. Treaty Vol. IV, 4394, 4396.

In the case of Kelly *v.* Griffin, 241 U. S. 6, 15, it was declared that the Court assumed that the Government of Canada, upon the surrender of the accused to that country, would respect the treaty invoked, and would not try him upon charges other than those upon which extradition was allowed.

[8] Art. III, treaty with Great Britain, July 12, 1889, Malloy's Treaties, I, 741; Art. VIII, treaty with the Argentine Republic, Sept. 26, 1896, *id.*, I, 27. Relative to the application of the British treaty, see Cosgrove *v.* Winney, 174 U. S. 64; Bryant *v.* United States, 167 U. S. 104; Johnson *v.* Browne, 205 U. S. 309; Cohn *v.* Jones, 100 Fed. 639; correspondence with Great Britain in 1891, *re* Leda Lamontagne, Moore, Dig., IV, 314–315, and documents there cited.

According to Art. 7 of the extradition treaty with Great Britain, of Dec. 22, 1931, U. S. Treaty Vol. IV, 4274, 4276: "A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered. This stipulation does not apply to crimes or offences committed after the extradition."

[9] Art. VII, treaty with France of Jan. 6, 1909, U. S. Treaty Vol. III, 2580, 2583; Art. IV, treaty with Austria of Jan. 31, 1930, U. S. Treaty Vol. IV, 3946, 3949.

See Donnelly *v.* Mulligan, 74 F. (2d), 220, 222–223, Hackworth, Dig., IV, 203.

See, also, correspondence between Mr. Root, Secy. of State, and Mr. Sternburg, German Ambassador, in 1907, with respect to the operation of the existing extradition treaty with Germany, containing no provision as to the circumstances when a person extradited thereunder might be prosecuted and punished for an offense committed prior to extradition. For. Rel. 1907, I, 517–519.

[10] Art. IV, treaty with Poland of Nov. 22, 1927, U. S. Treaty Vol. IV, 4561, 4564.

[11] Art. III, treaty with Turkey of Aug. 6, 1923, U. S. Treaty Vol. IV, 4663, 4665.

it is agreed that such consent is to be "freely granted and publicly declared by him." [12] Oftentimes the matter of consent is reserved to the surrendering State,[13] which, in some instances, is given the right to require the production of documents.[14] According to Art. IV of the treaty with the Netherlands of June 2, 1887, the restriction against punishing a person for an offense other than that for which he was surrendered is removed in case the offense charged is one of those embraced in the convention.[15] Some treaties contain the provision that the accused may be prosecuted for an offense mentioned in the agreement other than that for which he was surrendered, subject to notice to the surrendering State, to which is reserved the right to demand the production of documents.[16] The diversity of the foregoing provisions accentuates the desirability of a simple restrictive formula applicable generally to bi-partite as well as multi-partite conventions.[17]

The treaties of the United States do not purport to limit in any way the prosecution of the accused at any time after his surrender for any offense whatsoever committed subsequent to extradition, against the laws of the State to which he has been given up. The Supreme Court of the United States has declared that nothing in the Rauscher Case is authority for the contention that any duty rests upon the State to which surrender has been made, to afford the accused opportunity after his trial or other termination of his case, to return to the country from which he was extradited, if he committed an offense subsequent to his extradition.[18]

[12] See, for example, Art. VIII, treaty with Norway, June 7, 1893, Malloy's Treaties, II, 1303; Art. VIII, treaty with Denmark, Jan. 6, 1902, *id.*, I, 393. According to Art. IX of the treaty with Switzerland, May 14, 1900, the consent of the accused is to be expressed in open court and entered upon the record, *id.*, II, 1774.

Declared Mr. Root, Secy. of State, to the German Ambassador, Dec. 28, 1907: "The Department is therefore in accord with the Embassy upon the general principle that trial and acquittal of or trial and conviction for an extradition offense does not clothe the fugitive with permanent immunity from prosecution for other offenses committed prior to extradition, but that the fugitive may be re-arrested after he has been given a reasonable time to depart from the jurisdiction." (Hackworth, Dig., IV, 235.)

[13] Art. IX, treaty with Peru, Nov. 28, 1899, Malloy's Treaties, II, 1448; Art. III, treaty with Uruguay, March 11, 1905, *id.*, II, 1826. See correspondence, 1894–1895, with the German Embassy at Washington relative to the consent of Jacob David to trial in Illinois for an offense other than that for which he was extradited from Prussia, pursuant to the treaty of June 16, 1852, which contained no provision relative to the matter. For. Rel. 1895, I, 488–497, contained in part in Moore, Dig., IV, 320–326. See, also, documents, *id.*, IV, 319 and 326.

See, also, Art. IV, treaty with Austria of Jan. 31, 1930, U. S. Treaty Vol. IV, 3946, 3949; Art. V, treaty with Germany of July 12, 1930; *id.*, 4216, 4218.

[14] This provision frequently appears. See, for example, Art. IV, treaty with Salvador, April 18, 1911, U. S. Treaty Vol. III, 2820, 2822.

[15] Malloy's Treaties, II, 1268.

[16] Art. III, treaty with Luxemburg of Oct. 29, 1883, Malloy's Treaties, I, 1055; Arts. XII and XIII, treaty with Mexico of Feb. 22, 1899, *id.*, I, 1189.

[17] Article 23 of the Harvard Draft Convention on Extradition forbids punishment or prosecution, without the consent of the surrendering State for any act committed prior to extradition, other than that for which the accused was extradited, or the prosecution without that consent of the accused "before a court specially constituted for the trial, or to which special powers are granted for the trial."

See, also, Art. 17 of extradition convention signed Dec. 26, 1933, at the Seventh International Conference of American States, U. S. Treaty Vol. IV, 4800, 4804.

[18] Collins *v.* O'Neil, 214 U. S. 113; *affirming In re* Collins, 151 California 340. Declared Peckham, J., in the course of the opinion of the court: "It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and

(*b*)

§ 322A. **Re-extradition.** When a State surrenders to another a person for prosecution or punishment for a particular offense in pursuance of the terms of an extradition treaty, it is reasonable to maintain that the latter State should not, at least without the consent of the former, re-extradite that person to a third State for prosecution or punishment. This restriction which finds appropriate expression in the Harvard Draft Convention on Extradition,[1] is reflected in varying terms in numerous conventions to which the United States is a party.[2] Moreover, it has been held by the United States Circuit Court of Appeals in the Second Circuit that the United States was by implication under obligation to France not without its consent to re-extradite an accused person surrendered by that country under an existing extradition treaty for an offense committed prior to his surrender, even though the treaty contained no express provision in relation to the matter.[3]

---

therein providing that a criminal surrendered according to demand, for a crime that he has committed, if subsequently to his surrender he is guilty of murder or treason or other crime is, nevertheless, to have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender or any country as willing to accept it." *Id.*, 122–123. See, also, Collins *v.* Johnston, 237 U. S. 502.

Obviously extradition should not be used as a means for obtaining jurisdiction of the person of the accused for civil proceedings. Smith *v.* Government of Canal Zone, 249 Fed. 273, 279.

CIVIL SUITS. Relative to the question whether a fugitive surrendered pursuant to the terms of an extradition treaty may, prior to a reasonable opportunity to leave the country after his discharge from custody, be arrested in, or otherwise be made answerable to a civil action, see Moore, Extradition, I, §§ 178–187, and cases there discussed; documents cited in Moore, Dig., IV, 327–328; cases cited by Frederick Van Dyne in Cyc. of Law & Proc., XIX, 82. See, also, express provision in Art. VII, treaty with France, Jan. 6, 1909, U. S. Treaty Vol. III, 2580, 2583.

"The memorandum of the Department of State relating to applications for the extradition from foreign countries of fugitives from justice states that each application should contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive and not for any private purpose and that, if the application is granted, the criminal proceedings will not be used for any private purpose." (Hackworth, Dig., IV, 239.)

See Smith *v.* Government of Canal Zone, 249 Fed. 273, Hackworth, Dig., IV, 240, where, in the mind of the court, "there was the appearance of the process of extradition being permitted to be made use of, not for the ostensible purpose which could justify the resort to it, but to afford to private litigants the opportunity of securing the enforcement against the appellant of an asserted civil liability." (249 Fed. 279.)

§ 322A. [1] Art. 23, par. 1 (b). See, also, comment thereon, *Am. J.*, XXIX, *Supplement*, 215–217.

[2] See, for example, Art. V, treaty with Germany of July 12, 1930, U. S. Treaty Vol. IV, 4216, 4218. *Cf.* Art. III, treaty with Nicaragua of March 1, 1905, Malloy's Treaties, II, 1295; Art. IX, treaty with Switzerland of May 14, 1900, *id.*, 1774.

[3] United States *ex rel.* Donnelly *v.* Mulligan, 74 F. (2) 220. In this case, however, the President of the French Republic made a decree under date of Jan. 9, 1935, authorizing the United States to re-extradite the accused to Canada. Declared the same tribunal, through Manton, Circuit Judge: "The appellant cannot complain if France acted under the treaty, nor can he complain if it acted independent of the treaty as an act of international comity. The French decree consents to his re-extradition; moreover, it may be regarded as a consent given independently of the treaty and as an act of international comity. If under the treaty, it is conclusive upon the appellant. France had the right to give or withhold the asylum accorded him, as it saw fit. And it has withheld asylum for the purpose of re-extradition to Canada. The appellant cannot question this action on the part of France." United States *ex rel.* Donnelly *v.* Mulligan, 76 F. (2) 511, and 512.

(*c*)

§ 323. **Limitation of Trial by Lapse of Time. Certain Other Restrictions.** Provision is frequently made in the more recent treaties of the United States that extradition shall not be granted if the enforcement of the penalty for the act committed by the accused has been barred by limitation according to the laws of the country to which the requisition is addressed.[1] According to a very few conventions, there is a similar reservation, if from lapse of time (or other lawful cause) the accused is exempt from prosecution according to the law of the place where the offense was committed.[2] Some treaties provide in substance that extradition shall not take place if subsequently to the commission of the crime or offense, or the institution of penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the "party applying or applied to."[3]

It is not unreasonable for a State to decline to surrender to another a person who has already been tried and discharged or punished by the former, or who is undergoing prosecution by it, on account of the offense for which his extradition is sought. Nor is it unreasonable for a State to defer the extradition of a person to another until the complete termination of any criminal proceedings (embracing the full execution of any penalty imposed upon him) that the former has instituted against him, on account of any offense other than that for which his extradition is sought. Some treaties to which the United States is a party pay careful heed to these considerations.[4] Again, it is reasonable for a State to decline to agree to extradite a person when his surrender is requested with a view to his prosecution on account of an offense for which he has been

§ 323. [1] See, for example, Art. VIII, treaty with France of Jan. 6, 1909, U. S. Treaty Vol. III, 2583; Art. V, treaty with Latvia of Oct. 16, 1923, U. S. Treaty Vol. IV, 4394, 4396; Art. VI, treaty with Germany of July 12, 1930, U. S. Treaty Vol. IV, 4216, 4219.

[2] Art. V, treaty with the Dominican Republic, June 19, 1909, U. S. Treaty Vol. III, 2567; Art. V, treaty with El Salvador, April 18, 1911, *id.*, 2820; Art. V, treaty with Spain, June 15, 1904, Malloy's Treaties, II, 1715.

[3] See, also, Art. V, treaty with Great Britain of Dec. 22, 1931, U. S. Treaty Vol. IV, 4274, 4276; Art. V, treaty with Greece of May 6, 1931, U. S. Treaty Vol. IV, 4290, 4292; Art. VIII, treaty with Switzerland of May 14, 1900, Malloy's Treaties, II, 1773. See, also, Art. III (*a*), extradition treaty of Dec. 26, 1933, signed at the Seventh International Conference of American States, U. S. Treaty, Vol. IV, 4800, 4801.

According to Art. 4 of the Harvard Draft Convention on Extradition: "A requested State may decline to extradite a person claimed if under the law of the requesting State such person, at the time when the requisition is received, has become immune from prosecution or punishment by reason of the lapse of time, or if under the law prevailing in that part of the territory of the requested State in which the person is apprehended such person, at the time when the requisition is received, would have become immune from prosecution or punishment by reason of the lapse of time, if the act had been committed within the territory of the requested State." (*Am. J.*, XXIX, *Supplement*, 22.)

See also documents in Hackworth, Dig., IV, 194–195.

[4] See, for example, Arts. 4 and 5, treaty with Great Britain of Dec. 22, 1931, U. S. Treaty Vol. IV, 4274, 4276; Arts. VI and VII, treaty with Germany of July 12, 1930, *id.*, 4216, 4219.

See, also, Mr. Hay, Secy. of State, to Mr. Aspiroz, No. 158, March 14, 1901, MS. Notes to Mexican Legation, X, 573, Moore, Dig., IV, 402; correspondence between the United States and Mexico in 1895, respecting the Case of Chester W. Rowe, For. Rel. 1895, part II, 997–1011, Moore, Dig., IV, 302–303, 401–402.

See also documents in Hackworth, Dig., IV, 196–199.

tried, convicted or acquitted by the demanding State, except where it is sought to subject the fugitive to the fulfillment of an unexpired term of a sentence imposed through his conviction.[5] Numerous treaties to which the United States is a party provide that a fugitive shall not be surrendered when, from a "lawful cause" (other than or in addition to lapse of time), according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offense for which his surrender is asked.[6] In view of the abolition of capital punishment and of life imprisonment by the constitution of a contracting State, it may reserve the right to decline to grant extradition for crimes punishable by death and life imprisonment. Such a reservation is made in the treaty between the United States and Venezuela, of January 19, 1922.[7]

(7)

§ 324. **Requisition. Mandate.** The formal demand for the extradition of a fugitive is known as the requisition and must emanate from the executive au-

[5] See Art. V, convention with The Netherlands of May 22, 1880, Malloy's Treaties, II, 1263.

[6] See, for example, Art. V, treaty with Venezuela of Jan. 19 and 21, 1922, U. S. Treaty Vol. IV, 4672, 4674; Art. V, treaty with Poland of Nov. 22, 1927, *id.*, 4561, 4564; Art. V, treaty with Austria of Jan. 31, 1930, *id.*, 3946, 3949; Art. V, treaty with Greece, of May 6, 1931, *id.*, 4290, 4292.

See, in this connection, Arts. 9, 10 and 11, of Harvard Draft Convention on Extradition, *Am. J.*, XXIX, *Supplement*, 23–24, also comment thereon, *id.*, 145–157.

See, also, Art. 3, extradition treaty signed at Seventh International Conference of American States, Dec. 26, 1933, U. S. Treaty Vol. IV, 4800, 4801.

[7] Art. IV, U. S. Treaty Vol. IV, 4674, where it is added: "Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted." Concerning kindred arrangements and discussions thereof, see Hackworth, Dig., IV, 199–201.

Miscellaneous Provisions. In numerous treaties to which the United States is a party provision is made that articles found in the possession of the accused at the time of his arrest, whether being the proceeds of the crime or offense, or which may be material as evidence in making proof thereof, shall, so far as practicable, according to the laws of either of the contracting parties be delivered up with his person at the time of his surrender, due respect being had, however, for the rights of a third party with regard to such articles. See, for example, Art. X, of treaty with Spain of June 15, 1904, Malloy's Treaties, II, 1715. Also documents in Moore, Dig., IV, 405–406, especially opinion of Mr. Knox, Atty. Gen., 23 Ops. Attys. Gen., 440.

See, also, Art. X, treaty with Venezuela of Jan. 19 and 21, 1922, U. S. Treaty Vol. IV, 4672, 4675; Art. IX, treaty with Poland, of Nov. 22, 1927, *id.*, 4561, 4564; Art. X, treaty with Austria of Jan. 31, 1930, *id.*, 3946, 3949; Art. IX, treaty with Germany of July 12, 1930, *id.*, 4216, 4219; Art. XII, treaty with Great Britain of Dec. 22, 1931, *id.*, 4274, 4277; Art. X, treaty with Greece of May 6, 1931, *id.*, 4290, 4293.

See provisions for the delivery and return of property requested, in Art. 24 of Harvard Draft Convention on Extradition. Also documents in Hackworth, Dig., IV, § 340.

Expenses. "Every treaty of extradition to which the United States is a party contains a provision that the expenses of extradition shall be borne by the demanding government, and it is the practice for the demanding government to defray the expenses of the proceedings whether the fugitive is eventually surrendered or not." (Frederick Van Dyne in Cyc. Law & Proc., XIX, 79.)

According to Art. 13 of treaty with Great Britain of Dec. 22, 1931, U. S. Treaty Vol. IV, 4274, 4277: "All expenses connected with the extradition shall be borne by the High Contracting Party making the application."

See Art. 16, convention on extradition signed Dec. 26, 1933, at the Seventh International

thority of the demanding State.[1] "It is settled in the United States that a fugitive from the justice of a foreign country may be surrendered only after the receipt of a requisition therefor through diplomatic channels. This may be said to result from the fact that the statutory laws provide for surrender only pursuant to treaty, and the treaties provide for such a requisition." [2] The treaties of the United States commonly provide that requisition shall be made by the diplomatic agents of the contracting parties, or in their absence, by superior consular officers.[3] According to Article 15 of the extradition treaty with Great Britain of December 22, 1931, "the requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America." [4] While a formal requisition is always a condition precedent to the final surrender of the fugitive, it bears no such relation to his arrest or to the judicial proceedings in the United States preliminary to commitment. Requisition is normally to be made upon the foreign office of a contracting party and hence, when the demand is made upon the United States, it must be addressed to the Secretary of State.[5]

---

Conference of American States, U. S. Treaty Vol. IV, 4800, 4803; also, Art. 21 of Harvard Draft Convention on Extradition. See documents in Hackworth, Dig., § 346.

§ 324. [1] Mr. Cushing, Atty. Gen., 7 Ops. Atty. Gen., 6; see, also, Moore, Extradition, § 219.

[2] Statement in Hackworth, Dig., IV, 77–78.

[3] See, for example, Art. III, convention with France, Jan. 6, 1909, U. S. Treaty Vol. III, 2580, 2582; Art. X, treaty with Germany of July 12, 1930, U. S. Treaty Vol. IV, 4216, 4219.

According to Art. IX of the treaty with Mexico of Feb. 22, 1899, it is provided that: "In the case of crimes or offenses committed or charged to have been committed in the frontier States or Territories of the two contracting parties, requisitions may be made, either through their respective diplomatic or consular agents as aforesaid, or through the chief civil authority of the respective State or Territory, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory, and such respective competent authority shall thereupon cause the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination." Malloy's Treaties, I, 1188. For documents interpretative of this article see, Hackworth, IV, 82–86.

See, also, Art. III of convention with the Netherlands, Jan. 18, 1904, extending to the island possessions and colonies of the contracting parties the extradition treaty of June 2, 1887, Malloy's Treaties, II, 1272; also Art. XIII of treaty with France of January 6, 1909, respecting the requisition for the surrender of a fugitive criminal who has taken refuge in a colony or foreign possession of either contracting party, U. S. Treaty Vol. III, 2580, 2584.

[4] U. S. Treaty Vol. IV, 4274, 4278. It was also there provided that "such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland." See also Art. IX, convention with Mexico of Feb. 22, 1899, Malloy's Treaties, I, 1188, and documents in Hackworth, Dig., IV, 82–85.

[5] Mr. Cushing, Atty. Gen., 8 Ops. Attys. Gen., 40; also Mr. Bonaparte, Atty. Gen., July 10, 1908, For. Rel. 1908, 595.

Relative to applications by the United States for the extradition from foreign countries of fugitives from justice, see general circular of the Department of State, October, 1892, Moore, Dig., IV, 356; circular relative to the extradition of fugitives from the United States in British jurisdiction, May, 1890, Moore, Dig., IV, 359; documents contained and cited in Moore, Dig., I, 362–368, relative to extradition of fugitives from Mexico.

The Federal Courts and the Department of State seem at the present time to be agreed that the provisions of the statutory law render unnecessary the issuance of a mandate or a certificate of requisition by the Secretary of State as a foundation for proceedings in the United States with a view to the arrest or commitment of a fugitive.[6] Hence, it is believed that the provisions of any treaties intimating that judicial proceedings shall be dependent upon the exhibition of a mandate or certificate of requisition are rendered unimportant.[7] Some fairly recent treaties give no room for such an intimation.[8]

(8)

§ 325. **Provisional Detention.** Numerous treaties provide for the detention of a fugitive on proper application prior to the formal requisition for surrender. Such provision is commonly followed by the declaration that the fugitive shall be released from custody, unless formal requisition together with the documentary proofs be made within a specified period after the date of arrest.[1] As

---

Concerning applications for requisition in connection with the extradition of fugitives from foreign countries, see documents in Hackworth, Dig., IV, 79–82.

Concerning the transmission of extradition papers, see statement in Hackworth, Dig., IV, 91.

[6] Benson *v.* McMahon, 127 U. S. 457; Grin *v.* Shine, 187 U. S. 181; *In re* Adutt, 55 Fed. 376; *In re* Orpen, 86 Fed. 760; *In re* Schlippenbach, 164 Fed. 783; *Ex parte* Charlton, 185 Fed. 880; Charlton *v.* Kelly, 229 U. S. 447; *Ex parte* Schorer, 197 Fed. 67; also Mr. Bayard, Secy. of State, to Mr. West, Feb. 16, 1886, MS. Notes to Great Britain, XX, 189, Moore, Dig., IV, 371.

[7] Mr. Frelinghuysen, Secy. of State, to Mr. Barca, May 3, 1882, MS. Notes to Spain, X, 204, Moore, Dig., IV, 370; Mr. Gresham, Secy. of State, to Prince Cantacuzene, Russian Minister, Dec. 13, 1893, MS. Notes to Russia, VIII, 32, Moore, Dig., IV, 372.

According to Art. XI of the treaty with Austria of Jan. 31, 1930, U. S. Treaty Vol. IV, 3946, 3950: "In the United States, the application for arrest and detention shall be addressed to the Secretary of State, who shall deliver a mandate certifying that the application is regularly made and requesting the competent authorities to take action thereon in conformity to statute. In case of urgency, the application for arrest and detention may be addressed directly to the competent magistrate in conformity to the statutes in force."

[8] See, for example, Art. X, treaty with Germany of July 12, 1930, U. S. Treaty Vol. IV, 4216, 4219.

See in Art. 12 of Harvard Draft Convention on Extradition provisions for requisition and supporting documents.

See also documents in Hackworth, Dig., IV, § 324.

§ 325. [1] See, for example, Art. XI, treaty with Austria of Jan. 31, 1930, U. S. Treaty Vol. IV, 3946, 3950; Art. XI, treaty with Greece of May 6, 1931, *id.*, 4290, 4293.

The conventions of the United States providing for the provisional detention of fugitives are not uniform. Thus, for example, Art. IV of that with Chile of April 17, 1900, declares that the proper course in the United States shall be "to apply to a judge or other magistrate authorized to issue warrants of arrest in extradition cases and present a complaint on oath, as provided by the statutes of the United States." Malloy's Treaties, I, 194. Others, such as Art. IV of the treaty with Cuba of April 6, 1904, provide that a complaint "shall be made by an agent" of the demanding government "before a judge or magistrate etc." Malloy's Treaties, I, 369. In certain other conventions, such as Art. IX of convention with Guatemala of February 27, 1903, it is declared that "each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody" for a specified period of time to await the production of documents upon which the claim for extradition is founded. Malloy's Treaties, I, 882. It is not believed that this provision is intended to contemplate the arrest of a fugitive in the United States save on a complaint under oath. Nevertheless, it is significant of what the political department believes to be a sufficient compliance with the existing law. When the United States agrees to procure the arrest of a fugitive, it would seem to undertake that its own officers shall, under certain contingencies, become the agents of the demanding government for the purpose of swearing to complaints.

According to Art. X of the treaty with Germany of July 12, 1930, in the case of a pro-

the relevant Act of Congress is considered applicable to such cases, it is the practice in the United States to make provisional arrests irrespective of the existence of appropriate treaty provisions with demanding countries.[2] While, therefore, a demanding State which had caused the provisional detention of a fugitive would lack the right to complain that its treaty was violated, if, upon its own failure to produce the requisition and necessary documentary proofs within the time agreed upon after the date of arrest, the fugitive were released, it is not believed that the fugitive himself would, under similar circumstances, be necessarily entitled to his discharge from custody, if it appeared that the effort to secure his extradition was still being prosecuted in good faith by the State from whose territory he had fled.[3]

It may be observed that the Harvard Draft Convention on Extradition,[4] as well as the Convention on Extradition concluded at Montevideo December 26, 1933, at the Seventh International Conference of American States,[5] imposed an obligation upon the State from which extradition is sought, to endeavor to effect the provisional apprehension and detention of the person who is a fugitive within its territory.[6]

---

visional arrest, if the formal requisition for surrender together with the prescribed documentary proofs is not made within the period of time specified in the treaty, "each government agrees that, upon the request of the other government, it will address to the competent authorities an application for the extension of the time thus limited so as to allow an additional month for the purposes indicated and nothing herein contained shall be construed to prevent the granting of such an application." (U. S. Treaty Vol. IV, 4216, 4219.)

According to Art. XIII of the treaty with Paraguay of March 26, 1913, U. S. Treaty Vol. III, 2787 (as in numerous other treaties to which the United States is a party), it is agreed that upon a request for the arrest, detention or extradition of fugitive criminals, the legal (or other specified) officers of the country where the proceedings are had "shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their or its power."

See case arising in 1911, where the Spanish Consul General at New York was unable to secure the provisional arrest and detention by a United States Commissioner of certain fugitives, under Art. XI of the existing extradition treaty, because of the inability of the complainant to file a sufficient complaint. For. Rel. 1911, 716–722. It may be observed that the Department of State inclined to the opinion that the United States was not to be regarded as having failed in its contractual obligations towards Spain by reason of the inability of the Consul General to make a complaint containing allegations declared by the courts of the United States to be essential.

[2] Mr. Bayard, Secy. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50, 53, Moore, Dig., IV, 382; Mr. Moore, Assist. Secy. of State, to the Attorney-General, May 26, 1898, 227 MS. Dom. Let. 651, Moore, Dig., IV, 383. See, also, Moore, Extradition, I, pp. 395–407; documents in Hackworth, Dig., IV, § 326.

[3] See comment of Prof. Moore, relative to a communication of Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 174, May 14, 1901, MS. Notes to Mexican Legation, X, 585, Moore, Dig., IV, 384; case of extradition of one H. Garcia, from Mexico to the United States, in 1910, involving the re-arrest of the accused after the expiration of the forty-day detention period, For. Rel. 1910, 723–729.

See, in this connection, Hough, J., in McNamara *v.* Henkel, 46 F. (2), 84, *citing* Yordi *v.* Nolte, 215 U. S. 227.

[4] Art. 16. See, also, Art. 15, and comment on both articles, *Am. J.*, XXIX, *Supplement*, 171–182.

[5] Art. 10, where it is provided: "The requesting State may ask, by any means of communication, the provisional or preventive detention of a person, if there is, at least, an order by some court for his detention and if the State at the same time offers to request extradition in due course. The State from which the extradition is sought will order the immediate arrest of the accused." (U. S. Treaty Vol. IV, 4800, 4803.)

[6] See Art. X, treaty with Mexico of Feb. 22, 1899, Malloy's Treaties, I, 1188; also, Fernandez *v.* Phillips, 268 U. S. 311.

(9)

INTERPRETATION

(*a*)

§ 326. **The General Principle.** Extradition treaties are to be interpreted by the same processes that are applicable to other international agreements. There is always involved the twofold inquiry: first, respecting the standard of interpretation; secondly, concerning the sources of interpretation.[1] In case of a dispute, proof that at the time of negotiation the contracting parties understood that a certain term had a particular signification, as they employed it, should be decisive.[2] Proof of such a fact may come from many places.[3]

When the domestic laws of a contracting State establish the procedure to be followed in extradition cases, in order to facilitate the operation of its treaties, it must be inferred that the requirements of those laws were had in contemplation at the time of negotiation, and that, in the absence of evidence to the contrary, there has been no attempt to nullify them by an undertaking inconsistent therewith. Thus, it is generally believed that the extradition treaties of the United States, however differing in scope and phraseology, are always concluded with reference to the existing Acts of Congress, and are, therefore, to be construed in harmony therewith.[4] Whether the design to be imputed to the United States in this regard as a contracting party is to be imputed also to a foreign contracting State is obviously a matter of fact. It would be difficult, however, to establish that the parties to an extradition treaty contemplated the disregard or modification of the requirements of the statutory law of either. Thus, the imputation to both of a design to defer to the requirements of the local law of the United States is not unreasonable and is a fair presumption not likely to be capable of rebuttal. Nevertheless, in case of a sharp divergence between the requirements of the Act of Congress and the statutory law of the foreign contracting State in relation to extradition, if the facts leading up to the final consummation of the treaty showed that neither party was aware of the condition of the statutory law of the other, a tribunal might find difficulty in concluding that the requirements of the statutory law of one party were necessarily to be deemed to be decisive of the character or content of its undertakings.

The Supreme Court of the United States is emphatic in its opinion that there should be imputed to the contracting parties the intention that a technical non-compliance with some formality of criminal procedure should not be allowed

§ 326. [1] See Interpretation of Treaties, *infra*, §§ 530–531; also, J. H. Wigmore, Law of Evidence, 3 ed., IX, § 2458.

[2] This is substantially the position taken by the United States as to the interpretation of its extradition treaty with Italy, of Feb. 8, 1868. See Moore, Extradition, I, § 141.

It may be observed that under certain circumstances a national court may be influenced in the task of interpretation by the position taken by the political department of its own government, even subsequent to the time of negotiation. See Charlton *v.* Kelly, 229 U. S. 447, 476. *Compare, Ex parte* Charlton, 185 Fed. 880, 886.

[3] See Factor *v.* Laubenheimer, 290 U. S. 276.

[4] Johnson *v.* Browne, 205 U. S. 309; United States *v.* Rauscher, 119 U. S. 407, 422, 423.

to stand in the way of the discharge of a contractual obligation expressed in an extradition treaty.[5]

Where a treaty lacks any specific reference to the matter, it is generally believed, as a reasonable rule of construction, that the agreement should take effect from the date of signature, and thus operate retroactively.[6]

(*b*)

§ 327. **Conviction *Par Contumace.*** The agreement expressed in numerous conventions [1] to deliver up persons convicted of crimes is interpreted both by the political and judicial departments of the United States as applicable solely to a fugitive whose conviction took place while he was in the custody of the demanding government.[2] In case the trial and conviction are subsequent to the escape of the accused, so that the judicial decree is *par contumace,* he is regarded as one merely charged with the commission of the crime. Hence in the

[5] Grin *v.* Shine, 187 U. S. 181, 184, where Brown, J., speaking for a unanimous Court declared: "In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign Powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, *viz.,* submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged."

See, also, Benson *v.* McMahon, 127 U. S. 457, 466–467; Wright *v.* Henkel, 190 U. S. 40, 57; Pierce *v.* Creecy, 210 U. S. 387, 405. Holmes, J., in the opinion of the Court in Glucksman *v.* Henkel, 221 U. S. 508, 512, declared: "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender." Also United States *v.* Greene, 146 Fed. 766.

[6] Moore, Extradition, I, § 86, *citing In re* Angelo de Giacomo, 12 Blatchf. 391, also Mr. Evarts, Secy. of State, to Mr. Seward, Jan. 30, 1880, MSS. Dom. Let.

See, also, Mr. Hay, Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 17, July 11, 1899, MS. Notes to Mexican Legation, X, 469, Moore, Dig., IV, 269, concerning date of taking effect of the extradition treaty with Mexico, Feb. 22, 1899.

MOST-FAVORED-NATION CLAUSE. It is generally believed that extradition treaties do not fall within the most-favored-nation clause. Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 148, 155; Moore, Dig., V, 311.

Concerning the denunciation by the United States of the extradition treaty with Greece, of May 6, 1931, see Termination of Treaties, Denunciation by One Party, *infra,* §546. It may be observed that Art. 1 of the treaty was made the subject of a common interpretation by a protocol signed Sept. 2, 1937, U. S. Executive Agreement Series, No. 114, and that as a result, the denunciation was withdrawn.

§ 327. [1] See, for example, Art. I of convention with Italy, March 23, 1868, Malloy's Treaties, I, 967; also Art. I of treaty with San Marino, Jan. 10, 1906, *id.,* II, 1598; Art. I, treaty with Great Britain of Dec. 22, 1931, U. S. Treaty Vol. IV, 4274.

[2] Mr. Blaine, Secy. of State, to the Minister of the Netherlands, May 6, 1889, relative to the Case of C. E. Plugge, Moore, Extradition, I, 133; telegram of the Acting Secretary of State, to Mr. Leishman, Ambassador to Turkey, Oct. 10, 1907, For. Rel. 1907, II, 1070. See, also, *Ex parte* Fudera, 162 Fed. 591, in which the learned judge cites Moore, Extradition, I, § 102; "Report of a Recent Extradition Case, *re* Macaluso," *Ill. Law R.,* VII, 237; *Ex parte* La Mantia, 206 Fed. 330.

judicial proceedings following the requisition for his surrender, such evidence of criminality must be offered as is required in any case of one charged with the commission of an extraditable offense.[3]

"To the extent that the treaties impose on the contracting States obligations to extradite, the asylum State is required to take all reasonable steps to prevent the escape of the fugitive prior to his actual surrender." [4]

(10)

§ 328. **Scope of Treaties with Respect to Areas Covered.** The extradition treaties of the United States commonly declare that a person whose surrender may be demanded shall be either charged with or convicted of an offense committed in the "jurisdiction" of one of the contracting parties, and who seeks an asylum or who may be found within the "territories" of the other.[1]

The term jurisdiction appears to have been employed to designate any place lawfully subject to the control for purposes of jurisdiction of the demanding State at the time when the act was committed, such as one of its own public vessels,[2] or one of its merchant vessels on the high seas,[3] or its own domain,[4] or

[3] That this requirement has not always been appreciated by demanding governments is apparent from *Ex parte* Fudera, 162 Fed. 591, and *Ex parte* La Mantia, 206 Fed. 330.

"The status of an escaped convict is not to be confused with that of one who has been convicted *in absentia*. The latter is treated, under the practice prevailing in the United States, merely as a person charged with the commission of a crime. The only material difference between the two classes of cases is that with respect to the evidence which the demanding government is obliged to submit. If the fugitive was before the court when convicted, a copy of the sentence is presented as evidence. If he was convicted *in absentia*, evidence of the character of that required in cases where the accused has not been tried must be presented." (Statement in Hackworth, Dig., IV, 52, quoting Article XI of the treaty of extradition concluded on August 1, 1924, between the United States and Finland, U. S. Treaty Vol. IV, 4125, 4127.)

See also the Secy. of State to the Minister of Greece, May 20, 1931, Hackworth, Dig., IV, 132.

[4] Statement in Hackworth, Dig., IV, 182. See documents cited *id.*, 182–184.

§ 328. [1] See, for example, Art. I, convention with France of Jan. 6, 1909, U. S. Treaty Vol. III, 2580; Art. I, treaty with Esthonia of Nov. 8, 1923, U. S. Treaty Vol. IV, 4098; Art. I, treaty with Greece of May 6, 1931, *id.*, 4290; Art. I, treaty with Great Britain of Dec. 22, 1931, *id.*, 4274.

Art. I of the treaty with Germany of July 12, 1930, U. S. Treaty Vol. IV, 4216, employs the term "territorial jurisdiction" as descriptive of the place where the offense was committed. In Art. I of the treaty with Turkey of Aug. 6, 1923, *id.*, 4663, reference is made to offenses "committed in territory subject to the jurisdiction of such Party."

[2] President Adams, to Mr. Pickering, Secy. of State, May 21, 1799, relative to the case of one Nash, alias Robbins, 8 John Adams's Works, 651, Moore, Dig., IV, 281–282; Moore, Extradition, I, §§ 105 and 106, concerning cases respectively of Kent and of Markham.

[3] Mr. Cushing, Atty. Gen., 8 Ops. Attys. Gen., 73, 84. See, also, Mr. Buchanan, Minister to England, to Mr. Marcy, Secy. of State, Aug. 3, 1855, 67 MS. Despatches from Great Britain, Moore, Dig., IV, 282.

In a case of concurrent jurisdiction such as, for example, where an offense was committed on a merchant vessel of the demanding State on the high seas, resulting in the death of the victim after the vessel reached a port of the State on which requisition was made, the latter would doubtless be justified in asserting itself the right to prosecute the offender, and in declining to surrender him, if its authorities saw fit to take such a course. Mr. Fish, Secy. of State, to Mr. Watson, Aug. 15, 1874, MS. Notes to Great Britain, XVI, 413, Moore, Dig., IV, 281. See, also, Sternaman *v.* Peck, 83 Fed. 690. *Compare* situation in case of Peter Lynch, Moore, Extradition, I, § 107.

See Wilheim Wolthusen *v.* Albert Otto Starl, Supreme Court, Argentine Republic, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 231, where the Argentine Court granted extradition to the United States of the accused who was indicted for larceny com-

foreign territory under its military occupation,[5] or a foreign merchant vessel within its ports or bays,[6] or a foreign aircraft (other than a public military aircraft) when superjacent to its territory or to an area under its control.[7] Conversely, an offense committed by the national of a demanding State in foreign territory not subject to its control does not appear to have been committed within the jurisdiction of that State even though it may assert the right to punish the offender for his misconduct as an act in defiance of its own command.[8]

In refusing in 1923, to surrender to Panama certain fugitives who had escaped into the Canal Zone from the justice of a third State, Secretary Hughes declared: "The extradition treaties of the United States uniformly contain mutual agreements to surrender persons accused of certain offenses committed 'within territory' of the other contracting party. In its practice of extradition the United States treats offenses as essentially local in their character and refuses to surrender fugitives unless it be shown that the crime was committed in the territory, actual or constructive, of the demanding government." [9] Again, when,

---

mitted on board of an American merchant vessel when moored within the harbor of Rio de Janeiro.

[4] See the decision of Lowell, J., in *In re* Taylor, 118 Fed. 196, and the comment thereon in Moore, Dig., IV, 280.

See *Ex parte* Davis, 54.F.(2) 723, where the accused struck a fatal blow in Mexico productive of the death of the victim in American territory, and was held for extradition to Mexico.

In Extradition of Mertz, 52 F.(2) 241, it was found that the accused whose extradition for murder was sought by Canada, committed the act productive of death in the State of Vermont rather than in the Dominion.

[5] Report of Jan. 9, 1900, Magoon's Reports, 523, Moore, Dig., IV, 285; letter of the Secy. of War, Aug. 17, 1900, quoted in Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 101, Sept. 4, 1900, MS. Notes to Mexican Legation, X, 537, Moore, Dig., IV, 285.

[6] *In re* Newman, 79 Fed. 622.

[7] According to Article I of the treaty with Germany of July 12, 1930, U. S. Treaty Vol. IV, 4217: "The words 'territorial jurisdiction' as used in this article mean territory, including territorial waters, belonging to or under the control of one of the High Contracting Parties, merchant vessels on and aircraft over the high seas and men of war wherever situated." No reference is made to the case where an offense is committed on a foreign private aircraft when in flight over the territory of the demanding State.

According to Art. 3 (c) of the Harvard Draft Convention on Extradition: "For the purposes of this article public and private vessels and aircraft of a State, which have its national character, are assimilated to a State's territory; but while a private vessel is within the territorial waters of another State, or while a private aircraft is on or over the land or territorial waters of another State, acts committed upon such vessel or aircraft are also committed within the territory of the other State."

[8] Williams, Atty. Gen., 14 Ops. Attys. Gen., 281, *re* Case of Carl Vogt; *compare In re* Stupp, 11 Blatchf. 124.

"It has been announced by the Department of State that an offense committed in a country where extraterritorial jurisdiction is exercised by foreign Powers is not committed within the jurisdiction of such Powers in the sense of the extradition treaties, so as to give the government of the country of which the offender is a citizen or subject the right to demand his surrender from the territory of the United States," Moore, Extradition, I, § 108, *quoting* Mr. Cadwalader, Acting Secy. of State, to Mr. Bingham, American Minister to Japan, Aug. 18, 1875, For. Rel. 1875, II, 821; also Moore, Extradition, I, § 109, and documents there cited.

An American citizen in the Mexican Consular Service who committed an offense while in the discharge of official duties in a European city (Berlin) was not deemed by the Department of State to have committed the offense in question within the jurisdiction of the United States. See Mr. Hughes, Secy. of State, to Mr. Téllez, Mexican Chargé d'Affaires *ad interim*, at Washington, March 11, 1924, Hackworth, Dig., II, 202.

[9] Communication to the Panamanian Minister at Washington, July 7, 1923, For. Rel. 1923,

in 1925, the Esthonian Government sought the aid of that of the United States in procuring the arrest and extradition of a certain fugitive from justice who was believed to be in American territory, Secretary Kellogg declared that he was unable to agree with the view "that since the offenses charged against T. were committed in the Esthonian Legation at London they were committed within the territorial jurisdiction of Esthonia." He added: "On the contrary, I am of the opinion that they were committed within the territorial jurisdiction of Great Britain." [10]

That an offense committed within the territory of a demanding State may not produce its final effect (such as the death of a victim of stabbing) until the victim enters the domain of another within which refuge is sought, does not defeat the right of the former to demand the surrender of the accused on account of the offense committed within its territory.[11]

Difficulties that may arise respecting the surrender of a fugitive from the justice of a demanding State when he is found on board of a public vessel,[12] or concerning his arrest when he is on board of a foreign merchant vessel in a port of the State upon which requisition is made,[13] are unrelated to the question whether the case falls within the scope of a particular treaty.

As the lessee of particular areas within foreign territory, the United States

---

II, 705, 706. In this particular case Secretary Hughes was far from admitting that, under the existing extradition convention with Panama, any obligation rested upon the United States to surrender the fugitives to that country when it did not appear that they had committed extraditable offenses within its domain. See same to same, Oct. 13, 1923, *id.*, 707.

[10] Communication from Mr. Kellogg, Secy. of State, to the Esthonian Minister at Washington, April 15, 1925. See also cases of Ignacio Moran, and of Alfonso Casasola, which were the subject of correspondence with the Mexican Government in 1924, and 1926, respectively, Hackworth, Dig., IV, 70.

Application to mandated territory of extradition treaties with the mandatory State is effected through numerous conventions between the United States and mandatory powers. See, for example, Art. 6 of treaty with France of Feb. 13, 1923, U. S. Treaty Vol. IV, 4154; Art. 6 of treaty with France of Feb. 13, 1923, *id.*, 4161; Art. 7 of treaty with France of April 4, 1924, *id.*, 4171; Art. 6 of treaty with Great Britain of Dec. 3, 1924, *id.*, 4229; Art. 6 of treaty with Great Britain of Feb. 10, 1925, *id.*, 4236; Art. 6 of treaty with Great Britain of Feb. 10, 1925, *id.*, 4240; Art. 6 of treaty with Great Britain of Feb. 10, 1925, *id.*, 4245; Art. II (3) of treaty with Japan of Feb. 11, 1922, *id.*, Vol. III, 2725; Art. 6 of treaty with Belgium of April 18, 1923 and Jan. 21, 1924, *id.*, Vol. IV, 3956.

[11] See *Ex parte* Davis, 54 F. (2d), 723, Hackworth, Dig., IV, 71.

[12] Mr. Blaine, Secy. of State, to Mr. Denby, Minister to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74, Moore, Dig., IV, 283.

[13] Mr. Lincoln, Minister to England, to Mr. Blaine, Secy. of State, No. 480, June 24, 1891, MS. Despatches from England, Moore, Dig., IV, 284.

DOMESTIC LEGISLATION FOR EXTRADITION TO FOREIGN TERRITORY UNDER MILITARY OCCUPATION. The enactment by a State of a law (such as the amendment by the Act of Congress of June 6, 1900, 31 Stat. 656, 18 U.S.C.A. § 652) providing for the arrest within its territory of persons found therein after having violated certain criminal laws within foreign territory occupied by or under the control of the State, and establishing appropriate procedure for the surrender of such persons to the military governor of such territory, is merely an assertion of a right of jurisdiction by the sovereign in actual control of the place of refuge, and that also where the crime was committed. It is not based upon treaty. Nor is it responsive to any international obligation. Such legislation is essentially domestic in character. See Neely *v.* Henkel, 180 U. S. 109, in which the Act of June 6, 1900, was applied to Cuba, while occupied by the United States. See, also, Mr. Hay to Mr. von Mumm, Oct. 25, 1899, For. Rel. 1899, 318–319, Moore, Dig., IV, 265–266.

The Panama Canal Act of August, 1912, extended the operation of the extradition treaties of the United States to the territory embraced within the Isthmian Canal Zone. 37 Stat. 560, 569.

has at times made agreement with the territorial sovereign contemplating reciprocal arrangement for the surrender of fugitives from justice escaping therefrom or taking refuge therein.[14]

(11)

§ 329. **Fugitives from Justice.** The treaties of the United States are deemed to apply "not only to persons seeking an asylum here professedly, but to such as may be found in the country." [1] The reasons which may induce offenders to enter are unimportant.[2] There is, however, a disposition on the part of the United States to make the requirement that the person found within its territories shall have entered therein after having been himself within the "jurisdiction" of the State demanding his surrender. Consequently, a person who while in the United States and without leaving its domain, participated in a conspiracy to commit murder in that of a foreign State, within whose territory the conspiracy was carried into effect, might not be regarded as liable to extradition upon the demand of that State.[3] Nevertheless, in 1932, the Circuit Court of Appeals for the Ninth Circuit was of opinion that the drawer of a draft at Chicago on a Canadian bank under false pretenses, after he had left Canada to which he did not subsequently return, who caused a bank in Canada to part with its money as a result of these false pretenses, was subject to extradition to Canada under a treaty charge of obtaining money by false pretenses.[4]

It is not unreasonable for a State to agree to extradite a person found within its territory who, regardless of his nationality, while therein commits an act producing a sinister effect within the territory, or upon the life of another State, and whom the latter may, without violating international law, duly penalize if he enters its domain.[5] International coöperation doubtless encourages the conclusion of agreements along such lines. This circumstance hardly suffices, however, to justify the imputation of such a design to contracting parties which have not in fact made appropriate arrangement in support of it. The bi-partite extradition treaties to which the United States is a party lack specific provisions in relation to the matter.

[14] See, for example, Art. IV of agreement with Cuba of July 2, 1903, providing for the lease to the United States by Cuba of land and water for naval or coaling stations in Guantanamo and Bahia Honda, Malloy's Treaties, I, 361; Arts. IV and VIII of agreement with Great Britain of March 27, 1941, for the use and operation of certain bases, Dept. of State Bulletin, March 29, 1941, 387, 388, and 390.

§ 329. [1] The language in the text is that employed in the caption of the opinion by Mr. Cushing, Atty. Gen., 8 Ops. Attys. Gen., 306, *cited* in Moore, Dig., IV, 286.

[2] See *In re* Ezeta, 62 Fed. 972, 978.

[3] Mr. Hay, Secy, of State, to Baron Fava, Italian Ambassador, No. 654, March 8, 1901, MS. Notes to Italian Legation, IX, 508, Moore, Dig., IV, 286.

See, however, the differing view taken in King *v.* Godfrey, L.R. [1923] 1 K.B. 24; Reg. *v.* Nillins, 53 L.J. (M.C.) 157.

[4] *Ex parte* Hammond, 59 F. (2) 683.

[5] See Art. 3 (a) and (b) of Harvard Draft Convention on Extradition; also comment thereon, *Am. J.*, XXIX, *Supplement*, 86–95.

d

## Some Aspects of Procedure in the United States

(1)

§ 330. **In General.** The design of the statutory law of the United States in relation to extradition has been to facilitate rather than hinder the operation of treaties which might be concluded.[1] The procedure established has proved to be fairly well adapted to such an end. Other contracting States have generally had little reason or disposition to make complaint.[2] Inasmuch as the surrender of fugitives found within American territory calls for a strict observance of the local law, the interpretation given it by the Department of State, as well as by the courts, deserves attention. What, therefore, they believe is required in normal situations confronting the representatives or agents of foreign demanding governments is here examined.[3]

The steps leading up to the surrender by the United States of a person whose extradition is sought by another State in pursuance of a treaty are two-fold in character. In the first place, they call for certain acts to be consummated normally through the diplomatic channel. These find illustration in the requisition by the demanding government,[4] in the presentation to the Department of State of documents in support of the demand for surrender,[5] and at times, in the request that the United States itself endeavor to procure the arrest of the fugi-

§ 330. [1] The legislation of the United States is embraced in Rev. Stat. §§ 5270–5279, constituting title LXVI, and in the Act of Aug. 3, 1882, Chap. 378, 22 Stat. 215, in the Act of June 6, 1900, Chap. 793, 31 Stat. 656, and in that of June 28, 1902, Chap. 1301, 32 Stat. 475. An Act of Feb. 6, 1905, Chap. 454, 33 Stat. 698, made application of the provisions of the Revised Statutes for the delivery of fugitives as between a foreign country and the Philippine Islands. An Act of March 22, 1934, 48 Stat. 454, provided for the arrest and removal of an American national or citizen through American judicial authority in a country where the United States exercises extraterritorial jurisdiction, to the United States or other territory governed, occupied or controlled by it, and provided also, in the converse situation, for the arrest and removal therefrom of a citizen or national of the United States to the jurisdiction of the appropriate officer vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction. The existing legislation is embraced in 18 U.S.C.A. §§ 651–668, including §§ 662b–662e (in relation to the Act of March 22, 1934).

[2] Declares Professor Moore: "Whether an extradition treaty requires legislation for its execution by the Government of the United States has become a speculative question, as general legislation on the subject is now provided. By the Constitution, however, treaties are supreme laws, and as such are directly binding upon the courts, as well as upon the executive; and while they may, by reason of the generality of their terms, or by reason of an express reservation, require to be supplemented by legislation, an act of the legislature is not necessary to give them legal force." (Dig., IV, 270.)

[3] See Memorandum Relative to Applications for the Extradition from Foreign Countries of Fugitives from Justice, Department of State, Sept., 1921, published in Appendix VI to Harvard Draft Convention on Extradition, *Am. J.*, XXIX, *Supplement*, 432.

[4] See Requisition. Mandate, *supra*, § 324.

[5] In practice, when supporting documents are submitted through the diplomatic channel to the Department of State prior to the institution of proceedings before a committing magistrate, they are commonly returned to the diplomatic representative of the demanding government in order to enable it to institute and prosecute those proceedings. It is understood, however, that an exception to this is found in the case of requisitions by Mexico, the documents being sent to the Attorney General for transmission to the appropriate United States Attorney who, under the existing treaty, really represents Mexico. See Art. XI of extradition treaty of Feb. 22, 1899, Malloy's Treaties, I, 1188.

tive.[6] In the second place, the statutory law of the United States calls for the institution of certain judicial proceedings involving the issuance of a warrant for the arrest of the fugitive, a hearing on the evidence of criminality with a view to determining whether it suffices to sustain the charge made under the appropriate treaty and whether also under the provisions thereof the accused is subject to extradition, and a certificate to the Secretary of State, known as an order of commitment, that these requirements have been complied with (if such be the case), as a means of enabling the latter to surrender the accused to the demanding government.[7] The presentation of the case before the magistrate is commonly made by some agency of the demanding government, rather than by officers of the United States; and the hearing on the evidence of criminality and on the application of the treaty assumes the form of a foreign public prosecution of the accused, at least to the extent of establishing that the magistrate should commit the fugitive to await extradition. These two paths of action at times seemingly converge. This is apparent when, for example, after an order of commitment and pending the surrender of the accused to the demanding government, attempt is made by judicial process to secure his release from custody as by habeas corpus proceedings, or when, as is rarely the case, the Secretary of State returns the record to the committing magistrate to permit his consideration of further evidence,[8] or when the Secretary of State challenges the soundness of an order of commitment and declines to surrender the fugitive.[9] It is apparent also when the Secretary of State is called upon, in pursuance of the terms of a particular treaty, to institute proceedings through the agency of the Department of Justice, to effect the arrest and detention of the accused.[10] It may be observed that in the normal situation the judicial proceedings embracing the decision requisite to enable the Secretary of State to issue his warrant for the surrender of the accused have no direct or necessary connection with the proceedings through the diplomatic channel by which the United States is made aware of the demand of the foreign State for the surrender of the fugitive from its justice.

"The surrender of an alleged fugitive to a foreign government is dependent, in the United States, upon the filing of an accusation against him in the foreign jurisdiction, charging an offense specified in the treaty of extradition."[11] Mr.

[6] See Provisional Detention, *supra*, § 325.

[7] § 5270 Rev. Stat., 18 U.S.C.A. § 651, provides that if upon a hearing, the magistrate "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

[8] See Executive Discretion. Obstacles to Surrender, *infra*, § 340.

[9] See, for example, Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador at Washington, Jan. 26, 1909, in relation to the case of Christian Rudovitz, Hackworth, Dig., IV, 49.

[10] See Fernandez *v.* Phillips, 268 U. S. 311.

[11] Statement in Hackworth, Dig., IV, 76, quoting *Ex parte* Davis, 54 F. (2d) 723, 727. See also other documents, *id.*, 76–77.

Hackworth has declared that "it happens not infrequently that an alleged fugitive from justice decides not to resist extradition and waives a hearing." [12]

(2)

§ 331. **Magistrates.** Any Federal judge, or commissioner authorized to do so by any of the courts of the United States, or a "judge of a court of record of general jurisdiction of any State," may upon the proper complaint made under oath, issue a warrant for arrest, and upon the apprehension of the fugitive, hear the evidence of criminality, and act as a committing magistrate.[1] Such magistrate is deemed to possess broadest powers with reference to the hearings had before him. Thus he may use his discretion with respect to the matter of adjournment; [2] and this appears in practice to be true whether the prisoner is arrested provisionally to await the arrival of a requisition and depositions,[3] or is held pursuant to a formal demand for surrender and following the receipt of documentary evidence. It is common to allow ample opportunity for the translation of depositions prepared in a foreign language. An English translation must be furnished by the demanding government or its agents.[4] According to the extradition treaty with Turkey of August 6, 1923, specified documents are to be drawn up in the form prescribed by the laws of the party demanding the extradition and are to be accompanied by a translation "in the language of the Party

[12] Hackworth, Dig., IV, 123, where he adds: "The procedure in the United States in such a situation has been quite uniformly, during recent years, for the extradition magistrate to commit the prisoner to await the action of the Secretary of State and to send to the latter the record of proceedings showing that a waiver was made, whereupon the Secretary of State issues a warrant of surrender. In such cases the demanding government is relieved from responsibility for introducing evidence in support of its application. In other cases, after the accused has waived a hearing, the demanding government has moved to dismiss the proceedings, and the accused is released from custody and returns voluntarily. However, in such cases there is no authority to compel return. In a few cases of record it appears that after the waiver the extradition magistrate or the marshal has surrendered the accused to an agent of the demanding government. However, there is no authority of law for surrender except by the Secretary of State." See also documents, *id.*, IV, 124–127.

§ 331. [1] Rev. Stat. § 5270, 18 U.S.C.A. § 651. The judge before whom the complaint is sworn need not make the warrant returnable to himself. Grin *v.* Shine, 187 U. S. 181, 187. See, also, Vaccaro *v.* Collier, 38 F. (2d) 862, 867; Bernstein *v.* Gross, 58 F. (2d), 154.

[2] Rice *v.* Ames, 180 U. S. 371; also Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 91.

[3] Mr. Bayard, Secy. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50, 53, Moore, Dig., IV, 382; *Comment* in Moore, Dig., IV, 384, on communication of Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 174, May 14, 1901, MS. Notes to Mexican Legation, X, 585.

[4] *In re* Henrich, 5 Blatchf. 414, 426; Mr. Conrad, Acting Atty. Gen., 21 Ops. Attys. Gen., 428; Mr. Hay, Secy. of State, to Mr. Wilde, No. 19, March 20, 1901, MS. Notes to Argentine Leg. VII, 74, *cited* in Moore, Dig., IV, 375.

Declared Mr. Adee, Acting Secy. of State, in a communication to Mr. Wilson, Ambassador to Mexico, Nov. 2, 1910: "The translation of papers in extradition cases is not a service which the surrendering Government should be called upon to perform. The demanding Government should furnish translations of the documents, and the cost of translation is one of the items of the expenses of extradition, to be borne by the Government seeking the extradition." (For. Rel. 1910, 733.)

Relative to the competency of the translation, see *Ex parte* Zentner, 188 Fed. 344, 347.

See Art. 5 of extradition convention of Dec. 26, 1933, concluded at the Seventh International Conference of American States, U. S. Treaty Vol. IV, 4802; Art. 19 of Harvard Draft Convention on Extradition.

from which the extradition is demanded or in French, certified to be in conformity with the original." [5]

The proceeding before the magistrate is not to be regarded:

> as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.[6]

Hence, as will be observed later, defensive testimony, by way of confession and avoidance, becomes immaterial. The inquiry before the magistrate is never whether there is justification for the conduct of the accused, but whether there is reason to believe that he has committed or has been convicted of the offense charged.[7]

While there is some authority indicating that in very exceptional cases, the prisoner may be released on bail,[8] the Supreme Court of the United States has declared that such release cannot be permitted after an order of commitment.[9]

[5] Art. VI, U. S. Treaty Vol. IV, 4665; also, Art. XI of treaty with Austria of Jan. 31, 1930, U. S. Treaty Vol. IV, 3950.

[6] Benson *v.* McMahon, 127 U. S. 457, 463; also Mr. Olney, Secy. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS. Dom. Let. 680, Moore, Dig., IV, 390. See, also, Charlton *v.* Kelly, 229 U. S. 447, 456; Brandeis, J., in Collins *v.* Loisel, 259 U. S. 309, 314–315.

[7] *Ex parte* Charlton, 185 Fed. 880, 888, where the learned judge declared: "The duty of the committing magistrate is confined to determining: First, whether such warrant or certificate has been issued; second, whether the offense charged against the accused is extraditable under the treaty; third, whether the person brought before him is the one accused of such crime; and, fourth, whether there is a probable cause for holding the accused for trial, the evidence in that respect to be such as, according to the law of the State in which the accused is apprehended, would be sufficient to commit him for trial."

[8] *In re* Mitchell, 171 Fed. 289. *Compare* well-considered editorial, "Bail in Extradition Cases," *Am. J.*, IV, 422.

See, also, *In re* Gannon, 27 F. (2) 362; United States *ex rel.* McNamara *v.* Henkel, 46 F. (2) 84; *In re* Klein, 46 F. (2) 85. Also documents in Hackworth, Dig., IV, 169–170.

[9] Wright *v.* Henkel, 190 U. S. 40, 62, where Chief Justice Fuller declared: "The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassments. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination."

Warrant and Arrest. — The following statement of law is taken from Moore on Extradition, I, chap. 13, supplemented by certain decisions rendered since its publication. The validity of the warrant of arrest depends upon the sufficiency of the complaint. The warrant must show the authority of the magistrate. If he is a United States Commissioner authorized to act in extradition cases, that fact must be set out. See *In re* Farez, 7 Blatchf. 345; *In re* Kelley, 25 Fed. 268. The warrant should set forth the offense charged in conformity with the words of the treaty relied upon; and it should in substance at least correspond with the allegations of the complaint. *In re* Macdonnell, 11 Blatchf. 79, 88; Castro *v.* De Uriarte, 16 Fed. 93. While a warrant of arrest may run throughout the United States, the accused must be taken before the proper magistrate in a State where the arrest is made, and nearest to that place. Pettit *v.* Walshe, 194 U. S. 205. Concerning the different practice prior thereto, see, particularly, Moore, Extradition, I, § 304 and cases there cited. The discharge of the prisoner by virtue of a writ of *habeas corpus* does not necessarily prevent his re-arrest pursuant to a

In any case it must be obvious that the exercise by a court of its power to accept bail as assurance of the presence of a prisoner at any desired time during a period when the requesting State is entitled to demand that he be held in custody, may, if he defaults and escapes custody, serve to place the requested State in a position where it is exposed to the charge of violating its obligations under an extradition treaty. American tribunals are, therefore, reluctant to exercise a power that may be productive of such a result.

(3)

COMPLAINT

(*a*)

§ 332. **Authority.** The complaint may be made by any one having the authority of the demanding government.[1] Complaints are commonly made by consular officers, whose official character removes the necessity of affirmative proof of authority.[2] When a person other than a diplomatic or consular repre-

---

new complaint and warrant. Opinion of Coffey, Acting Atty. Gen., 10 Ops. Attys. Gen., 501; also, especially, Collins *v.* Loisel, 262 U. S. 426. Nor would the discharge of the accused by reason of the insufficiency of the evidence, either by the committing magistrate or the Secretary of State operate as a bar, in case the demanding government should be able subsequently to present the necessary evidence of criminality. Opinion of Cushing, Atty. Gen., 6 Ops. Attys. Gen., 91; Opinion of Coffey, Acting Atty. Gen., 10 Ops. Attys. Gen., 501; *In re* Macdonnell, 11 Blatchf. 170; *In re* Kelly, 26 Fed. 852; *ex parte* Schorer, 195 Fed. 334.

Concerning the distinction between the illegality of the attempt to withdraw from the custody of the court by a second warrant of arrest, a prisoner held by a marshal after the issuance of a writ of *habeas corpus,* and the legality of the service of a second warrant issued pending the proceedings before the United States Commissioner, but served subsequent to the discharge of the prisoner by such commissioner, see *In re* Macdonnell, 11 Blatchf. 170, as *compared* with *In re* Farez, 7 Blatchf. 345; also *In re* Fergus, 30 Fed. 607.

Respecting the arrest by a United States marshal of the Salvadorean refugees on the U.S.S. *Bennington* in the harbor of San Francisco in 1894, see Moore, Dig., IV, 380, and documents there cited. As to the arrest, pursuant to the application of the British government, of a fugitive on a British vessel in an American port by American authorities, see *In re* Newman, 79 Fed. 622, Moore, Dig., IV, 381.

That an illegal arrest by State or municipal authorities does not necessarily affect the jurisdiction of the United States Commissioner, is emphasized in the case of Kelly *v.* Griffin, 241 U. S. 6.

See also documents in Hackworth, Dig., IV, § 321.

§ 332. [1] *In re* Kelly, 26 Fed. 852, 856; *In re* Ferrelle, 28 Fed. 878. In a *dictum* in Grin *v.* Shine, 187 U. S. 181, 193, a person qualified to make a complaint (when not "the official representative of the foreign government" such as its consular officer) is described as one "acting under the authority of the foreign government, having knowledge of the facts." It may be doubted whether, at least in practice, the possession of such knowledge is made the test of the capacity of the complainant when he is not the official representative of such government.

In view of a provision expressed in certain treaties, such as in Art. IX of that with Nicaragua of March 1, 1905, Malloy's Treaties, II, 1296, that "each government shall endeavor to procure the provisional arrest" of the fugitive under specified circumstances, it would appear to be the duty of the Government of the United States, if the treaty were properly invoked, to designate an official to make the complaint. Such an individual might be regarded as possessed of the authority of the demanding government. See Provisional Detention, *supra,* § 325.

See Fernandez *v.* Phillips, 268 U. S. 311, where a complaint was filed by an Assistant United States Attorney, upon information, by order of the Attorney General, upon request of the Secretary of State, enclosing a request for the extradition from the Mexican Government, and a copy of proceedings in a Mexican court finding that the crime was duly proved against the accused and ordering his arrest, many pages of evidence being appended.

[2] Grin *v.* Shine, 187 U. S. 181, 193.

sentative is the complainant, his authority to act in behalf of the demanding government must be shown at some stage of the judicial proceedings. It need not, however, be disclosed in the complaint itself.[3]

(*b*)

§ 333. **Information and Belief of Complainant.** A complaint under Section 5270 of the Revised Statutes need not be, and rarely is, sworn to by a person having actual knowledge of the facts set out therein. It suffices if it is based upon information and belief.[1] It must appear to the magistrate called upon to issue the warrant of arrest that the sources of the complainant's information and belief justify much more than suspicion of the truth of what is charged.[2] The complaint itself should indicate that the complainant has been informed through a responsible governmental channel that criminal proceedings have been instituted against the accused by the demanding government, and that a requisition for his surrender accompanied by the necessary depositions duly authenticated has been, or is about to be, made.[3] The absence of any statement in the complaint setting out the sources of information and belief, is not, however, regarded as a fatal defect if there has previously been brought to the knowledge of the magistrate as such, in a proceeding relating to the extradition of the accused, proof that the complainant had in fact solid grounds for the allegations which he made.[4] The statement in the complaint of sufficient sources of information and belief would seem to obviate the necessity of offering simultaneously proof as to the existence or nature of those sources, or of attaching to the complaint copies of documents which were in fact the foundation of the complainant's allegations.[5]

(*c*)

§ 334. **Form of Charge.** The complaint should set forth clearly and precisely the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused of the precise nature

[3] *In re* Kelly, 26 Fed. 852, 856; *In re* Ferrelle, 28 Fed. 878; *In re* Herres, 33 Fed. 165; *In re* Mineau, 45 Fed. 188.

§ 333. [1] Rice *v.* Ames, 180 U. S. 371, 375–376; Glucksman *v.* Henkel, 221 U. S. 508; see, also, *Ex parte* Dinehart, 188 Fed. 858; Powell *v.* United States, 206 Fed. 400. See, also, Fernandez *v.* Phillips, 268 U. S. 311.

[2] Rice *v.* Ames, 180 U. S. 371, 375–376.

[3] *Ex parte* Dinehart, 188 Fed. 858.

[4] Yordi *v.* Nolte, 215 U. S. 227, *affirming Ex parte* Yordi, 166 Fed. 921.

[5] Notwithstanding the *dicta* of the court in Rice *v.* Ames, 180 U. S. 371, 375–376, there is an absence of judicial authority to the effect that the Act of Congress requires the complainant to offer documentary proof of the sufficiency of the sources of his information and belief. The test of the authority of the magistrate to issue a warrant seems to be whether he himself has reason to believe that the complainant has just ground for making the complaint. The former has reason for such belief, when the complainant asserts under oath the existence of certain facts which if true would create in the mind of the complainant reasonable belief of the truth of the allegations set forth in the complaint. In numerous cases complaints have been upheld by the courts where the complainant has referred to the receipt of certain telegrams as the sources of his information and belief, without exhibiting to the magistrate such telegrams or certified copies thereof, either by attaching them to the complaint itself or by any other process. See, Castro *v.* De Uriarte, 12 Fed. 250; Yordi *v.* Nolte, 215 U. S. 227; Powell *v.* United States, 206 Fed. 400. See, also, Desmond *v.* Eggers, 18 F. (2) 503.

of the charge against him, it is sufficient.[1] The complaint should contain the allegation that the accused is a fugitive or that he is believed to be within the jurisdiction; also the allegation that the offense charged is within the treaty.[2]

(4)

EVIDENCE

(*a*)

**§ 335. Amount of Proof Required of Demanding Government.** According to Section 5270 of the Revised Statutes, if the committing magistrate deems the evidence sufficient to sustain the charge under the provisions of the treaty, he must certify the same; and by a common treaty provision, the amount of evidence necessary for commitment is to be tested by what the law of the place where the fugitive was found would justify for apprehension and commitment, if the crime were there committed.[1] Thus, in applying local requirements, it

§ 334. [1] The statement in the text is the language used by Coxe, J., in *Ex parte* Sternaman, 77 Fed. 595, 596, quoted with approval by Fuller, C. J., in Yordi *v.* Nolte, 215 U. S. 227, 230. See, also, Grin *v.* Shine, 187 U. S. 181, 189; *Ex parte* Zentner, 188 Fed. 344; For. Rel. 1911, 716–722, where a Consul General of Spain was unable to make a complaint containing the allegations commonly declared to be essential.

[2] The language of the text is that of the captions in Moore, Extradition, I, §§ 294 and 295.

§ 335. [1] See, for example, Art. 9, treaty with Great Britain of Dec. 22, 1931, U. S. Treaty Vol. IV, 4277.

"The place by whose law the question is to be tested is, if the fugitive is apprehended in the United States, the State in which he is found." Moore, Dig., IV, 391, *citing* Pettit *v.* Walshe, 194 U. S. 205. See, also, Mr. Fish, Secy. of State, to Mr. Westenberg, Dutch Minister, Nov. 12, 1873, For. Rel. 1874, 785, Moore, Extradition, I, § 337, p. 517, note 1. See, also, Vaccaro *v.* Collier, 38 F. (2) 862; United States *ex rel.* Di Stefano *v.* Moore, 46 F. (2) 308.

AUTHENTICATION OF DOCUMENTARY EVIDENCE OF THE DEMANDING GOVERNMENT. The documentary evidence of the demanding government is rendered admissible if authenticated according to the requirements of the existing law of the United States. § 5 of the Act of August 3, 1882, 22 Stat. 216, 18 U.S.C.A. § 655, provides: "In all cases where any deposition, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

To understand the purport of the foregoing provisions it is desirable to examine the full and careful discussion contained in Moore, Extradition, I, chap. XIV, and also the documents cited in Moore, Dig., IV, 384–388. By such process it becomes possible to grasp the significance of the several Acts of Congress from 1848 until 1882 and of the decisions declaratory of them. With respect to what constitutes compliance with the Act of 1882, attention is called to the following cases: *In re* Behrendt, 22 Fed. 699; *In re* McPhun, 24 Blatchf. 254; *In re* Krojanker, 44 Fed. 482; *In re* Breen, 73 Fed. 458; *Ex parte* Glaser, 176 Fed. 702; *In re* Luis Oteiza y Cortes, 136 U. S. 330; Grin *v.* Shine, 187 U. S. 181; Elias *v.* Ramirez, 215 U. S. 398; *In re* Lincoln, 228 Fed. 70. See, also, *Ex parte* Schorer, 197 Fed. 67; Collins *v.* Loisel, 259 U. S. 309, 312–314; Desmond *v.* Eggers, 18 F. (2) 503. See also documents in Hackworth, Dig., IV, § 329.

Respecting the authentication of extradition papers by consular officers, see Mr. Knox, Secy. of State, to the Mexican Ambassador, April 13, 1910, For. Rel. 1910, 731, 732, where it was declared: "This department is of the opinion, however, that a consular officer of the United States, resident in a foreign country in which the United States maintains a diplomatic mission, is not authorized under this statute to authenticate extradition papers, and that were the question raised before the courts the courts would so interpret it."

"Other countries do not generally require that there be attached to documentary evidence

was held by Judge Morrow in the Ezeta Case, that the evidence of criminality

> need not be such as would be required at the trial of the accused, but must be such evidence as ordinarily obtains at a preliminary examination, and amount to probable cause of his guilt; probable cause being such evidence of guilt as would furnish good reason to a cautious man, and warrant him in the belief that the person accused is guilty of the offense with which he is charged.[2]

This statement is believed to be declaratory of the principle involved, particularly in view of the nature of the proceedings before the committing magistrate.[3]

It may be observed that the furnishing of requisite proof that the person arrested is in fact the fugitive charged with crime and whose extradition is sought, may prove to be a difficult task.[4] Frequently the demanding government finds it impossible to send to the United States persons capable of making proof of identification; and such individuals are not to be found at the place where the hearing is had. For that reason it is believed that there should be embraced within the depositions, whenever possible, some means of establishing the identity between the person arrested and him whose surrender is demanded. A photograph of the latter, or a specimen of his handwriting or of his finger-print, may suffice for such a purpose. According to Article 9 of the treaty of extradition with Great Britain, of December 22, 1931, extradition shall take place

---

in support of requests for extradition to the United States a certificate comparable to that required to be attached by the principal American diplomatic or consular officer to documents in support of requests for extradition from the United States. However, it is necessary in all cases that each warrant, affidavit, deposition, or other paper included as documentary evidence be certified by a notary public or other officer authorized to make such a certification and that the certification be authenticated under the great seal of the particular State or under the seal of the Department of Justice, as the case may be, in order that the authentication by the Secretary of State may be attached." (Statement in Hackworth, Dig., IV, 148.)

[2] *In re* Ezeta, 62 Fed. 972, 982, *citing* Aaron Burr's Case, 1 Burr's Trial, 11; Munns *v.* Dupont, 3 Wash. C. C. 31; *In re* Farez, 7 Blatchf. 345; *In re* Wadge, 15 Fed. 864; 16 Fed. 332; *In re* Macdonnell, 11 Blatchf. 170; *In re* Behrendt, 22 Fed. 699; Benson *v.* McMahon, 127 U. S. 457, 462. See, also, opinion of Mr. Nelson, Atty. Gen., 4 Ops. Attys. Gen., 201, Moore, Dig., IV, 388; Moore, Extradition, I, §§ 337–340; Mr. Olney, Secy. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS Dom. Let. 680, Moore, Dig., IV, 390; *In re* Piaza, 133 Fed. 998; *In re* Glaser, 176 Fed. 702, 704.

Declared Mr. Hull, Secy. of State, on Nov. 5, 1933, in an instruction to the American Minister to Greece, in reference to the case of Samuel Insull, Sr., whose extradition was sought by the American Government: "Without going into the details of the decision, it is evident that the authorities attempted actually to try the case, instead of confining themselves to ascertaining whether the evidence submitted by the United States Government was sufficient to justify the fugitive's apprehension and commitment for trial." (Dept. of State Press Release, Nov. 5, 1933.) See, in this connection, "The Extradition Case of Samuel Insull, Sr., in relation to Greece," *Am. J.*, XXVIII, 307.

[3] Benson *v.* McMahon, 127 U. S. 457, 462–463.

See, also, Collins *v.* Loisel, 259 U. S. 309, 314–315; Fernandez *v.* Phillips, 268 U. S. 311; United States *ex rel.* Lo Pizzo *v.* Mathues, 36 F. (2) 565; United States *ex rel.* Klein *v.* Mulligan, 50 F. (2) 687, 688, where Swan, Circuit Judge, declared: "The authorities just cited also make clear that competent evidence to establish reasonable ground is not necessarily evidence sufficient to convict, nor only such as can pass technical rules governing the admissibility of evidence in criminal trials." Also, United States *ex rel.* Donnelly *v.* Mulligan, 76 F. (2) 511.

See also documents in Hackworth, Dig., IV, § 327.

[4] See, for example, *Ex parte* La Mantia, 206 Fed. 330, 332–333.

only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence was committed in the territory of such party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party which makes the requisition, and that the crime or offence of which he was convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.[5]

(*b*)

§ 336. **Defensive Testimony.** Pursuant to the provisions of Section Three of the Act of Congress of August 3, 1882,[1] a fugitive is regarded as entitled to call witnesses in his own behalf, and to testify himself, if he so desires.[2] The Supreme Court of the United States has, however, held that Section Five of the same Act of Congress respecting the admissibility of depositions when certified in the manner prescribed, is not applicable to depositions offered on the part of the accused, and that such documents when so authenticated are not admissible.[3]

In view of the nature and purpose of the inquiry before the committing magistrate, the evidence on the part of the accused should be directed to show that he did not commit the acts charged against him, or that the acts so charged did not constitute any extraditable offense,[4] or that he was not in fact the individual charged by the demanding government in its requisition as having committed the offenses productive of the request for surrender.[5] Thus, for example, he might be able to offer convincing testimony that an act of robbery laid at his door was, by reason of the attending circumstances, of a political character, thus rendering the actor outside of the scope of the treaty.[6] On the other hand, evidence to show justification or excuse for an act committed by the accused, being a matter of defense, should be reserved until the trial before the court of the demanding government, and hence excluded from the consideration of the committing magistrate.[7]

[5] U. S. Treaty Vol. IV, 4277. In application of this article, see Cleugh *v.* Strakosch, Feb. 1, 1940, 109 F. 2d 330.

See Art. 5 (*c*) of extradition convention of Dec. 26, 1933, concluded at the Seventh International Conference of American States, U. S. Treaty Vol. IV, 4802.

§ 336. [1] 22 Stat. 215, 18 U.S.C.A. § 656.

[2] *In re* Farez, 7 Blatchf. 345; *In re* Kelley, 25 Fed. 268. "The magistrate is not bound to adjourn proceedings to enable the accused to obtain evidence of an alibi." Moore, Dig., IV, 391, *citing In re* Wadge, 15 Fed. 864. Also Charlton *v.* Kelly, 229 U. S. 447.

[3] *In re* Luis Oteiza y Cortes, 136 U. S. 330, 336–337.

[4] In the case of Extradition of Mertz, 52 F. (2) 241, defensive testimony was admitted to establish that the act of the accused (productive of the death of an individual) was committed in Vermont rather than in Canada.

[5] It is not unreasonable for the accused to demand the privilege of showing lack of identity between himself and the person charged by the demanding government with the offenses which through the institution of extradition proceedings are laid at the door of the former.

See documents in Hackworth, Dig., IV, 154–155.

[6] This was successfully shown, for example, in the Rudovitz Case. See *supra*, § 316.

[7] *In re* Cienfuegos, 62 Fed. 972, 976. In *Ex parte* Charlton, 185 Fed. 880, 883–884, it was held that the question of the sanity of the accused at the time of the commission of the crime charged was a matter of defense and could only be interposed when he was put on

(*c*)

§ 337. **Scope of Inquiry in *Habeas Corpus* Proceedings.** None doubt that a writ of *habeas corpus* cannot perform the function of the office of a writ of error.[1] The precise scope of the inquiry to be made by the court issuing the writ in extradition cases was well stated by Mr. Justice Blatchford, when, as a District Judge in 1875, he announced the decision of the court in the case of *In re Stupp*. He declared:

> In full conformity with these views, the great purposes of the writ of *habeas corpus* can be maintained, as they must be. The Court issuing the writ must inquire and adjudge whether the Commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But, such Court is not to inquire whether the legal evidence of facts before the Commissioner was sufficient or insufficient to warrant his conclusion. Nor, if there was legal and competent evidence of facts before the Commissioner, for him to consider in making up his decision as to the criminality of the accused, is the Court, on *habeas corpus,* to hold the proceedings illegal and to discharge the prisoner because some other evidence was introduced which was not legal or competent, but was held to be so by the Commissioner and was considered by him on the question of fact, or because the Court, on a consideration of all the evidence which the Commissioner considered, would have come to a different conclusion, or because the Court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of fact from that at which the Commissioner arrived. In other words, the proper inquiry is to be limited to ascertaining whether the Commissioner had jurisdiction, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender, without any legal evidence.[2]

As the documentary evidence of the demanding government when authenticated according to the requirement of the Act of Congress is thereby made admissible, no question can be raised as to its competence.[3] Thus the objection that

---

trial; also that inquiry as to the question of his sanity subsequent to the commission of the offense could only be raised immediately before the trial, and then in the forum where the trial might be pending. The decision was affirmed in Charlton *v.* Kelley, 229 U. S. 447.

§ 337. [1] *In re* Luis Oteiza y Cortes, 136 U. S. 330; Ornelas *v.* Ruiz, 161 U. S. 502, 508; Charlton *v.* Kelly, 229 U. S. 447; Collins *v.* Johnston, 237 U. S. 502.

[2] 12 Blatchf. 501, 519. See, also, McNamara *v.* Henkel, 226 U. S. 520; Bingham *v.* Bradley, 241 U. S. 511; Fernandez *v.* Phillips, 268 U. S. 311; Bernstein *v.* Gross, 58 F. (2d) 154.

The foregoing and other cases and relevant documents are set forth in Hackworth, Dig., IV, § 335.

[3] "Where the certificate is sufficient it is conclusive as to the admissibility of the evidence." Moore, Extradition, I, § 330. See, also, Elias *v.* Ramirez, 215 U. S. 398, 409; Bingham *v.* Bradley, 241 U. S. 511, 517; *Ex parte* Schorer, 197 Fed. 67, 72; earlier cases cited in Moore, Extradition, I, 501, note 3; *In re* Lincoln, 228 Fed. 70. Also Collier *v.* Vaccaro, 51 F. (2d) 17; Collins *v.* Loisel, 259 U. S. 309.

certain testimony contained in the depositions is not under oath and hence not admissible would be without force.[4] As to the oral testimony of the demanding government, the question respecting competence cannot easily arise for the reason that the rules which have been developed for the purpose of preventing certain classes of testimony from being presented to a jury, have no application to a situation where there is no jury, and the judicial proceedings are in the nature of a preliminary examination rather than a trial.

The committing magistrate must have before him some legal as well as competent evidence on which to pass judgment — evidence both of the "criminality" of the accused, and of the fact that the offense charged against him is rendered extraditable by the treaty invoked. It thus becomes important in *habeas corpus* proceedings to observe whether the objection to the decision of the committing magistrate in holding the accused to await extradition, rests upon the contention that there was an entire absence of legal evidence, or upon the contention that the legal evidence received was in fact insufficient.

Every treaty of extradition establishes certain tests of the legality of the evidence to be furnished by the demanding government. These are derived from the nature and description of offenses made extraditable; and they point, moreover, to requirements touching the sufficiency of evidence to be submitted. For example, a treaty rendering extraditable the embezzlement of "public monies" by "public officers," would appear to lay down as a test of the legality of evidence essential to commitment and surrender the circumstance that it was probative of the fact that the funds embezzled were "public" and that the accused was a "public" official. In the absence of proof of those facts the magistrate would have before him no legal evidence on which to act.[5]

(i)

§ 338. **The Same.** It has been seen that the treaties almost always make the duty to surrender the accused dependent upon the production of evidence of criminality sufficient to justify his commitment for trial according to the law of the place where he is found. If, therefore, the testimony of the demanding government should be exclusively of a kind which, according to the law of the place where accused was found, was rendered insufficient to commit a person for trial, there would be no legal evidence before the magistrate. If he should commit the accused on such testimony, the objection on *habeas corpus* proceedings would not be directed primarily against the sufficiency of evidence but rather against the nature of what was rendered illegal by the test laid down in the treaty.[1]

[4] Elias *v.* Ramirez, 215 U. S. 398, 409.

[5] Art. II of convention with Italy of March 23, 1868, Malloy's Treaties, I, 967; also *Ex parte* Ronchi, 164 Fed. 288. See, also, in this connection, *Ex parte* La Page, 216 Fed. 256.

§ 338. [1] An exact application of this principle is found in *Ex parte* Fudera, 162 Fed. 591, where the only testimony of the demanding government relative to a murder charged against the accused was certain hearsay testimony contained in the depositions. The court issuing the writ of *habeas corpus* held that by the law of the place where the accused was found, such testimony would not suffice to commit a person to await trial, that the treaty requirement was, therefore, not complied with, and that hence the accused was entitled to be discharged. It is

Not until there is legal evidence before the committing magistrate can a question as to its sufficiency arise. If the order of commitment should be based upon an amount of legal evidence so slight that the decision would appear incomprehensible in the matter of reasoning, or necessarily attributable to passion or partiality, it is believed that the court issuing the writ of *habeas corpus* would be justified in discharging the prisoner. In such case the committing magistrate would not have had before him sufficient evidence on which he could justify any judgment other than one favorable to the accused. Hence, the case would resemble one where no legal evidence whatever was offered. Thus the principle frequently announced by the Supreme Court of the United States that the sufficiency of the legal and competent evidence before the committing magistrate cannot be reviewed on *habeas corpus* proceedings is believed to signify that the impropriety of review depends upon the existence of any evidence such as would warrant the commitment of the prisoner without subjecting the magistrate to the charge of partiality or mental weakness.[2]

---

believed, however, that while the learned judge may have correctly stated the law of the place where the accused was found in the case before him, such is not universally the law in the United States. Sometimes the local law does permit the commitment of a person for trial on hearsay testimony. See, for example, the case of McKinney *v.* United States, 199 Fed. 25, where there was nothing but hearsay testimony before the grand jury to support the charge of the indictment, and where a motion to quash the indictment was overruled, and the judgment of conviction affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. Where such is the law, hearsay testimony in the depositions becomes legal testimony so far as the treaty is concerned. *Compare In re* Ezeta, 62 Fed. 972, 988, respecting the case against General Bolanos.

Declared Mr. Clark, Under Secretary of State, to the sheriff of Webb County, Texas, Feb. 13, 1939: "The Department has concluded that the extradition cannot be granted for the reasons that the papers do not contain evidence as to their authentication which would render them admissible in this country and that the evidence concerning the connection of the accused with the crime charged is entirely hearsay in character." (Hackworth, Dig., IV., 139.)

*Cf.* United States *ex rel* Klein *v.* Mulligan, 50 F. (2d) 687, Hackworth, Dig., IV, 139.

[2] It is not believed that the Supreme Court of the United States has announced a different rule. In the case of Benson *v.* McMahon, 127 U. S. 457, 463, the Court declared that the inquiry was whether there was legal evidence before the commissioner "to justify him in exercising his power to commit the person accused to custody." After reviewing the testimony the court expressed the opinion that the commissioner "was justified." The decision was quoted with approval by Mr. Justice Blatchford in the case of *In re* Luis Oteiza y Cortes, 136 U. S. 330. In announcing the opinion of a unanimous court he stated that the decision of the commissioner could not be reviewed when he had before him "competent legal evidence on which to exercise his judgment." *Id.*, 334. The same language was employed by Chief Justice Fuller in the opinion of the Court in Ornelas *v.* Ruiz, 161 U. S. 502, 508, and the foregoing decisions were cited as authority. In Bryant *v.* United States, 167 U. S. 104, the opinion was delivered by Mr. Justice Brown, who declared that "the question before us is . . . whether there was any *legal evidence* at all upon which the commissioner could decide that there was evidence *sufficient* to justify his commitment for extradition." To explain his meaning the learned Justice quoted the language of Chief Justice Fuller in Ornelas *v.* Ruiz. In the case of Terlinden *v.* Ames, 184 U. S. 270, 278, Chief Justice Fuller cited Ornelas *v.* Ruiz, and Bryant *v.* United States, and quoted as declaratory of the principle involved, the statement of the court in the case of *In re* Stupp, 12 Blatchf. 501, 519, which is quoted in the text above. In Elias *v.* Ramirez, 215 U. S. 398, 409, the Court was of opinion that the evidence was such as to "justify" the order of the commissioner, and for that reason reversed the decision of the Supreme Court of Arizona which had declared that there was no competent legal evidence of the crime charged upon which the commissioner might have exercised his judgment. Likewise in McNamara *v.* Henkel, 226 U. S. 520, 524, the Supreme Court expressed the opinion that there was evidence before the Commissioner upon which he "was entitled to exercise his judgment." In Bingham *v.* Bradley, 241 U. S. 511, 516–517, Mr. Justice Pitney declared in the opinion of the Court, that the decision of the Commissioner, deeming

(5)

SURRENDER

(*a*)

§ 339. **An Executive Function.** According to Section 5272 of the Revised Statutes, the Secretary of State is empowered to order, under his hand and seal of office, the person committed to be delivered to the duly authorized agent of the demanding government; and such agent is authorized to hold the prisoner in custody and to take him to the territory of the demanding government pursuant to the treaty.[1] The action of a United States commissioner in delivering an accused person to a consul of a demanding government was on one occasion declared to have been "entirely without warrant of law."[2]

An Act of Congress of February 6, 1905, extending Sections 5270–5278 of the Revised Statutes so far as applicable, to the Philippine Islands, provided that when a person is committed therein for extradition, the order for delivery "shall be issued by the Governor of the Philippine Islands under his hand and seal of office and not by the Secretary of State."[3]

---

the evidence sufficient to sustain the charge against the accused, could not be reversed on *habeas corpus* "if he acted on competent and legal evidence." McNamara *v.* Henkel, 226 U. S. 520, was cited. He added that the evidence was "abundantly sufficient" to furnish reasonable ground for belief that the accused had committed an extraditable offense within the terms of the treaty. Such was also the conclusion of the Court in relation to the evidence in Collins *v.* Loisel, 259 U. S. 309, 317. Mr. Justice Holmes in his opinion in behalf of the Court in Fernandez *v.* Phillips, 268 U. S. 311, at 312, citing Benson *v.* McMahon, *In re* Luis Oteiza y Cortes, Bryant *v.* United States, and Elias *v.* Ramirez, declared: "*Habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."

Concerning the matter of re-arrest, see Collins *v.* Loisel, 262 U. S. 426; also documents in Hackworth, Dig., IV, § 332.

§ 339. [1] See, also, statement in Moore, Extradition, I, § 359; Moore, Dig., IV, 397. Concerning the nature of the power to surrender, see Terlinden *v.* Ames, 184 U. S. 270, 289, where it was declared by Chief Justice Fuller: "The warrant of surrender is issued by the Secretary of State as the representative of the President in Foreign Affairs."

§ 5272 R. S., 18 U.S.C.A. § 653, makes provision also for the recapture of the accused in case of his escape. See case of G. D. Reed where, following an exceptional procedure, the accused was, at the request of the Mexican Government, delivered to its agents, not at the place of detention in New Jersey, but in Texas, to which State he was transferred by American authorities. For. Rel. 1908, 597–601.

[2] Counselor Moore to Commissioner Crane, Jan. 23, 1914, Hackworth, Dig., IV, 187. See other documents *id.*, 188.

[3] 33 Stat. 698, 18 U.S.C.A. § 664.

According to the terms of a convention between the United States and the Netherlands of January 18, 1904, the provisions of the existing extradition treaty of June 2, 1887, were made applicable to the island possessions of the United States and to the colonies of the Netherlands. Art. III declared that: "Application for the surrender of a criminal may be made directly to the governor or chief magistrate of the island possession or colony in which the criminal has sought refuge, by the governor or chief magistrate of an island possession or colony of the other contracting party, Provided, That both island possessions or colonies are situated in Asia or both in America (including the West India Islands); in making such application, the intervention of a consular officer in such a possession or colony may be used, although no modification shall thereby be made in his capacity as a commercial agent. The aforesaid governors or chief magistrates shall have authority either to grant the extradition or to refer the matter for decision to the mother country. In all other cases, application for extradition shall be made through the diplomatic channel." Malloy's Treaties, II, 1272.

A naval commander cannot execute an extradition treaty under the laws of the United States or in conformity with its express stipulations.[4]

(*b*)

§ 340. **Executive Discretion. Obstacles to Surrender.** The Secretary of State exercises a revisory power in cases where the accused has been duly committed by a magistrate, and even when an order of commitment has been sustained on *habeas corpus*.[1] The sufficiency of the evidence is a question for the extradition magistrate, without whose certificate of criminality the Secretary of State cannot order the extradition of the accused.[2] It is believed, therefore, that the Secretary has no power to surrender a fugitive upon any charge other than one which has been heard before a magistrate and certified by him to be sustained by the evidence offered.[3] On the other hand, the Secretary of State is unwilling to consider evidence which was not produced before the committing magistrate, in behalf either of the accused or of the demanding government.[4]

---

Attention is called to Art. IX of the extradition treaty with Mexico of February 22, 1899, which permits, under certain circumstances, requisitions to be made by specified authorities of "frontier States or Territories." This Article is believed to contemplate the surrender also by such authorities. Malloy's Treaties, I, 1188. Respecting the operation of the treaty, see Mr. Adee, Acting Secy. of State to Mr. Foster, October 24, 1900, 248 MS. Dom. Let. 453, Moore, Dig., IV, 244. Also Art. XIII, treaty with France, Jan. 6, 1909, U. S. Treaty Vol. III, 2584.

See interesting provision of Art. 15 of extradition treaty with Great Britain of Dec. 22, 1931, U. S. Treaty Vol. IV, 4278, in relation to the possible surrender by the "Governor or chief authority" of territory of his Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India (mentioned in Art. 14). It is stated, however, that such Governor or chief authority may, instead of issuing a warrant for the surrender of the fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland. See, also, Arts. 16 and 17.

[4] Such was the language of Mr. Blaine, Secy. of State, in a communication to Mr. Denby, Minister to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74, 75, Moore, Dig., IV, 283, where it was also said: "No order of his, for instance, would legally take the place of the warrant of surrender, which can only be issued by the Secretary of State after due fulfilment of the precedent judicial requirements. The same course of reasoning applies to the powers of the United States minister to grant extradition in such a case. He has no such power, by statute or treaty. Neither has a consul."

§ 340. [1] Statement in Moore, Dig., IV, 399 *citing* Moore, Extradition, I, 551–556, *In re* Stupp. 11 Blatchf. 124; 14 Op. 281, *In re* Stupp, 12 Blatchf. 501. See, also, Mr. Bayard, Secy. of State, to Mr. West, April 15, 1886, MS. Notes to Great Britain, XX, 233, Moore, Dig., IV, 403.

[2] See 18 U.S.C.A. § 653. *Cf.* Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 217, cited in Moore, Dig., IV, 400.

[3] The language in the text is taken from a statement in Moore, Dig., IV, 400, based upon a communication of Mr. Blaine, Secy. of State, to Sir J. Pauncefote, British Minister, May 17, 1892, MS. Notes to Great Britain, XXI, 664.

[4] Mr. Hay, Secy. of State, to Messrs. Kingsford and Son, Feb. 25, 1899, 235 MS. Dom. Let. 152, Moore, Dig., IV, 400; J. R. Clark, Jr., in *Proceedings* of Am. Soc., III, 95, 114, *citing* Moore, Extradition, I, §§ 374–376; and the Pouren Case.

Mr. Root, Secy. of State, in a communication to Mr. Shields, United States Commissioner, Oct. 13, 1908, declared: "Counsel for Jan Janoff Pouren, whom, pursuant to the provisions of our treaty of extradition with Russia, you recently committed, upon various charges, for surrender to that Government, have submitted to the Secretary of State certain affidavits not offered before the Commissioner, which are intended to show that the offences with which Pouren is charged and for which he was committed for surrender are of a political character.

"It would appear that in submitting these affidavits to the Secretary of State, counsel for the accused acted under the mistaken belief that matters of this sort might be brought directly before the Executive even though forming no part of the record of the case. Such, however, is not the practice of this Department which has, in the past, repeatedly refused to consider

The Secretary of State may, in view of conflicting evidence on the question of the locus of the acts of the accused, and of all the circumstances of the particular case, conclude, after an order of commitment, that no obligation rests upon the nation to surrender the accused and accordingly, decline to issue a warrant for surrender.[5] There is said to be "no executive discretion" to surrender an accused person to a foreign government, unless that discretion is granted by law. "It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power." [6]

The executive discretion exercised by the Secretary of State has merely reference to the fact that he eventually becomes a judge of the question whether on the facts of the particular case a situation has arisen where due respect for the requirements of the relevant treaty impose a legal obligation upon the United States to surrender the accused to the demanding government.[7] It is said, however, that the "warrant of the Secretary of State for the surrender of a fugitive from justice is subject to the authority of the courts of the United States to hold the fugitive for trial on any charge which may be pending therein against him." [8]

---

evidence which did not form a part of the record submitted by the committing magistrate.

"The evidence which counsel now offer is clearly of a kind that should have been submitted to the committing magistrate at the hearing when full opportunity was afforded, in order that such portions of it as might be found proper should become a part of the record and so be considered by the Commissioner in reaching his determination to release or hold the fugitive. Since as to the merits the only defence offered by the accused in this case appears to be that the offences with which he is charged are political in their character, and since the mistaken action of his counsel practically deprived him of this defence at the hearing, and since, further, if the offences are in reality political, extradition for their commission is expressly prohibited by the treaty, it would seem that the plain intent of the treaty would fail if this evidence were now altogether excluded from consideration.

"The courts have in the past repeatedly held fugitives, against whom a demanding government failed in the first instance to establish an extraditable offence, to await the production of further evidence by the demanding government, and fugitives have afterwards been surrendered upon such evidence so produced. Fair play and justice would appear to require that the fugitive in a proper case should be given similar reasonable opportunities.

"It would seem, therefore, that the fugitive should not under these circumstances be punished for his counsel's mistake, but should be given a reasonable opportunity to present such further evidence as he may have bearing upon this question of political offence.

"The record is therefore returned to you to the end that you may reopen the case and permit the counsel for both parties to offer such further evidence as they may see fit relating to the question of political offences. Upon the receipt of the amended certified record and your decision thereon, the Secretary of State can determine whether the warrant of surrender should issue." (The author is indebted to the courtesy of Mr. Knox, Secy. of State, Jan. 17, 1913, for a copy of the foregoing communication.) See also documents in Hackworth, Dig., IV, 121–123.

[5] See, for example, Mr. Hull, Secy. of State, to the Canadian Minister, July 18, 1934, in the case of one Vaccaro, Hackworth, Dig., IV, 162.

[6] Valentine *v.* United States *ex rel.* Neidecker, 299 U. S. 5, 9.

[7] "It does not appear that the Secretary of State has ever decided to overrule an opinion of the Supreme Court of the United States in favor of the demanding government in an extradition proceeding. While it is undoubtedly true that the Secretary of State, acting for the President, could reach a conclusion contrary to that of the Supreme Court and act upon his own conclusion, it is admitted that he should refrain from so doing except for most urgent reasons. Memorandum of the Assistant to the Legal Adviser of the Department of State (Baker), Jan. 4, 1934." (Hackworth, Dig., IV, 189.)

[8] The language in the text is quoted from that in Moore, Dig., IV, 401, which is based upon the following authorities: Mr. Gresham, Secy. of State, to Mr. Romero, Mexican Minister, May 15, 1893, MS. Notes to Mexico, IX, 666; Mr. Adee, Acting Secy. of State, to

This signifies in substance that a decisive obstacle to surrender might still arise subsequent to a decision by the Secretary of State in favor of the demanding government.

In view of the provision of the Act of Congress permitting the accused to secure his release under specified circumstances, if within two calendar months after the order of commitment, he shall not have been conveyed out of the United States, any revisory action on the part of the Secretary of State must necessarily be taken without delay.[9] Hence, an appeal in behalf of the accused from the order of commitment should be made directly upon the entering thereof. Such proceedings, however important, are of an informal character. The filing of briefs by counsel is permitted. Should the Department of State deem it useful, opportunity for informal conference with the law officer of the Department may also be given. "It is not the practice of the Department to have formal hearings in extradition cases." [10]

Elsewhere are noted obstacles to surrender growing out of statutes of limitations, and some attributable to other causes.[11]

(*c*)

§ 341. **Transit.** No foreign State having custody of a person surrendered to it by any other, pursuant to extradition proceedings, may lawfully convey him through the territory of a third State or into a place subject to its exclusive control without its consent.[1] Hence, special arrangements have been made necessary for the return of a fugitive to the United States where a vessel conveying

---

Mr. Romero, July 3, 1893, *id.*, 676; Mr. Gresham to Mr. Romero, July 12, 1893, *id.*, 679; Mr. Rockhill, Acting Secy. of State, to Atty. Gen., July 21, 1896, 211 MS. Dom. Let. 440.

[9] Rev. Stat. § 5273, 18 U.S.C.A. § 654. Concerning it see *In re* Dawson, 101 Fed. 253; also, Mr. Olney, Secy. of State, to Messrs. Ingham & Hewitt, May 11, 1896, 210 MS. Dom. Let. 94, Moore, Dig., IV, 404; Mr. Adee, for Mr. Knox, Secy. of State, to the Ambassador of Austria-Hungary, Oct. 26, 1910, For. Rel. 1910, 78.

See also *In re* Normano, 7 F. Supp. 329; Mr. Fletcher, Acting Secy. of State, to Justice Whitmyer, June 21, 1921, Hackworth, Dig., IV, 208.

[10] Mr. Root, Secy. of State, to Mr. Hyde, of counsel for Christian Rudovitz, Dec. 15, 1908, file No. 16649/11; also Moore, Extradition, I, § 376.

See statement in Hackworth, Dig., IV, 171; also Memorandum by Mr. Anderson, Counselor of Dept. of State, for Mr. Knox, Secy. of State, Feb. 5, 1912, Hackworth, Dig., IV, 172.

[11] See Limitation of Trial by Lapse of Time. Certain Other Restrictions, *supra*, § 323.

Concerning various aspects of the removal of the accused from the country, see Hackworth, Dig., IV, § 341, and documents there cited.

§ 341. [1] Mr. Frelinghuysen, Secy. of State, to Mr. Brewster, Atty.-Gen., Jan. 2, 1885, 153 MS. Dom. Let. 549, Moore, Dig., IV, 406. "In consequence of the theory of English and American jurisprudence, regarding the territoriality of crime, no person can lawfully be arrested or held in custody in this country for a crime committed outside of its jurisdiction, except as provided by statute or by treaty." Memorandum to the Japanese Embassy, March 2, 1907, For. Rel. 1907, II, 759.

In 1908 the German Embassy objected to the action of the American Consul-General at Tangier in having put on board a German merchant vessel in 1906, for transportation to New York, without application for the assent of the German government, one Paul O. Stensland in the custody of two authorized agents of the United States, through whose efforts he had been arrested. For. Rel. 1908, 353–355.

See difficulties connected with the transit of a fugitive from justice in the course of extradition proceedings between Luxemburg and the United States, contained in For. Rel. 1910, 81–105.

him thereto was obliged to stop at an intermediate foreign port.[2] In the absence of an appropriate Act of Congress, or of a treaty, the executive authority of the United States is believed to lack the right to consent to transit through its territory, at least to the extent of preventing the courts from releasing the prisoner by a writ of *habeas corpus*.[3] In 1924, Secretary Hughes denied the request of the French Government that a permit be issued allowing the transit through the Panama Canal of an individual whose extradition to France had been granted by the Government of Chile.[4]

While the United States may at any time object to the transit through its domain of fugitives in the course of transportation between third States, the Department of State has declared that "this is a right which in practice is left to be invoked by the party in appropriate judicial proceedings and not by this government in the first instance." [5]

In numerous multi-partite conventions embracing that emanating from the Seventh International Conference of American States at Montevideo in 1933,[6] the obligation of a third State to permit transit through its territory is acknowledged.[7]

[2] Memorandum to the Japanese Embassy, For. Rel. 1907, II, 759, 760, referring also to the case in For. Rel. 1878, 151, where, in transit across the Isthmus of Panama, the fugitive was permitted to escape.

[3] Mr. Strobel, Third Assist. Secy. of State, to Mr. Coppinger, Consul at Toronto, No. 9, Feb. 20, 1894, 144 MS. Inst. Consuls, 411, Moore, Dig., IV, 406.

It may be observed that Art. XVI of the treaty with Mexico of Feb. 22, 1899, which makes provision for the transit of fugitives through the territories of the contracting parties, declares that the Article shall not take effect "until the Congress of the respective countries shall by law authorize such transit, and the issue of a warrant therefor." Malloy's Treaties, I, 1189.

See, also, treaty with Great Britain of May 18, 1908, in reference to reciprocal rights for the United States and Canada in the matters of conveyance of prisoners and wrecking and salvage. Malloy's Treaties, I, 830.

Art. XIV of the treaty with Salvador of April 18, 1911, makes provision for transit, where the fugitive is not a citizen of the country to be passed through, if the permission of the Secretary of State of the United States, or of the Minister for Foreign Relations of Salvador, as the case may be, is first obtained. U. S. Treaty Vol. III, 2825.

[4] Mr. Hughes, Secy. of State, to Mr. Jusserand, French Ambassador at Washington, Jan. 5, 1924, Hackworth, Dig., IV, 221.

[5] Memorandum to the Japanese Embassy, March 2, 1907, For. Rel. 1907, II, 759, 761. Also Mr. Hughes, Secy. of State, to Mr. Jusserand, French Ambassador at Washington, Jan. 5, 1924, Hackworth, Dig., IV, 221.

[6] Art. 18, U. S. Treaty Vol. IV, 4804. This article was not accepted by the United States.

[7] See, also, provisions of Art. 22 of Harvard Draft Convention on Extradition, and comment thereon, *Am. J.*, XXIX, *Supplement*, 209–213.

# TITLE D

## NATIONALITY

### 1

§ 342. **In General.**[1] Nationality refers to the relationship between a State and an individual which is such that the former may with reason regard the latter as owing allegiance to itself. The State may describe such a person as its na-

§ 342. [1] See, generally, Hackworth, Dig., III, Chap. IX; documents in Moore, Dig., III, 273–810; cases in Moore, Arbitrations, III, 2449–2655; papers relating to Expatriation, Naturalization and Change of Allegiance, For. Rel. 1873, II, 1185–1438; Report on Citizenship of the United States, Expatriation and Protection Abroad, by J. B. Scott, David J. Hill and Gaillard Hunt, Washington, 1906, House Doc. No. 326, 59 Cong., 2 Sess.; Frederick Van Dyne, Citizenship of the United States, Rochester, 1904; same author, Law of Naturalization of the United States, Washington, 1907; Compilation of Certain Departmental Circulars relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc., Department of State, 1925.

The Nationality Act of 1940, approved Oct. 14, 1940, 54 Stat. 1137, reveals the existing position of the United States with respect to nationality at birth, nationality through naturalization, loss of nationality and certain miscellaneous matters. See Richard W. Flournoy, "Revision of Nationality Laws of the United States," *Am. J.*, XXXIV, 36; also George S. Knight, "Nationality Act of 1940," *Foreign Service Journal,* Nov., 1940, 605. See also Report Proposing a Revision and Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., House Committee Print, 1939.

For bibliographies of the extensive literature relating to Nationality see Clunet, *Tables Générales,* I, 559–587, 915–919; Bonfils-Fauchille, 8 ed., § 417; E. M. Borchard, Diplomatic Protection, § 320; Carlo Bisocchi, *Acquisto e Perdita della Nazionalità,* Milan, 1907, xxiii–xxxiv; A. G. de Lapradelle, *De la Nationalité d'Origine,* Paris, 1893, ix–xvii.

See, also, Edouard de Germiny, *Les Conflits de Nationalités devant les Juridictions Internationales,* Paris, 1916; Ernest Lehr, *La Nationalité dans les Principaux États du Globe,* Paris, 1909; Sir Francis T. Piggott, Nationality, 2 parts, London, 1906; E. S. Zeballos, *La Nationalité (au point de vue de la législation comparée et du droit privé humain),* French translation by André Bosq, 3 vols., Paris, 1914–1916; E. Oudin, "*État des traités et lois relatifs à la Nationalité et la Naturalisation en vigueur dans les principaux pays au 15 avril* 1917," Clunet, XLIV, 817–841; W. W. Willoughby, "Citizenship and Allegiance in Constitutional and International Law," *Am. J.*, I, 914; D. O. McGovney, "American Citizenship," *Columbia Law R.,* XI, 231 and 326; Richard W. Flournoy, Jr., "Observations on the New German Law of Nationality," *Am. J.*, VIII, 477 (text of law printed in Supp., *Am. J.*, VIII, 217); T. H. Thiesing, "Dual Allegiance in the German Law of Nationality and American Citizenship," *Yale Law J.,* XXVII, 479.

Also, A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties with notes and bibliographies, edited by Richard W. Flournoy, Jr., and Manley O. Hudson, New York, 1929; League of Nations, Conference for the Codification of International Law, Bases of Discussion drawn up for the Conference by the Preparatory Committee, Vol. I. — Nationality (League of Nations Doc. No. C.73.M.38.1929.V.), Geneva, 1929; League of Nations Committee of Experts for the Progressive Codification of International Law, Questionnaire No. I, Jan. 29, 1926, Nationality, with Report of Sub-Committee, M. Rundstein, *Rapporteur,* supplementary notes and observations, and preliminary amended draft of a convention, *Am. J.*, XX, *Special Supplement,* July and October, 1926, 21–61; International Law Association, Thirty-Third Conference, Report of Committee on Nationality and Naturalization, adopted Sept. 9, 1924, *Proceedings,* 28–32, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 119; *L'Institut de Droit International,* Resolutions (Venice), 1896, *Annuaire,* XX, 289, and (Stockholm) 1928, *Annuaire,* XXXIV, 760, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 118 and 125, respectively; de Bustamante Code of Private International Law annexed to Final Act of Sixth International Conference of American States,

tional.[2] It will be seen that in the case of a minor child, the right to claim allegiance is oftentimes challenged or regarded as held in abeyance, when the sovereign does not also possess the power to exact allegiance. Hence the State may not be disposed or able to shield him from the conflicting although rea-

---

Havana, Feb. 20, 1928, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 114; Convention on Nationality adopted by the Seventh International Conference of American States, Dec. 26, 1933, Report of the Delegates of the United States of America to the Seventh International Conference of American States, Dept. of State, Conference Series, No. 19, 136; Draft Rules prepared by *L'Association de Droit International du Japon* and Japanese Branch, International Law Association, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 123; Harvard Research in International Law (Manley O. Hudson, Director), Convention on Nationality, Richard W. Flournoy, Jr., Reporter, with Comment by the Reporter, and Appendices, embracing among them texts of prior draft conventions and resolutions, and also Schedule of Points drawn up by League of Nations Preparatory Committee (League of Nations Doc. No. C.44.M.21.1928.V.), *Am. J.*, XXIII, *Special Supplement,* April, 1929, 13–129; League of Nations, Hague Conference for The Codification of International Law, 1930, Minutes of meetings of First Committee on Nationality (M. Politis, Chairman), March 17, 1930–April 8, 1930; Report to the Conference on behalf of the First Committee, by M. Guerrero, *Rapporteur,* April 9, 1930, Publications, League of Nations, V. Legal Questions, 1930. V. 8; *Am. J.*, XXIV, *Documents,* 215; Recommendations adopted by the First Committee, April 9, 1930; Final Act of The Conference, April 12, 1930, Publications, League of Nations, V. Legal Questions, 1930. V. 7; *Am. J.*, XXIV, *Documents,* 169; Convention on Certain Questions Relating to the Conflict of Nationality Laws, Publications, League of Nations, V. Legal Questions, 1930, V. 3; *Am. J.*, XXIV, *Documents,* 192; Protocol Relating to Military Obligations in Certain Cases of Double Nationality, Publications, League of Nations, V. Legal Questions, 1930. V. 4; *Am. J.*, XXIV, *Documents,* 201; Special Protocol Concerning Statelessness, Publications, League of Nations, V. Legal Questions, 1930. V. 6; *Am. J.*, XXIV, *Documents,* 211; and Protocol Relating to a Case of Statelessness, Publications, League of Nations, V. Legal Questions, 1930. V. 5; *Am. J.*, XXIV, *Documents,* 206.

See, also, R. W. Flournoy, Jr., "Nationality Convention, Protocols and Recommendations Adopted by The First Conference on the Codification of International Law," *Am. J.*, XXIV, 467; Manley O. Hudson, "The First Conference for the Codification of International Law," *id.*, 447; same writer, "The Hague Convention of 1930 and the Nationality of Women," *id.*, XXVII, 117; David Hunter Miller, "Nationality and Other Questions Discussed at The Hague," *Foreign Affairs,* VIII, 632; J. B. Scott, Observations on Nationality, with special reference to the Hague Convention of April 12th, 1930, New York, 1931.

Also, J. Basdevant, G. Jèze, N. Politis, *Conséquences au point de vue de la Nationalité de la Création d'un Nouvel État,* Paris, 1927; E. Bourbousson, *Traité général de la Nationalité dans les cinq parties du monde,* Paris, 1931; R. W. Flournoy, Jr., "The Need of Amending Existing Citizenship Laws," Dept. of State Press Releases, Feb. 20, 1932, 178; same writer, "Proposed Codification of our Chaotic Nationality Laws," *Amer. Bar Assoc. J.*, XX, 780; Luella Gettys, The Law of Citizenship in the United States, Chicago, 1934; Emile Giraud, "*Le Droit des Nationalités, sa valeur, son application,*" *Rev. Gén.*, XXXI, 17; E. J. Hover, "Derivative Citizenship in the United States," *Am. J.*, XXVIII, 255; Bernard Joseph, Nationality, Its Nature and Problems, London, 1929; D. O. McGovney, "Our Non-Citizen Nationals, Who Are They?" Legal Essays in tribute to Orrin Kip McMurray, University of California Press, 1935, 323; W. O. Molony, Nationality and the Peace Treaties, London, 1934; Lawrence Preuss, "International Law and Deprivation of Nationality," *Georgetown Law Journal,* XXIII, 250; Hermann Raschhofer, *Hauptprobleme des Nationalitätenrechts,* Stuttgart, 1931; Robert Redslob, *Le Principe des Nationalités,* Paris, 1930; D. V. Sandifer, "A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality," *Am. J.*, XXIX, 248; J. B. Scott, "Nationality: *Jus Soli* or *Jus Sanguinis*," *Am. J.*, XXIV, 58; C. Seckler-Hudson, Statelessness: with special reference to the United States, Washington, 1934; Marc Vichniac, "*Le Statut International des Apatrides,*" *Recueil des Cours,* 1933, I, 115.

[2] " 'Nationality' is the status of a natural person who is attached to a State by the tie of allegiance." (Harvard Draft convention on Nationality, Art. I, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 13.)

"For the purposes of this Act — (*a*) The term 'national' means a person owing permanent allegiance to a State. (*b*) The term 'national of the United States' means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien." (Section 101, Nationality Act of 1940.)

sonable demands of a foreign country of which also he has the nationality and within whose territory he may happen to be, so long as he remains therein.[3] In the case of an adult, it will be found that, if the claim to his allegiance has a just foundation, the retention of his national character, according to the view of the United States, does not depend upon his remaining within the physical control of his sovereign. Hence, until his expatriation, he may commonly invoke its aid to protect himself from the wrongful exactions of any other.[4]

In a broad sense international law limits the right of a State to impress its national character upon an individual, or to prevent that character from being lost or transferred. The freedom of action of each member of the family of nations is, however, wide. That circumstance, as well as the modern practice of States to declare by statute what persons are deemed to be nationals by birth, and how nationality may be acquired or lost, serves to obscure from view the final test of the reasonableness of the local law.[5]

Citizenship, as distinct from nationality, is a creature solely of domestic law.[6] It refers to rights which a State sees fit to confer upon certain individuals who are also its nationals. When the Constitution or laws of the United States declare that persons born under specified circumstances, or changing their allegiance by certain processes, shall become citizens of the United States, citizenship may be truly regarded as a source of American nationality; for the citizen of the United States is necessarily also a national of the United States. It is to be observed, however, that the United States claims as nationals numerous per-

[3] Double Allegiance, *infra*, § 372.

[4] It should be observed, however, that a State may cause the prolonged residence abroad of one who has acquired its nationality through naturalization to produce, under certain conditions, expatriation. See Residence of a Naturalized Citizen in a Foreign Country, *infra*, § 384.

[5] "Under international law the power of a State to confer its nationality is not unlimited." (Harvard Draft convention on Nationality, Art. II; also, comment by Mr. Flournoy, Reporter, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 26.)

According to Article I of The Hague Convention on Nationality of 1930: "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."

See Fourth Advisory Opinion, Permanent Court of International Justice, on the Nationality Decrees in Tunis and Morocco, Publications, Permanent Court of International Justice, Series B, No. 4, 24.

"The modern world is a world of individuals organized into or under States: it is just as much an international question to what State a man belongs as to what State a territory belongs. International rights and duties depend constantly on the nationality of individuals. To say that for questions of nationality there is no international law is to hand over a large mass of international matters to anarchy. But this is not to deny that according to international law, nationality as a general rule is left to be settled by municipal regulations." (Sir John Fischer Williams, "Denationalization," *Brit. Y.B.*, 1927, 45, 51.)

[6] "National character, in legal and diplomatic discussion, usually is denoted by the term 'citizenship.' In most cases this is not misleading, since citizenship is the great source of national character. It is not, however, the only source. A temporary national character may be derived from service as a seaman, and also, in matters of belligerency, from domicil, so that there may exist between one's citizenship and his national character, for certain purposes, an actual diversity. . . . Citizenship, strictly speaking, is a term of municipal law, and denotes the possession within the particular State of full civil and political rights, subject to special disqualifications, such as minority or sex. The conditions on which citizenship is acquired are regulated by municipal law." (Moore, Dig., III, 273.)

See excellent discussion by D. O. McGovney in "Our Non-Citizen Nationals, Who Are They?" Legal Essays in tribute to Orrin Kip McMurray, University of California Press, 1935, 323.

sons upon whom it has not conferred the status of citizens of the United States. International law is concerned with American citizenship only in so far as it emphasizes or establishes simultaneously American nationality.

It will be seen that in the process of conferring American citizenship upon persons who in the course of the enlargement of its territorial domain have become its nationals, the United States has been inclined to associate the yielding of that concession with the fact or circumstance that the beneficiaries were the inhabitants of areas that were by affirmative action incorporated into, or dealt with as though they were a part of, the so-called continental United States.[7]

Problems pertaining to nationality which have confronted the United States have in large degree concerned the interpretation and application of its statutory laws and, accordingly, have not necessarily called for the solution of questions of international law.[8] This has been the case although those laws have themselves marked the assertion by the United States of what it conceived to be its privileges as an independent State in claiming individuals as its nationals at birth or by naturalization, or in withdrawing its nationality from persons possessed of it. In the course of changing its statutory laws, and notably as a consequence of the enactment of the Nationality Act of 1940, the interpretations of its earlier statutes (even where they have not ceased to be applicable) have, and will increasingly, become matters of diminishing importance because of the gradually decreasing numbers of occasions for their use. There have been, and there remain serious questions of international law pertaining to nationality in the solution of which the United States must acknowledge a vital interest. These concern, for example, the matter of dual allegiance of adult persons, and certain effects of naturalization, as well as various kindred matters. In the final solution of them the United States must be expected to exert the full measure of its in-

[7] See some instances referred to *infra*, § 344.

The Legal Adviser of the Department of State has recently observed: "The terms *citizenship* and *nationality* refer to the status of the individual in his relationship to the State and are often used synonymously. The word *nationality*, however, has a broader meaning than the word *citizenship*. Likewise the terms *citizen* and *national* are frequently used interchangeably. But here again the latter term is broader in its scope than the former. The term citizen, in its general acceptation, is applicable only to a person who is endowed with full political and civil rights in the body politic of the State. The term *national* includes a *citizen* as well as a person who, though not a citizen, owes permanent allegiance to the State and is entitled to its protection, as, for example, natives of certain of the outlying possessions of the United States. It also includes legal entities, such as corporations. Certain classes of persons are described as "nationals but not citizens" by section 204 of the Nationality Act of 1940 (54 Stat. 1139).

"The terms *American citizen* and *American citizenship* have been in common use since the early days of the Republic, although they are not found in the Constitution of the United States. Originally, the terms were used as the equivalent of the terms *citizen of the United States* and *citizenship of the United States*, but, since the acquisition of the various outlying possessions having inhabitants who owe permanent allegiance to, but who are not citizens of, the United States within the meaning of the Constitution, the exact meaning of these terms, when used, is not always clear. The point is illustrated by various provisions of the act of March 2, 1907 (*ante*) relating to citizenship and expatriation, particularly by sections 2, 3, 4 and 5 wherein the terms *American, American citizen* and *American citizenship* were used without any clear indication as to whether they were intended to include persons who were nationals but not citizens of the United States." (Hackworth, Dig., III, 1–2.)

[8] The issues that have arisen have for the most part concerned the question not whether the statutory law was violative of international law, but rather whether, in contacts with particular individuals, aliens or nationals, the enactments of Congress have been respected.

fluence for the attainment of a result which in its opinion will serve to promote the cause of international justice.

## 2

## THE ACQUISITION OF AMERICAN NATIONALITY BY BIRTH

### a

### With or through Citizenship

#### (1)

#### By Right of Place. *Jure Soli*

##### (*a*)

§ 343. **The Common Law.** According to the common law every child born "within the ligeance or obedience" of the King of England was regarded as his subject.[1] It is not true that all persons born within the King's domain were within his "ligeance or obedience." Thus, the child of an alien enemy born in British territory within hostile military occupation was regarded as outside thereof; likewise the child born within the realm whose father was an alien, and, at the time of the birth of the child, a diplomatic officer accredited to the Crown by a foreign sovereign.[2] As these were, however, the only instances where persons born within the royal domain failed to acquire English nationality, it became natural to assert as a rule of law, commonly known as the *jus soli*, that, subject to these exceptions, a person became a natural-born subject by reason of his birth within the King's domain.[3]

##### (*b*)

§ 344. **The Laws of the United States.** It was not until 1866 that any law was enacted in the United States indicating what persons born within its territory of alien parentage were to be regarded as nationals. Up to that time the opinion was oftentimes expressed, judicially and otherwise, that the rule of the common law would be followed, in cases where the parents were temporarily residing in

§ 343. [1] Calvin's Case (1608), 7 Rep. 18 *a;* A. Cockburn, Nationality, 7; A. V. Dicey, Conflict of Laws, 2 ed., 166–167; also authorities cited in United States *v.* Wong Kim Ark, 169 U. S. 649, 656; "*De l'applicabilité du jus soli en matière de nationalité,*" by Richard Kleen, *Rev. Gén.,* III, 429. See J. B. Scott, "Nationality: *Jus Soli* or *Jus Sanguinis,*" *Am. J.,* XXIV, 58.

[2] Calvin's Case, 7 Rep. 18 *a;* A. V. Dicey, Conflict of Laws, 2 ed., 167–168. Also Story, J., in Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 155–156, 164.

[3] "The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown." A. V. Dicey, Conflict of Laws, 2 ed., 781.

the United States at the time of the birth of the child,[1] as well as in those where they were domiciled therein.[2] In 1866 the Civil Rights Act became a law. According to it all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were declared to be citizens of the United States.[3]

In 1868 the Fourteenth Amendment to the Constitution was declared ratified by a joint resolution of the Congress and was duly promulgated. It provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." [4]

Prior to 1897, the Supreme Court of the United States had made no decision respecting the application of the Fourteenth Amendment to a child born within the United States to foreign parents.[5] In that year, however, that Court, in the case of *United States* v. *Wong Kim Ark,* decided that a child born in the United States of parents of Chinese descent who, at the time of his birth, were subjects of the Emperor of China, and domiciled within the United States, where they were engaged in business, became, at the time of his birth, a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment.[6] In the opinion of the Court, delivered by Mr. Justice Gray, it was stated that the Amendment should be interpreted in the light of the common law; that the rule of that law respecting nationality by birth of a child of alien parents was in force in all of the English Colonies on the American continents until the Declaration of Independence, and continued to prevail thereafter in the United States; that there was little ground for the theory that at the time of the adoption of the Fourteenth Amendment, there was any settled and definite rule of international law generally recognized by civilized nations inconsistent with the ancient rule of citizenship by birth within the dominion; that in the forefront both of the Amendment and of the Civil Rights Act of 1866, the principle of

§ 344. [1] See, for example, Lynch *v.* Clarke, 1 Sandf. Ch. 583; Munro *v.* Merchant, 26 Barb. 383, 400.

[2] See Opinion of Attorney General Black, 9 Ops. Attys. Gen., 373; Opinion of Attorney General Bates, 10 Ops. Attys. Gen., 382; Report on Citizenship of the United States, 73; Van Dyne on Citizenship, 1–7.

Declared Mr. Justice Gray, in United States *v.* Wong Kim Ark, 169 U. S. 649, 674: "It is beyond doubt that, before the enactment of the Civil Rights Act of 1866 or the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States."

[3] Rev. Stat. § 1992; 14 Stat. 27.

[4] Section 1. See Mr. Bayard, Secy. of State, to Mr. de Bounder, Belgian Minister, April 2, 1888, For. Rel. 1888, I, 48, Moore, Dig., III, 277.

[5] The Court had, however, in the case of Elk *v.* Wilkins, 112 U. S. 94, expressed the opinion "that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States and 'subject to the jurisdiction thereof,' within the meaning of the clause in question." Gray, J., in United States *v.* Wong Kim Ark, 169 U. S. 649, 680.

[6] 169 U. S. 649.

citizenship by birth within the domain was reaffirmed in the most explicit and comprehensive terms; that notwithstanding considerations that might influence the legislative or executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens, there were none that could constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Amendment.[7]

There appears to be no reason to anticipate a different conclusion in case the alien parents of a child born in the United States are temporary sojourners, and not domiciled therein.[8] The Department of State is not, at the present time, in view of the decisions of the courts, disposed to raise a distinction based upon the domicile of the parents.[9] This attitude was emphasized in the case of one Ona Laszas who was born on Ellis Island, New York, to an alien mother who was at the time awaiting entry into the United States.[10]

By affirmative action the Congress has proceeded to incorporate certain outlying areas into the United States, and in the course of so doing, and as a consequence of such action, to clothe persons born therein with American citizenship. The treatment accorded to inhabitants of Alaska, Hawaii, Puerto Rico and the Virgin Islands of the United States is illustrative.[11]

[7] *Id.*, 653–654, 657, 658, 667, 675, 694. See, also, Benny *v.* O'Brien, 58 N. J. L. 36; *In re* Giovanna, 93 Fed. 659. Also *In re* Look Tin Sing, 21 Fed. 905, and other cases of children born in the United States of Chinese parentage, cited in Report on Citizenship of the United States, by Messrs. Scott, Hill and Hunt, 73–74. It is there observed that the question relative to citizenship of a child of parents who may not become citizens has "arisen in connection with alien parents who were domiciled in this country, and not in connection with persons here temporarily. Moreover, the cases found have always concerned the citizenship of persons of Chinese parentage."

[8] Inasmuch as the Supreme Court interprets the Fourteenth Amendment in the light of the common law, and as that law pays no heed to the domicile of the parents in determining the nationality of the child, it would be difficult if not impossible for that Tribunal to raise a distinction based upon the domicile of the former, without abandoning the theory of interpretation which has been adopted. Nor do the *dicta* contained in the opinion of the Court in United States *v.* Wong Kim Ark, 169 U. S. 649, at 682, 687 and 693, encourage belief that such a change of theory is to be anticipated.

*Cf.*, in this connection, Seventh Advisory Opinion of the Permanent Court of International Justice, of Sept. 15, 1923, on the question concerning the Acquisition of Polish Nationality, Publications, Permanent Court of International Justice, Series B, No. 7.

"Nationality of the United States is acquired by birth on a foreign merchant vessel in the territorial waters of the United States." (Hackworth, Dig., III, 10, quoting opinion from the Office of the Solicitor for the Dept. of State, Feb. 7, 1929.)

[9] Mr. Bacon, Acting Secy. of State, to Mr. Towle, American Ambassador at Berlin, March 8, 1907, For. Rel. 1907, I, 516; also Mr. Fish, Secy. of State, to Mr. Marsh, May 19, 1871, MS. Inst. Italy, I, 350, Moore, Dig., III, 278; Mr. Adee, Acting Secy. of State, to Mr. Iddings, Chargé at Rome, Aug. 8, 1901, For. Rel. 1901, 303. *Compare* Mr. Frelinghuysen, Secy. of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 394, Moore, Dig., III, 278; Mr. Bayard, Secy. of State, to Mr. Winchester, Minister to Switzerland, Nov. 28, 1885, For. Rel. 1885, 814, Moore, Dig., III, 279. Also, section 137 of the Consular Regulations of the United States, as of March, 1932.

[10] Hackworth, Dig., III, 10, footnote.

[11] "Alaska is an incorporated territory and the provisions of the Constitution of the United States and the laws relating to citizenship in the United States are applicable to it." (Hackworth, Dig., III, 117, quoting Rassmussen *v.* United States, 197 U. S. 516, 525, where it was said: "It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit.")

According to the Act of April 30, 1900, in relation to the Territory of Hawaii, Chap. 339, § 4, 31 Stat. 141, "all persons who were citizens of the Republic of Hawaii" on Aug. 12,

Applying the theory of the *jus soli,* the Nationality Act of 1940 declares that the following shall be nationals and citizens of the United States at birth:

(*a*) A person born in the United States, and subject to the jurisdiction thereof;

(*b*) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(*c*) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(*f*) A child of unknown parentage found in the United States, until shown not to have been born in the United States.[12]

---

1898, were declared to be "citizens of the United States and citizens of the Territory of Hawaii." See also joint resolution of the Congress, approved July 7, 1898, 30 Stat. 750, and President McKinley, Annual Message, Dec. 5, 1898, For. Rel. 1898, LVII.

In relation to Puerto Rico, see § 7, Act of April 12, 1900, 31 Stat. 79; § 5, Act of March 2, 1917, 39 Stat. 953, and as amended by insertion of § 5 *a* through Act of March 4, 1927, 44 Stat. 1418, and by addition of § 5 *b* through Act of June 27, 1934, 48 Stat. 1215. See also § 202 of the Nationality Act of 1940. As interpretative of the statutory law prior to 1930, see documents in Hackworth, Dig., III, 141–146.

In relation to the Virgin Islands of the United States, see § 1, Act of Feb. 25, 1927, 44 Stat. 1234, as amended by § 5 of the Act of June 28, 1932, 47 Stat. 336, 8 U.S.C.A. § 5 *b*. As interpretative of the statutory law, see documents in Hackworth, Dig., III, 150–154. See also § 201 of the Nationality Act of 1940.

[12] Sec. 201.

"(*d*) The term 'United States' when used in a geographical sense means the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States.

"(*e*) The term 'outlying possessions' means all territory, other than as specified in subsection (*d*), over which the United States exercises rights of sovereignty, except the Canal Zone." (Sec. 101.)

With respect to foundlings, so-called, see communication from the Department of State, March 16, 1929, to the Preparatory Committee of the Hague Conference for the Codification of International Law of 1930, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 153. Attention was called to the Case of Jules Michot, referred to in communication from Mr. Hay, Secy. of State, to Mr. Leishman, Minister to Switzerland, July 12, 1899, For. Rel. 1899, 760, Moore, Dig., III, 281. The Department added: "Cases of the kind included in the above heading would seem to be of special interest to States whose nationality laws are based wholly or principally upon *jus sanguinis,* rather than to States, such as the United States, whose nationality laws are based principally upon *jus soli.*"

See, also, Harvard Draft Convention on Nationality, Art. 7, and Comment, *Am. J.,* XXIII, *Special Supplement,* April, 1929, 34; also Art. 14 of the Convention on Nationality proposed at the Hague Conference of 1930, in which it is provided that "a child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known. A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found."

According to Article I of the Protocol Relating to a Certain Case of Statelessness, emanating from The Hague Conference of 1930, for the Codification of International Law: "In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State." (League of Nations Doc. No. C.226.M.113.1930.V, *Am. J.,* XXIV, *Documents,* 206.)

According to Section 202 of the Nationality Act of 1940: "All persons born in Puerto Rico on or after April 11, 1899, subject to the jurisdiction of the United States, residing on the effective date of this Act in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are hereby declared to be citizens of the United States."

It may be observed that the provisions quoted in paragraph (*b*) with reference to American Indians clarified the terms of the existing statutory law.[13]

Following the exceptions of the common law, a child born in the United States would not be regarded as acquiring American nationality by birth, either in case the alien father was a diplomatic officer accredited to the United States,[14] or in case the parents were alien enemies and the birth of the child occurred in a place under hostile military occupation.[15]

In March, 1929, the Department of State declared that it seemed quite clear that a person born in the United States to a foreign diplomatic officer does not come within the scope of the provision of the Fourteenth Amendment, "since he is not born subject to the jurisdiction of the United States," and that he cannot claim citizenship of the United States through the mere fact of birth within its territory.[16] There was no intimation that the father need be accredited to the United States.[17] It was added that with respect to children "born in the United States to officials of foreign Governments not enjoying diplomatic privileges — such as consuls, financial agents, members of a military or commercial mission, etc. — a different rule would seem to be applicable." Accordingly, it was said that since children born in the United States to foreign consuls and other foreign officials not entitled to diplomatic immunity must be regarded as born not only "within the United States," but also "subject to its jurisdiction," it seemed clear that they are native citizens of the United States.[18] This theory

[13] See Act of June 2, 1924, 43 Stat. 253, in which it was announced that "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

See Report Proposing a Revision and Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., House Committee Print, 8. Hackworth, Dig., III, 158.

See in this connection documents in Hackworth, Dig., III, 157–161, where is noted the Cayuga Indians Case, American-British Pecuniary Claims Arbitration, under agreement of Aug. 18, 1910, Nielsen's Report, 307, 309–310.

[14] Geofroy *v.* Riggs, 133 U. S. 258, 264; United States *v.* Wong Kim Ark, 169 U. S. 649, 682; Mr. Wharton, Acting Secy. of State, to Mr. Grant, Minister to Austria-Hungary, Aug. 10, 1891, For. Rel. 1891, 21, Moore, Dig., III, 281. See, also, Mr. Bacon, Acting Secy. of State, to Mr. White, American Chargé, Feb. 15, 1907, For. Rel. 1907, I, 38.

[15] United States *v.* Wong Kim Ark, 169 U. S. 649, 682; Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99. In the latter case (p. 156) Mr. Justice Story said, in the course of the opinion of the Court: "Thus, the children of enemies, born in a place within the dominions of another sovereign, then occupied by them, by conquest, are still aliens; but the children of the natives born during such temporary occupation by conquest, are, upon a re-conquest, or re-occupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy."

[16] Observations of March 16, 1929, submitted to Preparatory Committee of the Hague Conference for the Codification of International Law, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 152, 153.

[17] *Cf.* Comment by R. W. Flournoy, Jr., Reporter, on Article 5 of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 33, where it is said that "it is believed that, under the laws of most if not all States having *jus soli,* the nationality of such States is not conferred upon persons born within their territories to foreign diplomatic officers, at least to such as are accredited to those States. According to the dicta of courts, this seems to be the rule in Great Britain and the United States. Calvin's Case (1609) 7 Coke 1; United States v. Wong Kim Ark (1898) 169 U. S. 657."

[18] "It has long been the view of the Department that under this Constitutional provision (art. XIV) persons born in the United States of fathers who are in the employ of a foreign government other than in a diplomatic capacity are considered to be born subject

raises the question whether the granting by a multi-partite treaty, of diplomatic immunity to a non-diplomatic official, such as a judge of an international tribunal, would suffice to remove from the jurisdiction (in the constitutional sense) of the United States the child born to such an officer within its domain. The Supreme Court has not as yet had occasion to declare whether it is the diplomatic immunity or the diplomatic character possessed by the father which serves or suffices to withdraw the child at birth from the jurisdiction referred to in the Fourteenth Amendment. Both the Harvard Draft Convention on Nationality and The Hague Convention on Nationality of 1930, make the father's possession of diplomatic immunity the test of the inapplicability of the *jus soli* to the child.[19]

It has recently been declared that it has long been held by the Department of State that "children born in the United States whose fathers are accredited to the United States as diplomatic officers do not acquire nationality of the United States at birth."[20] It has, moreover, been held by the Department of State that "a child born in the United States to a diplomatic officer accredited to a third State acquired nationality of the United States at birth"; and also that "a child born in the United States after the termination of the father's mission and after his departure from the country, acquires nationality of the United States at birth."[21]

(2)

§ 345. **By Right of Blood. *Jure Sanguinis.*** By right of blood, *jure sanguinis,* a child at birth may acquire the nationality of a parent. Numerous States regard as their respective nationals children born to fathers who are their na-

---

to the jurisdiction of the United States and consequently acquire at birth the status of citizens of the United States. Consular officers and their assistants are not considered to have a diplomatic status although, by reason of their office, they may have by law, treaty and usage, privileges not accorded to other aliens." (Mr. Messersmith, Assist. Secy. of State, to the French Chargé d'Affaires *ad interim* at Washington, March 3, 1938, Hackworth, Dig., III, 14.)

[19] Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 13; Hague Convention on Nationality of 1930, Art. 12. It is here wisely provided that "the law of each State shall permit children of *consuls de carrière,* or of officials of foreign States charged with official missions by their Governments, to become divested, by repudiation or otherwise, of the nationality of the State in which they were born in any case in which on birth they acquired dual nationality, provided that they retain the nationality of their parents."

[20] Hackworth, Dig., III, 12, and rulings there cited.

[21] Hackworth, Dig., II, 12–13, citing opinion of the Legal Adviser, Dept. of State, Dec. 24, 1937, concerning the nationality status of Marie Françoise de Hedry; also memorandum of office of the Legal Adviser, Dept. of State, July 17, 1933, in reference to case of Mrs. Yung Kwai.

Mr. R. W. Flournoy of the Department of State, in a recent communication to the author, is inclined to the view that a child born in the United States, to the wife of a diplomatic officer accredited to a third State, if birth occurs when the parents are passing through the United States in the course of the father's official duties, should not be regarded as an individual born "subject to the jurisdiction," within the meaning of the Fourteenth Amendment to the Constitution, and should not, therefore, be regarded as a citizen of the United States at birth. See in this connection, generally, Lauterpacht's 5 ed. of Oppenheim, I, 629, footnote 2.

See Diplomatic Intercourse of States, The Rights and Duties of Ministers, Transit, *infra,* 432.

tionals when birth occurs abroad as well as within the national domain.[1] In some instances a like claim is made if either parent is a national of the claimant.[2] It has been noted by a careful observer that as tested by the existing laws of various States, the rule of *jus sanguinis* is of widespread extent, exerting "its paramount influence upon the law of nationality throughout the world."[3]

The United States conferred its citizenship as well as its nationality upon children born under the following conditions specified in the Act of Congress of February 2, 1855: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."[4]

The two conditions thus made essential to the acquisition of American citizenship by birth, in the case of a child born outside of the limits and jurisdiction

§ 345. [1] For a list of States whose laws are based (1) solely on *jus sanguinis*, (2) on *jus soli* and *jus sanguinis*, (3) principally on *jus sanguinis*, but also contain provisions based on *jus soli*, and (4) principally on *jus soli*, but also contain provisions based on *jus sanguinis*, see Appendix No. I to Comment on Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 80.

Declared R. W. Flournoy, Jr., Reporter, in his Comment on the Harvard Draft Convention on Nationality, of 1929: "From an examination of the nationality laws of the various States it appears that seventeen are based solely on *jus sanguinis*, two equally upon *jus soli* and *jus sanguinis*, twenty-five principally upon *jus sanguinis* but partly upon *jus soli*, and twenty-six principally upon *jus soli* and partly upon *jus sanguinis*. The nationality law of no country is based solely upon *jus soli*. A combination of the two systems is found in the laws of most countries. Therefore, it is apparent that international law has not adopted either system to the exclusion of the other. Nor does there seem to be in the existing international law any provision for preferring one to the other as the basis of nationality." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 29.)

[2] According to Decree 202 of Oct. 29, 1924, of the Union of Soviet Socialist Republics, § 4: "Persons of whom, at the moment of their birth, one parent was a citizen of the Union of Soviet Socialist Republics are deemed to be citizens of the constituent republics, and thereby of the Union of Soviet Socialist Republics, provided that either of the parents was at that moment in the territory of the Union of Soviet Socialist Republics." (Flournoy and Hudson, Nationality Laws, 1929, 512.) "Children born in Turkey or abroad of a Turkish father or a Turkish mother are Turkish citizens." (Art. 1 of Turkish law of May 28, 1928, Flournoy and Hudson, Nationality Laws, 1929, 570.) In so far as nationality at birth is derived through the nationality of the mother, the claim is strictly *jure sanguinis*, in a biological sense. Nevertheless, it should be observed that acquisition of nationality at birth, *jure sanguinis*, has heretofore usually had reference to a situation where the child at time of birth derived its nationality from the father rather than the mother.

[3] D. V. Sandifer, "A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality," *Am. J.*, XXIX, 248, 278. The same writer adds: "It may be observed finally with respect to these rules of *jus soli* and of *jus sanguinis* that of the seventy-nine countries, not including the United States, embraced in this study (self-governing dominions, and some colonies and protectorates having separate nationality laws being included), forty-eight follow principally the rule of *jus sanguinis*, twenty-nine that of *jus soli*, while in two, Siam and Venezuela, the laws are based equally on the two rules. It may be recalled also that *jus sanguinis* rules are insignificant in the laws of but eleven countries." (*Id.*, 256.)

[4] Rev. Stat. § 1993. See, also, Act of 1790, 1 Stat. 104, Chap. 3; Act of 1795, 1 Stat. 415, Chap. 20, Sec. 3; Act of 1802, 2 Stat. 155, Chap. 28, Sec. 4. Concerning this legislation see F. Van Dyne, Citizenship, 32–33; also Report on Citizenship of the United States, above cited, 77–78. It may here be observed that § 6 of the Act of March 2, 1907, 34 Stat. 1229, has reference to the retention, rather than the acquisition of citizenship by birth, of children born outside of the limits of the United States. Whether the Act of 1855, and the Statute of 25 Edw. III, providing for the right of inheritance by foreign-born children of English subjects, were declaratory of the common law, see United States *v.* Wong Kim Ark, 169 U. S. 649, 669–674.

of the United States, were the American citizenship of the father at the time of the birth of the child and the prior residence of the father at some time within the United States. In the judgment of the Supreme Court it did not suffice if such residence were not acquired until after the birth of the child.[5] Residence of the father in an American community in a foreign State, where he was subjected to the extraterritorial jurisdiction of the United States, was not regarded by the Department of State as compliance with the statutory requirement that he should have resided within the United States.[6]

Notwithstanding the character of certain previous rulings, the Legal Adviser's Office of the Department of State concluded in 1931 that children born abroad to parents who were naturalized citizens themselves subject to an unrebutted presumption of expatriation under Section 2 of the Act of March 2, 1907 (34 Stat. 1228) "must be regarded as having acquired citizenship at birth, if the Department is not prepared to hold that their fathers had lost such citizenship." [7]

It may be observed that the United States did not hesitate to accept the convention on Nationality of Women, concluded at the Seventh International Conference of American States, December 26, 1933, in which the parties declared, in Article 1, that "there shall be no distinction based on sex as regards nationality, in their legislation or in their practice." [8] According to an Act of Congress

[5] Weedin *v.* Chin Bow, 274 U. S. 657, in which it was held that a child born in China, of a father born in that country who did not become a resident within the United States until after the birth of the son, was not a citizen of the United States.

In 1873 Mr. Fish, Secy. of State, in a communication to Mr. Washburne, Minister to France, expressed the opinion that Congress intended that a distinction should be observed between the right of citizenship conferred by the Act of 1855, and the "full citizenship" of persons born within the territory and jurisdiction of the United States, inasmuch as "those declared to be citizens by the Act could not transmit citizenship to their children without having become residents within the United States; the heritable blood of citizenship was thus associated unmistakably with residence within the country, which was thus recognized as essential to full citizenship." For. Rel. 1873, I, 256, Moore, Dig., III, 282. See, also, Report on Citizenship, 77–78; F. Van Dyne, Citizenship of the United States, 32–34; Barzizas *v.* Hopkins, 2 Randolph, 276; State *v.* Adams, 45 Iowa, 99; Browne *v.* Dexter, 66 Calif. 89; Mr. Adee, Acting Secy. of State, to Mr. Terres, Sept. 25, 1893, MS. Inst. Haiti, III, 346, Moore, Dig., III, 287; Mr. Gresham, Secy. of State, to Captain Crowninshield, U.S.N., Feb. 23, 1895, For. Rel. 1895, I, 426, Moore, Dig., III, 284; Mr. Hill, Acting Secy. of State, to Mr. White, American Ambassador at Berlin, June 14, 1901, For. Rel. 1901, 179, Moore, Dig., III, 285; Case of Clemens Belling, For. Rel. 1907, II, 975; Mr. Bacon, Acting Secy. of State, to Mr. Merry, American Minister, May 11, 1907, *id.*, II, 920; decision of Court of Appeals of Santiago, Chile, enclosed in communication from Mr. Janes, American Chargé, to Mr. Root, Secy. of State, Aug. 5, 1907, For. Rel. 1907, I, 124.

[6] See circular instructions to American diplomatic and consular officers in China and Turkey, July 27, 1914, enclosing memorandum of Mr. Johnson, The Solicitor for the Dept. of State, June 22, 1914, in the matter of the citizenship of Ben Zion Lillienthal, Circulars Relating to Citizenship, 1916, 43.

"Persons born in countries in which the United States exercises extraterritorial jurisdiction, and whose fathers were also born in those countries and never resided in the United States before the persons' births, cannot claim American citizenship under section 1993 of the Revised Statutes." (Note 1 to section 137 of the Consular Regulations of the United States, as of March, 1932.) Also, Hackworth, Dig., III, 15.

See also other documents interpretative of Rev. Stat. § 1993, in Hackworth, Dig., III, 19–21.

[7] See case of Raffaele De Feo, Hackworth, Dig., III, 25. See also documents cited *id.*, footnote, 26.

Concerning previous rulings of the Department, see Hackworth, Dig., III, 25.

[8] U. S. Treaty Vol. IV, 4813, 4814. Note statement of reservation on signature, *id.*, 4814.

of May 24, 1934, the Act of February 2, 1855, set forth in section 1993 of the Revised Statutes, was amended to read as follows:

> Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.[9]

On July 21, 1934, Attorney General Cummings announced the opinion that a child born abroad subsequent to May 24, 1934, one of whose parents was a citizen of the United States and the other an alien, acquired American citizenship at birth; and thus such citizenship was subject to being divested if such child thereafter failed to comply with the two conditions described in the Act, which were to be regarded as conditions subsequent and not as conditions precedent.[10]

In respect to illegitimate children born abroad to American mothers, the Department of State declared in 1929, that while the opinion had been expressed that the former were born citizens of the United States, and American passports had been granted to them, the reference in the statutory law to children born abroad to American "fathers," and the absence of a reference to mothers, sufficed to prevent the American nationality of such children from being "regarded as having been established beyond question."[11] It was declared to be "fairly clear that illegitimate children born abroad of American fathers do not acquire American nationality at birth."[12] It was added, however, that "if such a child is legitimated under the law of the father's domicile through subsequent marriage of the parents and formal recognition by the father, he will be regarded thereafter as having the same nationality status which he would have had if he had been born in lawful wedlock."[13] Through consular regulations, the

[9] 48 Stat. 797. It should be noted that Section 1993, Revised Statutes, as amended by section 1, Act of May 1, 1934, was repealed by the Nationality Act of 1940.

[10] 38 Ops. Attys. Gen. 10.

[11] Communication of March 16, 1929, for the Preparatory Committee of The Hague Conference for the Codification of International Law of 1930, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 154. Van Dyne's "Citizenship of the United States," 49, was cited as the basis of the opinion.

[12] There was cited the case of Guyer *v.* Smith, 22 Md. 239.

[13] There was cited 32 Ops. Attys. Gen. 162.

See opinion of Mr. Lowndes, for the Commission, United States and Spanish Claims Commission (1871), Moore, Arbitrations, III, 2462, Moore, Dig., III, 285.

See Mr. Hay, Secy. of State, to Mr. Lardy, Swiss Chargé, Aug. 23, 1901, relative to the effect of the laws of New York legitimatizing a child by the marriage of its parents after its birth, in a case where the father was a citizen of New York, and the child born out of wedlock in France, to a French mother who was afterwards married to the father in Lon-

Department of State long announced that it considered that the citizenship of illegitimate children born abroad of unmarried American mothers followed that of their mother.[14] The modification of the Act of February 2, 1855, by that of May 24, 1934, served to render thereafter without value deductions to be derived from the form of the earlier law.

In interpreting the Act of 1855, even as amended by the Act of May 24, 1934, there would appear to be no ground for a distinction between children of native, and those of naturalized parents; [15] or between children of parents domiciled abroad, and those of parents temporarily residing abroad.[16]

That a State should not confer its nationality at birth, *jure sanguinis,* upon a person born in the territory of another State, beyond the second generation of persons born and continuously maintaining an habitual residence therein, if such person has the nationality of such other State, was a limitation that found appropriate acknowledgment in the Harvard Draft Convention on Nationality of 1929,[17] and was proposed by the American delegation in behalf of the United States at The Hague Conference of 1930.[18] It brought home to the family of nations the sharp inquiry whether invocation of the *jus sanguinis* might not be inequitable as the basis of a claim to the nationality of a person under the conditions which were proscribed.

Applying the theory of the *jus sanguinis,* the Nationality Act of 1940 declares that the following shall be citizens of the United States at birth:

---

don. For. Rel. 1901, 512, Moore, Dig., III, 285. See, also, opinion of Mr. Ames, Acting Atty. Gen., addressed to the Secy. of State, April 7, 1920, in the course of which it was said: "The State Department has for many years held that a child born out of wedlock which, by the laws of the father's domicile has been legitimated, is a citizen of the United States within the meaning of Revised Statutes, Section 1993. There appear to be no considerations of public policy which require a different decision." (32 Ops. Attys. Gen., 162, 164.)

According to Article 8 of the Harvard Draft Convention on Nationality: "When a person is born of parents who are of different nationalities and are not married to each other, the State of which the mother is a national shall regard the mother as standing in the place of the father for the purpose of determining the descent upon the basis of which its nationality (*jure sanguinis*) may be conferred; if such person is legitimated as the child of its father before it reaches the age of twenty-one years, the State of which the father is a national shall regard the person as the child of the father for that purpose, unless at the time of the legitimation the person is residing in the territory of the State of which the mother only is a national." (*Am. J.,* XXIII, *Special Supplement,* April, 1929, 14.)

[14] "For many years (at least following 1912) the Department of State uniformly held that an illegitimate child born abroad of an American mother acquired at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling was based upon section 1993 of the Revised Statutes, that section being construed to apply to an illegitimate child born abroad of an American mother on the ground that the mother in such a case stood in place of the father." (Hackworth, Dig., III, 27.)

[15] Oldtown *v.* Bangor, 58 Me. 353; Sasportas *v.* De La Motta, 10 Rich. Eq. 38.

[16] In United States *v.* Gordon, 5 Blatchf. 18, where a child was born to American parents on an American merchant vessel while at a foreign port in the course of a voyage, the Court laid stress on the fact that the American domicile of the parents remained unchanged. See, also, Albany *v.* Derby, 30 Vt. 718; Lynden *v.* Danville, 28 Vt. 809. *Compare* Ware *v.* Wisner, 50 Fed. 310.

[17] Art. 4, *Am. J.,* XXIII, *Special Supplement,* April, 1929, 13; also Comment of R. W. Flournoy, Jr., Reporter, *id.,* 30.

[18] It was proposed as an additional Basis of Discussion on March 18, 1930. There were added the words: "But this provision shall have no application to persons born in territory in which the State of the parents' nationality has extraterritorial jurisdiction or in territory of a protectorate of such State."

(*c*) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

(*d*) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States.

(*g*) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(*h*) The foregoing provisions of subsection (*g*) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.[19]

According to Section 203 of the same Act:

(*a*) Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.

(*b*) Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, employed by the Government of the United States or by the Panama Railroad Company, is declared to be a citizen of the United States.[20]

[19] Sec. 201.

[20] According to Sec. 205: "The provisions of section 201, subsections (*c*), (*d*), (*e*), and (*g*), and section 204, subsections (*a*) and (*b*) hereof, apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation or adjudication of a competent court.

b

## American Nationality as Not Derived from or Associated with Citizenship

(1)

§ 346. **By Right of Place. *Jure Soli.*** American territory embraces outlying areas with respect to the inhabitants of which neither the constitutional nor statutory law of the United States relative to the acquisition of American citizenship by birth is necessarily applicable.[1]

The United States may not unreasonably claim as its nationals persons born to foreign parents in any territory under its dominion, notwithstanding the fact that in a domestic or constitutional sense that territory is not regarded as a part of, or as incorporated within, the United States.[2] No requirement of international law would be a deterrent. Such a claim, regardless of the domicile or residence of the parents, would, moreover, be consistent with the policy applied in situations where American nationality at birth is derived through, or associated with, citizenship.[3] Congress has not, however, even in its enactment of 1940, seen fit to make so broad a claim. Hence the Department of State has, for example, long been reluctant to conclude that children born to alien parents in the Philippine Islands, subsequent to their cession to the United States, possessed American nationality.[4] It is to be noted that in the Philippine Independ-

---

"In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status."

"The Department of State held that a child born out of wedlock of a father having American nationality, which, by the laws of the father's domicil, had been legitimated, was a citizen of the United States within the meaning of section 1993 of the Revised Statutes. This was approved in an opinion of the Attorney General of April 7, 1920, in response to an inquiry from the Secretary of State." (Hackworth, Dig., III, 28, referring to 32 Ops. Attys. Gen. 162, 164.) "In an opinion of August 6, 1937, given in response to a request from the Secretary of State, the Attorney General held that the principle stated in the Attorney General's opinion of April 7, 1920, quoted *ante,* was applicable to the case of a child born abroad to an American father and an alien mother who was at the time married to an alien. Following the mother's divorce, the natural parents had been married and the child legitimated under the law of the father's domicil." (Hackworth, Dig., III, 29, referring to 39 Ops. Attys. Gen. No. 155.)

§ 346. [1] See statement by Mr. Hackworth, in his Digest, III, 115.

[2] Gonzales *v.* Williams, 192 U. S. 1; American Railroad of Porto Rico *v.* Didricksen, 227 U. S. 145.

[3] See opinion of Mr. Justice Gray, in United States *v.* Wong Kim Ark, 169 U. S. 649, 667.

[4] "The Department of State has long held that the common law rule of acquisition of nationality through the fact of birth within the territory and jurisdiction of a country, confirmed by the United States by the provisions of the Fourteenth Amendment to the Constitution with reference to persons born in the United States proper or in the Territory of Hawaii to which the Constitution of the United States was made specifically applicable by Section 5 of the Act of April 30, 1900, is not applicable to cases of persons born in the Philippine Islands, Puerto Rico, or other outlying possessions which are not incorporated territories of the United States. The principle of the common law rule of *jus soli* has been applied by specific but qualified legislation to Puerto Rico and unqualifiedly to the Virgin Islands of the United States. Such specific legislation confirms the view of the Department of State that neither the principle of the common law nor the Fourteenth Amendment to the Constitution is applicable to outlying territories of the United States unless specifically made applicable by treaty, the extension of the Constitutional provision, or specific legisla-

ence Act of March 24, 1934, it was declared that "all citizens of the Philippine Islands shall owe allegiance to the United States." [5] It was contemplated that pending the final and complete withdrawal of the sovereignty of the United States over those Islands the citizens thereof should continue to be deemed nationals of the United States.[6]

Where by process of collective nationalization the inhabitants of newly acquired areas have attained American nationality, their children thereafter born therein have not of course been regarded as the children of foreign parents.[7] Obviously, the political status of persons born within such areas prior to the change of sovereignty would depend upon the laws of the former sovereign; and these would have a bearing upon the solution of the question whether such persons, in the process of collective nationalization through treaty or otherwise, acquired American nationality when the United States succeeded to the sovereignty.[8]

In view of the special relation of the Canal Zone to the United States growing out of the treaty with Panama of November 18, 1903, it was appropriate that definite provision be made in the statutory law of the former respecting the acquisition of American nationality and citizenship at birth of persons born within the Zone after the treaty became effective. The Nationality Act of 1940 did so.[9]

The Nationality Act of 1940 declares that unless otherwise provided in Section 201 thereof, the following shall be nationals, but not citizens, of the United States at birth:

(*a*) A person born in an outlying possession of the United States of parents one of whom is a national but not a citizen, of the United States;

(*c*) A child of unknown parentage found in an outlying possession of the

---

tion of the Congress." (Mr. Messersmith, Assist. Secy. of State, to the Secy. of War, Jan. 15, 1938, Hackworth, Dig., III, 133, footnote.) See also Mr. Wilson, Acting Secy. of State, to the Secy. of War, April 5, 1912, *id.*, 132.

"The Department . . . is of the opinion that persons, born in the Canal Zone of alien parents since the annexation of the Zone do not thereby acquire American nationality." (Mr. Olds, Under Secy. of State, to the Consul at Kingston, March 17, 1927, Hackworth, Dig., III, 118.)

[5] 48 Stat. 456.

[6] "Citizens of the Philippine Islands are not aliens. They owe no allegiance to any foreign government, but do owe allegiance to the United States. Toyota *v.* United States, 268 U. S. 402, 410–412." (Roque Espiritu de la Ysla *v.* United States, 77 F. (2) 988, 989.)

[7] "Moreover, the Department has assumed that children born in such outlying possessions to parents who became American nationals through the annexation, themselves acquired at birth American nationality, but not citizenship of the United States." (Report Proposing a Revision and Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., House Committee Print, 1939, 15.)

[8] See, documents in Hackworth, Dig., III, 119–127, concerning the political relationship to Hawaii of persons born prior to 1898, and also between 1898 and April 30, 1900.

[9] Sec. 203 of the Nationality Act of 1940 was derived from the Act of August 4, 1937, 50 Stat. 558.

"While special acts determining the civil rights and political status of inhabitants of Puerto Rico and the Philippines have been passed by Congress, there has been no legislation concerning the civil rights, and political status of the inhabitants of Guam." (Hackworth, Dig., III, 154, quoting Consular Regulations of the United States, sec. 159, n. 25, March, 1933.)

See *supra*, § 345.

United States, until shown not to have been born in such outlying possession.[10]

(2)

§ 347. **By Right of Blood.** ***Jure Sanguinis.*** If the Act of Congress of February 2, 1855, as amended by that of May 24, 1934,[1] and the corresponding provisions of the Nationality Act of 1940, concerning the acquisition of American citizenship at birth of a child born outside the limits and outlying possessions of the United States, through the American citizenship of a parent, indicate generally the policy of the United States,[2] it is believed that a like claim, similarly restricted, might be made in the case of children born abroad to American nationals however lacking in citizenship of the United States. Of somewhat narrower scope is the claim that the Congress has recently made.[3] According to the Nationality Act of 1940, "a person born outside the United States and its outlying possessions of parents both of whom are nationals, but are not citizens, of the United States, and have resided in the United States or one of its outlying possessions prior to the birth of such person," is declared to be a national, but not a citizen, of the United States at birth.[4] It will be observed that the American nationality of *both* parents is made a prerequisite, as well as the residence of *both* within American territory prior to the birth of the child.[5]

(3)

§ 347A. **Analogies from** ***Jus Soli.*** A State may not unreasonably confer its nationality upon children of foreign parents born outside of its own territory in a place or physical entity closely associated with itself as under its constructive control, and not within the territory of any other State. Its ships on the high seas and its aircraft flying over those seas are instances.[1] A State may re-

[10] Section 204. Subsection (*a*) is believed to be a relatively narrow assertion or claim to nationality of an individual at birth by right of blood as well as by right of place. It is believed that the United States might well claim as a national at birth a person born within an outlying possession as defined in the Nationality Act of 1940, regardless of the nationality of either parent.

§ 347. [1] 48 Stat. 797.

[2] See Acquisition of American Citizenship by Right of Blood, *supra*, § 345.

[3] Declared Mr. Messersmith, Assist. Secy. of State, in a communication to the Governor of American Samoa, Oct. 13, 1937:

"Moreover, there is no law of the United States under which a person born in a foreign country to a father who has the status of a national, but not a citizen, of the United States, acquires American nationality at birth. It therefore seems necessary to hold that the person in question has not American nationality, but is an alien, who, as an immigrant, would be chargeable to the quota of New Zealand, the country of his birth." (Hackworth, Dig., III, 156, footnote.)

[4] Sec. 204.

[5] ". . . The Department has heretofore held that persons born outside of the Philippine Islands of parents who are citizens of the Philippine Islands by virtue of the treaty with Spain and subsequent acts of the Congress of the United States acquire the status of citizens of the Philippine Islands at birth. It also considers that persons born outside of the Philippine Islands of parents who were naturalized as citizens of the Philippine Islands acquire the status of citizens of the Philippine Islands at birth. Of course, a child born in the United States and subject to its jurisdiction acquires the status of a citizen of the United States regardless of the nationality status of its father." (Consular Regulations of the United States, sec. 159, n. 4 (*d*), March, 1933, Hackworth, Dig., III, 135.)

§ 347A. [1] See in this connection the statutory laws or decrees of Argentina, Great Britain

frain, however, as a matter of domestic policy, from availing itself of the privilege. The nature of its statutory law may betray a lack of interest in the matter. That of the United States as yet reveals unconcern.[2] Nevertheless, the theory responsible for the *jus soli* indicates a broad field within which a State may, without disrespect for the principles of international law, claim, for the purpose of conferring nationality at birth, the assimilation to its territory of various places outside thereof.

Whether that field embraces foreign territory temporarily under the control of the State making the claim, such as that of its enemy which it occupies as a belligerent, or a place within foreign territorial limits over which it exercises a broad measure of control, such as a vessel of war in foreign waters, or an embassy on foreign soil, presents a further question. Does the fact of control over the place where the birth of the child to its foreign parents occurs serve to justify the claim to assimilation? It is believed that it does. Whether the claim to assimilation is to become habitual and is to be invoked increasingly on such a theory may be expected to depend upon the extent to which States find it mutually desirable to make fullest use of analogies from the *jus soli* which the law of nations does not proscribe.[3] It should be observed, however, that the trend of practice in such a direction would serve to multiply instances of dual claims to the nationality of the same individual. No instance has been noted where the United States has sought to confer its nationality upon a child born to foreign parents in foreign territory.

c

§ 348. **The Attitude of International Tribunals.** The inquiry whether the *jus soli* or the *jus sanguinis* should be applied in determining nationality by birth has frequently confronted international courts of arbitration, where one State has demanded of another an indemnity in behalf of a person regarded by the latter as one of its own nationals. Neutral arbitrators have generally been agreed in requiring the sovereign which claimed an individual as a national to

---

and Northern Ireland, Guatemala, Honduras, Mexico, Salvador and Spain, in Flournoy and Hudson, Nationality Laws, 1929, 11, 62, 322, 334, 430, 519, and 530, respectively.

Also Harvard Draft Convention on Nationality, Art. 3, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 13, and comment thereon, *id.*, 27.

[2] Declared the Department of State in its communication of March 16, 1929, for the Preparatory Committee of The Hague Conference on the Codification of International Law: "It has not been decided by the courts whether the Government of the United States can by legislation or treaty change the status of American vessels in such a way as to assimilate them to the territory of the United States, thereby making the provisions of the Constitution quoted above applicable to persons born thereon of alien parents. While it might be possible, aside from the constitutional provision mentioned, to confer nationality of the United States by legislation or treaty upon persons born on American vessels of alien parents, the desirability of such legislation is not apparent." (League of Nations, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V., 155.)

See Lam Mow *v.* Nagle, 24 F. (2) 316, affirming *In re* Lam Mow, 19 F. (2) 951.

See also, Hackworth, Dig., III, 11.

[3] "Any person born on board a British ship whether in foreign territorial waters or not" is deemed to be a natural-born British subject. See Nationality and Status of Aliens Act, 1914, as amended by Acts of 1918 and 1922, Flournoy and Hudson, Nationality Laws, 1929, 61, 62.

adhere to a position consistent with its own municipal laws or constitution.[1] In case of a conflict of laws, the opinion seems to have prevailed that the law of the State in which the individual resided when the claim arose should govern the question of his allegiance in so far as it was derived from, or dependent upon, the fact of his nationality by birth.[2] It is to be observed, however, that the cases involving a conflict usually raise a question respecting the effect of certain acts or events alleged to have changed the nationality of the individual, rather than an issue concerning his nationality by birth.[3]

d

§ 348A. **Concerning Proof of Nationality.** No rule of international law as such points to the character or sufficiency of evidence that is to be deemed requisite in order to establish that an individual is possessed of the nationality which is claimed in his behalf.[1] The bare question of proof is not necessarily related to that growing out of competitive claims to the allegiance of a single individual, where, for reasons of law rather than on account of the character of the evidence, the demands of a claimant State are sought to be defeated by another.[2] Nor is the former question necessarily germane to the problem concerning the impeachment of the validity of the process, such as naturalization, through which the nationality of an individual may have been acquired.[3]

While the views of international tribunals have lacked uniformity, and have at times betrayed confusion of thought, the trend of judicial opinion within

§ 348. [1] Case of Joseph O. Wilson, No. 121, Spanish-American Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2454; Case of Heirs of H. S. Shreck *v.* Mexico, No. 768, Mexican-American Commission, Convention of July 4, 1868, *id.*, 2450; Claim of Maria Adelaide Morton, included in J. M. Ancira, attorney for numerous claimants *v.* Mexico, No. 374, before same Commission, *id.*, 2453; Stevenson's Case, respecting certain children born in Trinidad, British-Venezuelan Commission, 1903, Ralston's Report, 438, 454.

In the Corvaïa Case, before the Italian-Venezuelan Commission, 1903, it was held by Ralston, umpire, that the original claimant, born a subject of the Two Sicilies, and who had lost his citizenship according to the code of that country by accepting diplomatic employment from Venezuela, and who had never regained such citizenship, had taken steps which made it inequitable for the Italian Government subsequently to claim him as a subject as against Venezuela. *Id.*, 782, 808.

[2] Cases of L. Lavigne and F. Bister, Spanish-American Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2454; also Plumley, umpire, in Mathison's case, British-Venezuelan Commission, 1903, Ralston's Report, 429, 433–438.

See award of May 3, 1912, in the Canevaro Case between Italy and Peru, before the Permanent Court of Arbitration at the Hague, respecting the claim of Raphael Canevaro.

[3] Cases of Narcisa de Hammer and Amelia de Brissot, American-Venezuelan Commission, convention of Dec. 5, 1885, Moore, Arbitrations, 2456, 2461; Plumley, umpire, in Stevenson's Case, British-Venezuelan Commission, 1903, Ralston's Report, 438, 442–452; Ralston, umpire, in Brignone Case, Italian-Venezuelan Commission, 1903, *id.*, 710, 715; same umpire in Miliani case, before same Commission, *id.*, 754, 759–760; same umpire in Poggioli case, before same Commission, *id.*, 847, 866.

§ 348A. [1] See opinion of Nielsen, Commissioner, for the Commission, in Case of G. L. Solis, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol., 48.

See statement in Hackworth, Dig., III, 346.

[2] See, for example, Case of Carlos L. Oldenbourg (demurrer), Decisions and Opinions of Commissioners, convention of Nov. 19, 1926, Great Britain and the United Mexican States, 1931, 97.

[3] See Impeachment of Naturalization, Rule of International Action, *infra*, § 371.

fairly recent years has acknowledged that whatever is in fact probative of the possession or acquisition of a particular nationality by an individual may be accepted for what it is worth by an international forum, and may suffice to convince a tribunal as to the existence of the fact in support of which it is adduced.[4] Accordingly, a consular certificate of registration may well be deemed to constitute *prima facie* evidence of the nationality of the person registered.[5] The United States would regard its own certificate of naturalization as evidence of the American nationality of the person to whom it was issued, and as worthy of acceptation as evidence of the fact.[6] In an international tribunal, satisfaction of what the court regards as the requirements of logic, rather than conformity with the requirements of the local law concerning the admission of evidence obtaining within the territories of the particular States at variance, may be accepted as indicative of a sound test.[7]

[4] See discussion in Sandifer, Sections 46–48.

[5] See illuminating decision of Verzijl, President of Franco-Mexican Claims Commission under convention of Sept. 25, 1924, in Case of Georges Pinson, *Jurisprudence de la Commission Franco-Mexicaine des Réclamations* (1924–1932), Paris, 1933, 1, summarized in McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 194. See, also, Case of William A. Parker, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 35; Case of Daniel R. Archuleta, *id.*, 1929 Vol., 73; Case of Robert J. Lynch, (demurrer), Decisions and Opinions of Commissioners, convention of Nov. 19, 1926, Great Britain and the United Mexican States, 1931, 20; Case of Mrs. Virginia L. Cameron, *id.*, 33.

See, *contra,* Case of Carlos Klemp, interlocutory resolution, April 11, 1927, German-Mixed Claims Commission, *Am. J.*, XXIV, 610.

Among the earlier decisions see Case of Medina (which was, however, a case involving the impeachment of American naturalization), under convention, United States and Costa Rica, July 2, 1860, Moore, Arbitrations, III, 2583, 2586–2589; Case of Ramon Garay, under convention, United States and Mexico, of July 4, 1868, Moore, Arbitrations, III, 2532; Case of G. E. Brockway, under same convention, Moore, Arbitrations, III, 2534; Case of Thomas Gilmore, under convention, United States and Costa Rica, of July 2, 1860, Moore, Arbitrations, III, 2538–2539; Case of Miguel Esteves, under protocol, Spain and Venezuela, of April 2, 1903, Ralston's Report, 922; Case of Dona Tomasa Rocatallada y Escartin, *compromis,* France, Great Britain, Spain and Portugal, of July 31, 1913, for the arbitration of claims relating to religious property, J. B. Scott, Hague Court Reports, second series, 22; Case of Dona Magdalena Rodriguez y Laplana, under same *compromis, id.,* 24. It should be noted that Dr. Verzijl adverted to all of these cases in his decision in the Case of Georges Pinson referred to above.

[6] "This Department does not consider that a passport or a consular registration certificate is conclusive evidence of American nationality. It does, however, consider that when a passport or consular registration certificate is issued it should be assumed that the case has received very careful consideration on the part of the Department or a consular officer and that the nationality of the individual has been reasonably established." (Mr. Bundy, Assist. Secy. of State, to the Secy. of Labor, Aug. 18, 1931, Hackworth, Dig., III, 347.)

See Art. 17 of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement,* 1929, 58.

Concerning proof of naturalization, see *infra,* § 370.

[7] Declared the Commission under convention between the United States and Mexico, Sept. 8, 1923 (of which Dr. van Vollenhoven was Presiding Commissioner), in the Case of William A. Parker: "For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law,' or 'the general theory of law,' and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before

It may be observed that according to the Nationality Act of 1940, the Secretary of State is authorized to issue, in his discretion and in accordance with rules and regulations prescribed by him, a certificate of nationality for any person not a naturalized citizen of the United States who presents satisfactory evidence that he is an American national and that such certificate is needed for use in judicial or administrative proceedings of a foreign State. It is declared also that such certificate shall be solely for use in the case for which it was issued, and shall be transmitted by the Secretary of State through appropriate official channels to the judicial or administrative officers of the foreign State in which it is to be used.[8]

Both the Department of State and international commissions have under certain circumstances been disposed to accept some forms of so-called secondary evidence as a means of enabling the individual concerned to establish the place of his birth, or of his nationality at a particular time.[9] The Supreme Court of

---

this Commission with the view of discovering the whole truth with respect to each claim submitted." (Opinions of Commissioners, 1927 Vol., 35, 38.)

See, also, opinion of Nielsen, Commissioner, in Case of G. L. Solis, under same convention, 1929 Vol., 48; opinion of Nielsen, Commissioner in Case of Naomi Russell, Opinions of Commissioners, Special Claims Convention of Sept. 10, 1923, between the United States and Mexico, 1931 Vol., 44. *Cf.* opinion of Gonzáles Roa, Commissioner, in same case, *id.*, 97, 110.

[8] Sec. 502.

According to Sec. 503 of the Nationality Act of 1940: "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided."

[9] Declared Mr. Grew, Under Secy. of State, to the Atty. Gen., April 29, 1925: "In cases coming before this Department involving the question of citizenship by birth in the United States where the person in question is unable to submit a birth certificate or a certified copy of a birth record, the Department accepts, as evidence of birth in the United States, baptismal certificates or the affidavits of attending physicians, midwives, nurses, or of parents or relatives or of other persons who are in a position to testify regarding the date and place of the birth of the person in question." (Hackworth, Dig., III, 348.)

Declared Nielsen, Commissioner, in his opinion for the Commission, in the case of Archuleta *v.* United Mexican States, American-Mexican Claims Commission, under convention of Sept. 8, 1923 (as extended): "There is no reason why the Commission should question the American nationality of the deceased in the absence of evidence to rebut the evidence submitted to prove his nationality. There is evidence in the record that the deceased was born in the United States. Furthermore, there is pertinent evidence that he occupied important legislative offices in the State of Colorado which evidently he could not have lawfully held had he been an alien. Considerable weight has been given to evidence of this kind by courts of the United States and by international tribunals." (Opinions of Commissioners, 1929 Vol., 73, 75, quoted in Hackworth, Dig., III, 348.)

the United States has declared that citizenship is a privilege not due of common right, and has significantly observed that "one who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good." [10]

3

§ 349. **Acquisition of Nationality by Revolution.** When a colony by process of revolution wins independence and becomes a State, the persons formerly nationals of the parent State who adhere to the new one and continue to reside within its territory may be regarded as becoming automatically the nationals of the latter. Thus, as a consequence of the American Revolution, persons formerly of British nationality, who adhered to the cause of the revolutionists and resided in the territory which they controlled, acquired American nationality when the United States came into being.[1] A privilege of election was, however, accorded. British subjects withdrawing from the United States and so manifesting their adherence to the British Crown, were regarded as never acquiring American citizenship. The Supreme Court of the United States was of opinion that the change of nationality wrought by the Revolution was effected on or about July 4, 1776; and it tested generally, by reference to that date, the timeliness of acts indicative of an election to retain British nationality.[2] In England the courts were of opinion that the change of nationality took effect with the operation of the treaty of peace concluded September 3, 1783.[3]

Nationality which results from revolution is a natural consequence of the change of sovereignty brought about by the occupants of the territory of the new State. No other affirmative acts are required of such individuals. Their duty of allegiance to the new sovereign arises from the circumstance that it, as the successor of the parent State, may reasonably claim as nationals all who pre-

[10] Morrison *v.* California, 291 U. S. 82, 89, Hackworth, Dig., III, 346.

§ 349. [1] McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209; Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99; Mr. Gallatin to Mr. Lowrie, Feb. 19, 1824, 2 Gallatin's Writings, 287, Moore, Dig., III, 294.

"All white persons, or persons of European descent, who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were, by the Declaration, invested with the privileges of citizenship." Van Dyne, Naturalization, 272.

[2] Thompson, J., in Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 120–126. The learned Justice who delivered the opinion of the Court said in part: "*Prima facie,* and as a general rule, the character in which the American *ante-nati* are to be considered, will depend upon, and be determined by, the situation of the party, and the election made, at the date of the Declaration of Independence according to our rule; or the treaty of peace, according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election be at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the Declaration of Independence and the treaty of peace. To say that the election must have been before, or immediately at, the declaration of independence, would render the right nugatory."

[3] Doe *v.* Acklam, 2 Barn. & Cresw. 779. With reference to the treaty of peace, the text of which is contained in Malloy's Treaties, I, 586, see, also, Story, J., in Shanks *v.* Dupont, 3 Pet. 242, 247, 248, Moore, Dig., III, 292–293.

Also Art. II of the Jay Treaty of Nov. 19, 1794, Malloy's Treaties, I, 591, concerning the right of British settlers and traders within the precincts of military posts within the boundaries of the United States and occupied by British forces, to retain British nationality after the removal of said forces, and the opinion of Mr. Wirt, Atty. Gen., as to the interpretation of the treaty. 5 Ops. Attys. Gen., 716, Appendix, Moore, Dig., III, 293–294.

viously owed allegiance to that State, at least while they remain residents of the territory of which the sovereignty has undergone a change. The situation does not resemble that where an individual attempts through his own acts to expatriate himself, and simultaneously to acquire through naturalization the benefits of the nationality of a foreign State, or where a State confers its nationality upon persons who, until it does so, are aliens to itself. In no sense is the new State produced by revolution foreign to those inhabitants whom it is permitted to regard as its nationals and whom it may so regard without recourse to legislation or the performance of a formal act.[4]

## 4

## NATURALIZATION

### a

§ 350. **Definition. Regulation.** Naturalization is the process by which a State adopts a foreigner and stamps upon him the impress of its own nationality.[1] The reasonableness of such action depends upon whether, in the particular case, circumstances have so combined as to warrant the claim that a relationship has been established between the naturalizing State and the individual such that there is due from him to it an obligation of allegiance superior to, and inconsistent with, any previously due to any other sovereign. Such a relationship is the consequence of the conduct of the individual and of such State. The acts of the former, embracing all that he does in satisfaction of terms imposed by the latter, together with the formal affirmative conferring of nationality, must be considered in determining whether the requisite relationship has in fact been perfected. The point to be emphasized is that in American opinion such a relationship may, and oftentimes does, come into being; and that when it does, the act of naturalization produces a change of nationality of which the validity is not dependent upon the approval of any foreign entity such as the State of origin.

The law of nations does not as yet restrict the freedom of a State to withhold its nationality from particular types or classes of aliens, or from aliens who, although regarded as eligible therefor, fail to comply with such conditions as it may prescribe. Thus, it is impossible to derive from that law obligations that impose upon a State a duty to regard as a national an alien who may in a variety

[4] For that reason the acquisition of nationality by revolution is not dealt with as an instance of naturalization. See Collective Naturalization, *infra*, § 352.

§ 350. [1] "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen." Fuller, C. J., in Boyd *v.* Thayer, 143 U. S. 135, 162.

According to Section 101 of the Nationality Act of 1940: "The term 'naturalization' means the conferring of nationality of a State upon a person after birth."

According to Art. I of the Harvard Draft Convention on Nationality: " 'Naturalization' is the process by which a State confers its nationality upon a natural person after birth." R. W. Flournoy, Reporter, declares in the Comment on the Convention, that the term as there used "means the conferring of nationality, not merely limited rights of citizenship, upon an alien after birth." *Am. J.*, XXIII, *Special Supplement*, April, 1929, 24.

See, also, Report on Citizenship of the United States, by J. B. Scott, D. J. Hill and G. Hunt, House Doc. No. 326, 59 Cong., 2 Sess.; Frederick Van Dyne, Law of Naturalization of the United States, Washington, 1907; Dana's Wheaton, Dana's Note No. 49.

of ways attain a close and intimate relationship with it, so long as he does not satisfy the requirements of its statutory laws pertaining to naturalization.

Whether naturalization serves also to confer rights of citizenship depends solely upon the will of the State whose nationality is acquired.[2] That State is free to determine according to its discretion what classes or races of aliens it will accept as nationals and the conditions on which they may become such. It may be noted that until the beginning of the twentieth century the statutory law of the United States offered abundant opportunity for fraud on the part of aliens seeking to acquire American citizenship.[3]

That nationality by virtue of naturalization may be acquired or yielded by various processes must be obvious.[4]

b

§ 351. **Voluntary Individual Action.** "The Government of the United States has taken the position that, as a general rule, no person should have the nationality of a foreign country forced upon him after birth without his consent, express or implied. In the case of a minor naturalized through the naturalization of the parent, the consent of the parent is under certain conditions imputed to the child. In the case of a woman who acquires the nationality of a State by marrying a national thereof, her consent may be regarded as implied. The same may be said with regard to a married woman naturalized in a State through the naturalization of her husband therein, at least if she acquires or retains after marriage a residence in the naturalizing State. Persons collectively naturalized in a State through acquisition by it of the territory in which they reside may be presumed to have given their consent if they voluntarily remain in such territory after the change of sovereignty." Such were the views of the Department of State set forth in its communication of March 16, 1929, for the

[2] This is true when naturalization takes place in the United States by virtue of Sec. 1 of the Fourteenth Amendment to the Constitution, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

[3] President Grant, Annual Message, Dec. 5, 1876, For. Rel. 1876, ix, Moore, Dig., III, 298; President Arthur, Annual Message, Dec. 1, 1884, For. Rel. 1884, x, Moore, Dig., III, 299; President Cleveland, Annual Message, Dec. 3, 1888, For. Rel. 1888, I, xvii-xviii, Moore, Dig., III, 300; President Roosevelt, Annual Message, Dec. 6, 1904, For. Rel. 1904, xxxii-xxxiv; opinion of Mr. Justice Brandeis, in United States *v.* Ness, 245 U. S. 319, 324.

But see § 15 of the Act of Congress of June 15, 1906, respecting fraudulent naturalization, and the Diplomatic Instructions and Consular Regulations based thereon, April 19, 1907, For. Rel. 1907, I, 8–9.

[4] The various methods are thus enumerated by Mr. Hackworth: "Nationality by naturalization may be acquired by several different methods: (*a*) Direct naturalization in one's own right under general naturalization laws — a judicial process in some countries, including the United States, a legislative process in others, and an executive function in still other countries; (*b*) derivative naturalization, as, for example, the naturalization of a minor child through the naturalization of his parent or parents, naturalization of a wife through the naturalization of her husband, or in some cases by the marriage of an alien to a national (the last two methods are no longer recognized as a means of acquiring citizenship in the United States); (*c*) in a few countries by the adoption of an alien minor; (*d*) collective naturalization, through the transfer of territory from one State to another (where the transfer takes place by cession the change of nationality by the inhabitants of the ceded territory is usually covered by treaty stipulations), or through legislative enactments covering specific classes of persons; and (*e*) special legislation in individual cases." (Hackworth, Dig., III, 3.)

Preparatory Committee of The Hague Conference on the Codification of International Law.[1]

In 1934, the Department of State declared that its position, consistently followed over a period of many years, was that "an American citizen should not be considered as having been expatriated under the provisions of Section 2 of the Act of March 2, 1907, by being naturalized in a foreign State in conformity with its laws, unless the naturalization is the result of a distinctly voluntary act or, if the naturalization is acquired as a result of an involuntary act, he has performed some overt act indicating the acceptance of the foreign nationality involuntarily conferred upon him." [2]

A transfer of allegiance is deemed to possess an involuntary aspect when, without the knowledge or consent of the individual, it is made the legal consequence of his purchase of land,[3] or of his residence within the territory of a State.[4] No objection is, however, apparent when the granting of land to an

§ 351. [1] Bases of Discussion, I, Nationality, citing Mackenzie *v.* Hare, 239 U. S. 299, League of Nations Doc. No. C.73.M.38.1929.V, 145, 146.

See Art. 15 of Harvard Nationality Convention, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 15; also Comment by R. W. Flournoy, Reporter, *id.*, 53, where it is added: "Perhaps the commonest case of naturalization of an adult without consent, is that of the naturalization of married women through the naturalization of their husbands. . . . It would seem to be in line with the modern ideas of the status of married women to require that their consent should be given to their naturalization when their husbands are naturalized." 54–55.

According to Art. 10 of The Hague Convention on Nationality of 1930: "Naturalization of the husband during marriage shall not involve a change in the nationality of the wife except with her consent."

See Mr. Bayard, Secy. of State, to Mr. Manning, Minister to Mexico, Nov. 20, 1886, For. Rel. 1886, 723, Moore, Dig., III, 305–306. See, also, Same to Same, April 27, 1887, For. Rel. 1887, 717, Moore, Dig., III, 307; Mr. Fish, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 22, 1875, MS. Inst. Venezuela, II, 283, Moore, Dig., III, 303.

It may be observed that through the operation of the treaty between the United States and Spain of Dec. 10, 1898, the natives of the Philippine Islands and Porto Rico were collectively naturalized, and left without means of retaining their Spanish nationality while they remained in those islands.

[2] Mr. Carr, Assist. Secy. of State, to Consul General Clum, March 16, 1934, Hackworth, Dig., III, 209.

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." (Perkins *v.* Elg, 307 U. S. 325, 334.)

[3] See cases relative to the ownership of land in Mexico, before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2468–2483, especially Case of Fayette Anderson and Wm. Thompson, No. 333, *id.*, 2479, and 2481. Mr. Bayard, Secy. of State, in a communication, to Mr. Manning, Minister to Mexico, April 27, 1887, expressed "dissent from the position that foreigners who have purchased land or had children born to them in Mexico may, from time to time, by a municipal statute, be deprived of their nationality unless they take some affirmative step to preserve it." For. Rel. 1887, 717, Moore, Dig., III, 307.

Compare Mr. Olney, Secy. of State, to Mr. Ransom, Minister to Mexico, Dec. 13, 1895, For. Rel. 1895, II, 1008, Moore, Dig., III, 307, respecting the refusal of Mexico to extradite one Chester W. Rowe, a fugitive from the justice of the United States.

Also Article 3 of Resolution respecting Nationality adopted by the Institute of International Law at Stockholm, 1928, *Annuaire*, XXXIV, 760, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 125, 126.

[4] Mr. Webster, Secy. of State, to Mr. Sharkey, Consul at Havana, July 5, 1852, Moore, Arbitrations, 2701, 2703, in which it was declared: "Change of *domicil* is matter of intention, and, notwithstanding residence in fact, there must be the *animus manendi*. Change of allegiance, which is manifested by the voluntary action, and usually by the oath of the party himself, ought always to be accomplished by proceedings which are understood on all sides to have that effect. It is certainly just that acts which are to be regarded as changing the allegiance of American citizens, should be distinctly understood by those to whom they are applied, as having that effect; that the practical as well as the theoretical construction of such

alien is made contingent upon his accepting the nationality of the grantor. In such case the transaction is regarded as a voluntary arrangement.[5] The Department of State has been unwilling to admit that a foreign State may denationalize American citizens within its domain as a consequence of their failure, within a specified period of time to exercise the right to refuse its citizenship.[6] The Department has, however, under certain circumstances advised American residents within foreign territory to make desired declarations indicative of an intention to retain their nationality before an American diplomatic or consular representative.[7] "The Department of State has uniformly held that an oath of allegiance taken under duress, usually in conjunction with military service, or an act resulting in naturalization performed under duress does not affect the American nationality of the person concerned." [8]

c

§ 352. **Collective Naturalization.** Whenever a State acquires from another a part of its territory, the inhabitants of the area transferred, who were nationals of the former sovereign, are, in the absence of agreement, collectively naturalized. They are at once subjected to a duty of allegiance to the transferee.[1] As the Department of State announced in Consular Regulations of 1933: "Under the general principles of international law, it is well settled that, in the case of the acquisition of inhabited territory, the acquiring sovereign becomes entitled to the allegiance of the inhabitants who immediately prior to the acquisition owed allegiance to the State from which the territory was acquired, unless the treaty of acquisition provides otherwise." [2] It may be doubted whether any requirement of international law obliges the transferee to permit them to depart from its control in order that they may by so doing retain the nationality of the transferor,[3] or to allow them, if remaining within the territory transferred,

---

acts should be unequivocal and uniform, and that no acts should be deemed acts of expatriation, except such as are openly avowed and fully understood."

[5] Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, Dec. 1, 1899, For. Rel. 1899, 403, Moore, Dig., III, 310.

[6] See Mr. Carr, Assist. Secy. of State, to the Consul General at Bucharest, March 16, 1934, Hackworth, Dig., III, 214. *Cf.* Instruction of Aug. 22, 1938, to the Legation at Bucharest, in reference to a somewhat different situation, Hackworth, Dig., III, 216.

[7] See abstracts of documents in Moore, Dig., III, 307–310, concerning a discussion with Brazil in 1890.

[8] Hackworth, Dig., III, 210, footnote. See also documents *id.*, § 255.

"The Department considers that Italian nationality conferred under the provisions of the law under discussion is voluntarily accepted when a naturalized American citizen of Italian origin (1) accepts employment by the Italian Government, (2) applies for and accepts an Italian passport or identity card describing him as an Italian national, (3) votes in the general elections in Italy, or (4) joins the Italian National Fascist Party." (Mr. Carr, Acting Secy. of State, to Ambassador Long, July 30, 1934, Hackworth, Dig., III, 212–213.)

§ 352. [1] American Insurance Co. *v.* Canter, 1 Pet. 511, 542; Fuller, C. J., in Boyd *v.* Thayer, 143 U. S. 135, 162; Tobin *v.* Walkinshaw, McAllister, 186, Moore, Dig., III, 312; Case of Egle Aubrey, American-French Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, III, 2511. See, also, Van Dyne, Naturalization, 266–332.

See Mr. Kellogg, Secy. of State, to the Acting Secy. of War, Aug. 25, 1927, quoted in Hackworth, Dig., III, 116, footnote.

[2] Hackworth, Dig., III, 155. See also Opinion of Mr. Cummings, Atty. Gen., Oct. 15, 1936, 38 Ops. Attys. Gen. 525, 530.

[3] In a word, change of nationality is wrought by the change of sovereignty, subject to the

to retain by other processes, the nationality of the transferor.[4] While the latitude enjoyed by the transferee is not necessarily affected by the mode through which a change of sovereignty is wrought, if the change is attributable to, or exemplified by a treaty of cession, provision may be made whereby nationals of the former sovereign even though continuing to reside within the territory transferred may retain their nationality by taking specified steps regarded as appropriate to that end.[5]

It may be observed that in pursuance of the provisions of Article IX of the treaty with Spain, of December 10, 1898,[6] "a law was enacted by Congress on July 1, 1902 (32 Stat. 691), section 4 of which conferred Philippine citizenship on certain residents of the Philippines. This section of law was amended by an act of Congress of March 23, 1912 (37 Stat. 77). The latter section of law was superseded by section 2 of an act of Congress of August 29, 1916 (39 Stat. 545)," [7] which is set forth below.[8]

---

condition subsequent that the persons residing within the area transferred who prior to the transfer were nationals of the transferor do not in fact depart and escape from the control of the transferee. No decision has been seen in which a tribunal has found it necessary to hold that the transferee State lacked the power to prevent departure or the abandonment of residence within its territory. The language of Mr. Justice Story in the case of Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 122, to the effect that "This right of election must necessarily exist, in all revolutions like ours," can not, in view of the circumstances there involved, be regarded as necessarily supporting an opposing theory.

*Cf.* Second paragraph of Art. 18, of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement,* April, 1929, 15.

[4] The preference of the individual residents must, in so far as international law is concerned, be regarded as subordinate to the will of the transferee.

[5] See, for example, Art. VIII, Treaty of Guadalupe-Hidalgo, Feb. 2, 1848, Malloy's Treaties, I, 1111, and documents respecting its operation in Moore, Dig., III, 318; also cases in Moore, Arbitrations, III, 2509–2511; Art. III, convention with Russia, March 30, 1867, ceding Alaska to the United States, Malloy's Treaties, II, 1523, also documents respecting its operation in Moore, Dig., III, 319; Art. IX of the treaty of peace between the United States and Spain, Dec. 10, 1898, Malloy's Treaties, II, 1693, and documents concerning its operation in Moore, Dig., III, 321–327; also Bosque *v.* United States, 209 U. S. 91, where the removal of a Spanish resident from the Philippine Islands in 1899, and his absence therefrom until 18 months after the ratification of the treaty of peace, caused him to remain a Spaniard, in spite of no declaration of intention to preserve allegiance to Spain. See Martinez *v.* Asociación de Señoras, 213 U. S. 20, with reference to a Spanish corporation organized for purely local and charitable purposes in Porto Rico, in which the court declared: "We are of opinion that the cession of Porto Rico by Spain to the United States severed all relations between Spain and this corporation, and that thereafter it cannot be regarded in any sense as a citizen or subject of Spain. Spain has no duty to or power over it. We confine this statement to a corporation like the one before us, formed for charitable purposes and limited in its operations to the ceded territory. A different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration, as, for instance, if it were a Spanish trading corporation, with a place of business in Spain but doing business by comity in the island of Porto Rico."

[6] Malloy's Treaties, II, 1693.

[7] Consular Regulations of the United States, Sec. 159, Note 2, March, 1933, Hackworth, Dig., III, 128.

[8] "All inhabitants of the Philippine Islands who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands, except such as shall have elected to preserve their allegiance to the crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain, signed at Paris, December tenth, eighteen hundred and ninety-eight, and except such others as have since become citizens of some other country: *Provided,* That the Philippine Legislature, herein provided for is hereby authorized to provide by law for the acquisition of Philippine citizenship by those natives of the Philippine Islands who do not come within the foregoing provisions, the natives of the insular possessions of the United States and such other persons

When a State relinquishes its life as such through incorporation into or absorption by another, nationals of the former acquire automatically the nationality of the latter.[9]

A treaty of cession may declare that persons whose nationality is to be changed may become citizens as well as nationals of the new sovereign.[10] In the absence of agreement the change of allegiance resulting from the change of sovereignty does not serve also to confer rights of citizenship. The acquisition of them depends upon the will of the new sovereign. No principle of international law is involved.

The principle of collective naturalization was necessarily applied in the treaty of Versailles of June 28, 1919, and in other treaties marking the termination of the World War. It was declared, for example, that German nationals "habitually resident in any of the territories recognized as forming part of the Czecho-Slovak State will obtain Czecho-Slovak nationality *ipso facto* (*de plein droit*) and lose their German nationality."[11] In relation to Belgium, it was declared that when the transfer to it of the sovereignty over specified territories should become definitive, "German nationals habitually resident in the territories will definitively acquire Belgian nationality *ipso facto* (*de plein droit*) and

---

residing in the Philippine Islands who are citizens of the United States, or who could become citizens of the United States under the laws of the United States if residing therein."

See in this connection documents cited or quoted in Hackworth, Dig., III, 128–132.

[9] According to Art. 18 of the Harvard Draft Convention on Nationality: "When the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 15.)

As a consequence of the subjugation by Italy in 1911 of Tripoli and Cyrenaïca, the native population acquired Italian nationality. See royal decree of Nov. 5, 1911, annexing Tripoli and Cyrenaïca, which contained no reference to the change of nationality, Arch. Dip., 3 *sér.*, 52d year, tom. 121, p. 181. The same document is contained in *Nouv. Rec. Gén.*, 3 *sér.*, VI, 4. See, also, treaty of peace between Italy and Turkey, Oct. 18, 1912, Arch. Dip., 3 *sér.*, 53d year, tom. 125, p. 16. The same document is contained in *Nouv. Rec. Gén.*, 3 *sér.*, VII, 7. In this connection see "*Die Erwerbung Tripolitaniens durch Italien und deren völkerrechtlicher Charakter*," by Dr. G. Diena, *Zeit. Int. Recht*, XXIII, Part I, 1.

If by occupation a State asserts dominion over a region not deemed to belong to any civilized State or to any country or political entity regarded as capable of possessing title, as in the case of a land inhabited solely by uncivilized people, the impressing of the nationality of the occupant upon the native inhabitants is the natural consequence of the creation of a right of sovereignty over the territory on which they dwell. Such persons may, therefore, be regarded as possessed of no nationality until subjected to the allegiance of the occupying State.

[10] "Every treaty of cession to which the United States has been a party, with the exception of the treaty of peace of 1898 (30 Stat. 1754), with Spain, ceding Porto Rico and the Philippine Islands to the United States, contains a stipulation providing that the inhabitants of the territory ceded may, in whole or in part, become citizens of the United States, either immediately or under certain conditions. The treaty with Russia for the cession of Alaska (15 Stat. 542) excepted 'uncivilized native tribes' from the privilege of admission to citizenship." Van Dyne, Naturalization, 275–276.

See, also, Art. VI of the treaty between the United States and Denmark of Aug. 4, 1916, U. S. Treaty Vol. III, 2558, 2561; also Act of Congress of Feb. 25, 1927, 44 Stat. 1234.

[11] Art. 84. See, also, Art. 91, with respect to Poland; Art. 105 and Art. 106, with respect to the Free City of Danzig; Annex 1 following Art. 79, in relation to Alsace-Lorraine, where a contrasting rule was applied, which did not regard Germans habitually resident therein as acquiring French nationality, and which limited the acquisition of that nationality to specified categories, among which were persons who lost French nationality by the application of the Franco-German treaty of May 10, 1871 and who had not subsequently acquired any nationality other than German.

will lose their German nationality." [12] Careful provision was made, however, that permitted German nationals over eighteen years of age habitually resident within any of the territories recognized as forming part of the Czecho-Slovak State,[13] or of territories transferred to Belgium,[14] to opt for German nationality.

The treaties of Saint Germain-en-Laye with Austria, of September 10, 1919,[15] of Neuilly-sur-Seine with Bulgaria, of November 27, 1919,[16] of Trianon with Hungary, of June 4, 1920,[17] and of Lausanne with Turkey, of July 24, 1923,[18] also reflected the effort to combine the application of the principle of collective naturalization with appropriate concessions of the privilege of opting. In the several treaties of peace, that principle seems to have been accepted as a point of departure for various limitations or modifications which, for reasons of policy, were applied. The States which exercised the dominant power in determining what they should be, did not, however, regard themselves as obliged to yield the faculty of opting in so far as it was conceded, or of restricting the same in so far as it was curtailed.

## d

## American Naturalization

### (1)

§ 353. **Regulated by Congress. Entrusted to the Courts.** Under the Fourteenth Amendment to the Constitution,[1] one who is naturalized in the United States and subject to the jurisdiction thereof becomes a citizen of the United States. In becoming a citizen he at the same time, of course, becomes a national. The constitutional provision appears to contemplate the naturalization solely of persons who at the time are subject to the jurisdiction of the United States. Under the existing law, which is in harmony with the Fourteenth Amendment, a person naturalized on his own application must at the time be a resident of, and physically present within, the domain of the United States.

[12] Art. 36.

[13] Art. 85, where it was also provided that Czecho-Slovaks who were German nationals and were habitually resident in Germany should have a similar privilege (described in the French text as *faculté* which is unfortunately referred to in the English text as "right") to opt for Czecho-Slovak nationality.

[14] Art. 37. See, also, Art. 106 with respect to the Free City of Danzig; Art. 113 with respect to that portion of the territory of Schleswig that might be restored to Germany in consequence of the operation of a plebiscite.

See, in this connection, J.-P. Niboyet, "*La Nationalité d'après les traités de paix qui ont mis fin à la grande guerre de 1914–1918*," *Rev. Droit Int., 3 sér.*, II, 285; Eugène Audinet, "*Les Changements de nationalité résultant des récents Traités de Paix*," *Jour. Droit Int.*, XLVIII, 377; C. Luella Gettys, "The Effect of Changes of Sovereignty on Nationality," *Am. J.*, XXI, 268.

[15] Arts. 70–82.

[16] Arts. 39–40, 45–46, 196.

[17] Arts. 61–66.

[18] Arts. 21, 30–36.

§ 353. [1] Section 1.

See Behrensmeyer *v.* Kreitz, 135 Ill. 591.

See Harold Fields, "Conflicts in Naturalization Decisions," *Temple Law Quarterly*, X, 272.

See historical sketch in Hackworth, Dig., III, § 223.

See Art. I, naturalization treaty with Albania, April 5, 1932, U. S. Treaty Vol. IV, 3922.

The power to enact naturalization laws is lodged exclusively in the Congress.[2] That body "is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit." [3] Upon compliance with the regulations which it has adopted, aliens are admitted to citizenship without regard to any claims upon them asserted by the State of their origin.[4]

Naturalization in the United States is normally effected through the operation of a judicial act which must be performed by a court.[5] The statutory law specifies the courts that are clothed with jurisdiction to naturalize.[6] The executive

[2] Art. I, Sec. 8, of the Constitution declares that the Congress shall have power "to establish an uniform rule of naturalization." See United States *v.* Villato, 2 Dall. 370; Chirac *v.* Chirac, 2 Wheat. 259. Compare Collet *v.* Collet, 2 Dall. 294. Also Van Dyne, Naturalization, 6–9; Moore, Dig., III, 327–328, and documents there cited, including a list of statutes of the United States relating to citizenship and naturalization from 1790 to 1894; Historical Sketch of Naturalization in the United States, Bureau of Naturalization, Dept. of Labor, Washington, 1926; Flournoy and Hudson, Nationality Laws, 1929, Editors' Note, 573.

THE IMMIGRATION AND NATURALIZATION SERVICE. The Act of June 29, 1906, Chap. 3592, § 1, 34 Stat. 596, established a so-called Bureau of Immigration and Naturalization under the direction of the Secretary of Commerce and Labor. To this Bureau was given charge of "all matters concerning the naturalization of aliens." It was made the duty of the Bureau among other things to cause the registration of every alien arriving in the United States, and also to issue to him a certificate of such registration. In order to prevent the perpetration of fraud upon the citizenship of the United States, later sections of the Act made provision for coöperation between courts exercising jurisdiction in naturalization proceedings and the Bureau, in connection with both the granting and canceling of naturalization. The purpose was to establish an organ of the Government which should be possessed of complete information with respect to all naturalization cases arising in the United States, and which should exercise important administrative functions greatly needed as an additional safeguard to supplement the judicial functions entrusted to the courts.

By an Act of March 4, 1913, Chap. 141, § 3, 37 Stat. 737, the Bureau of Naturalization was established under the direction of the Secretary of Labor. A Commissioner of Naturalization was declared to be the administrative officer in charge of the Bureau "and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor." The Act was amended also in 1918, 40 Stat. 542, and in 1926, 44 Stat. 709. See, also, Act of March 2, 1929, 45 Stat. 1512, 1516; Act of March 4, 1929, 45 Stat. 1545, amendatory of the Act of June 29, 1906, 34 Stat. 596. By executive Order No. 6166, of June 10, 1933 (in pursuance of an Act of March 3, 1933, 47 Stat. 1517), the Bureaus of Immigration and of Naturalization of the Department of Labor were consolidated as an Immigration and Naturalization Service under the management of a Commissioner of Immigration and Naturalization. 5 U.S.C.A. § 132, note.

On May 22, 1940, pursuant to the provisions of the Reorganization Act of 1939, approved April 3, 1939, the President announced to the Congress, the transfer of the Immigration and Naturalization Service of the Department of Labor (including the office of the Commissioner of Immigration and Naturalization) to the Department of Justice, and stated that it was to be administered under the direction and supervision of the Attorney-General. See *Federal Register*, June 14, 1940, 2223.

[3] Terrace *v.* Thompson, 263 U. S. 197, 220.

[4] Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, May 10, 1900, For. Rel. 1900, 30, 31, Moore, Dig., III, 328.

[5] The statement in the text is substantially that of Professor Moore, in Moore, Dig., III, 328. See, also, Marshall, C. J., in Spratt *v.* Spratt, 4 Pet. 393.

Inasmuch as the act to be performed by the court involves a decision based upon the examination of witnesses as to whether the petitioner satisfies the requirements of the law, that act may be fairly described as a judicial one. While the court does not decide that the petitioner is or is not a citizen, it does decide whether the evidence suffices to justify the admission of the petitioner to citizenship.

That American diplomatic and consular officers in countries where they exercise judicial functions by law and treaty, are without authority to naturalize aliens, see Mr. Gresham, Secy. of State, to Mr. Terrell, Minister to Turkey, Nov. 2, 1893, For. Rel. 1893, 701, Moore, Dig., III, 329.

[6] JURISDICTION TO NATURALIZE. According to the Nationality Act of 1940, Sec. 301: "(*a*) Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby

branch of the Government cannot prescribe the action of any tribunal on a given application.[7] It should be observed that naturalization may be, and at times has been, effected by special Act of Congress.

In 1926, the Supreme Court of the United States declared, in an opinion through Mr. Justice Brandeis, "that the Constitution does not confer upon aliens the right to naturalization," but that it authorizes Congress to establish a uniform rule therefor. It held that the opportunity having been conferred by the Naturalization Act, "there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate." [8] Accordingly, it concluded that the Circuit Court of Appeals has jurisdiction to review by appeal the order or decree of the District Court denying the petition to be admitted to citizenship in the United States.[9]

(2)

§ 354. **Persons Eligible for Naturalization as American Citizens.** Under the statutory law, in the form that it assumed prior to the enactment of the Nationality Law of 1940, the provisions for naturalization were declared to "apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent." [1]

---

conferred upon the following specified courts: District Courts of the United States now existing, or which may hereafter be established by Congress in any State, District Courts of the United States for the Territories of Hawaii and Alaska, and for the District of Columbia and for Puerto Rico, and the District Court of the Virgin Islands of the United States; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited. The jurisdiction of all the courts herein specified to naturalize persons shall extend only to such persons resident within the respective jurisdictions of such courts, except as otherwise specifically provided in this Act.

"(*b*) A person who petitions for naturalization in any State court having naturalization jurisdiction, may petition within the State judicial district or State judicial circuit in which he resides, whether or not he resides within the county in which the petition for naturalization is filed.

"(*c*) The courts herein specified, upon request of the clerks of such courts, shall be furnished from time to time by the Commissioner or a Deputy Commissioner with such blank forms as may be required in naturalization proceedings.

"(*d*) A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this Act, and not otherwise."

[7] The language of the text is that of Mr. Bayard, Secy. of State, in a communication to Mr. Stuart, Sept. 9, 1885, 157 MS. Dom. Let. 93, Moore, Dig., III, 328.

[8] Tutun *v.* United States, and Neuberger *v.* United States, 270 U. S. 568, 578.

[9] *Id.*, 580. See H. B. Hazard, "The Right of Appeal in Naturalization Cases in the Federal Courts," *Am. J.*, XXI, 40.

§ 354. [1] Rev. Stat. § 2169, amended, Feb. 18, 1875, Chap. 80, § 1, 18 Stat. 318.

"By the Acts of 1802 and 1824, only 'free white persons' were capable of naturalization. By the Act of 1870, the benefits of the law were extended to 'aliens of African nativity and to persons of African descent.' The law, as consolidated in the Revised Statutes, thus stands, embracing only 'white persons' and persons of African descent." Statement in Moore, Dig., III, 329.

Declared Mr. R. W. Flournoy, in a communication to the author of Dec. 10, 1932: "As the Fourteenth Amendment resulted from the emancipation of the slaves in the United States, and as they were all negroes, the word 'African' probably means 'negro,' and the phrase in question may doubtless be paraphrased to read: 'persons of the African race, whether born in Africa or elsewhere.' Those responsible for the adoption of the Fourteenth Amendment were not interested in persons merely because they were born on the continent of Africa."

"Chinese, since they are neither of the 'white' (Caucasian), nor of the African, race, are not within the general statutes relating to naturalization." [2] An Act of Congress of May 6, 1882, provided that thereafter no court should admit Chinese to citizenship.[3] Hence it was subsequently held that a certificate of naturalization issued to a Chinese person is void.[4]

Judicial opinion reflected in the decisions of the lower Federal Courts lacked uniformity in interpreting the words "free white persons" of the statutory law, before the Supreme Court of the United States undertook to construe them. It had been held that Syrians, Armenians, Parsees and high caste Hindus were eligible for naturalization,[5] and that Japanese were ineligible.[6] The Supreme Court in due course declared Japanese persons to be ineligible,[7] and that a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, was not a white person within the meaning of the Act of Congress.[8]

In 1926, the Department of Labor informed the Department of State that it had reached the opinion that a person in order to be eligible to citizenship must have a preponderance of either white or African blood or both; and that

[2] Moore, Dig., III, 330, *citing In re* Ah Yup, 5 Sawyer C. C. 155, followed in Mr. Evarts, Secy. of State, to Mr. Holcombe, No. 250, Oct. 29, 1878, MS. Inst. China, II, 574; State *v.* Ah Chew, 16 Nev. 50, 61; Mr. Olney, Secy. of State, to Mr. Ritter, Sept. 20, 1895, 205 MS. Dom. Let. 8.

[3] Chap. 126, § 14, 22 Stat. 61. Relative to this Act and its relation to Art. V of the treaty with China of July 28, 1868, see documents cited in Moore, Dig., III, 330.

[4] *In re* Gee Hop, 71 Fed. 274; *In re* Hong Yen Chang, 84 Cal. 163; Opinion of Mr. McKenna, Atty. Gen., 21 Ops. Attys. Gen., 581.

[5] *In re* Najour (a Syrian), 174 Fed. 735; *In re* Halladjian (an Armenian), 174 Fed. 834; *In re* Mudarri (a Syrian), 176 Fed. 465; *In re* Ellis (a Syrian), 179 Fed. 1002; United States *v.* Balsara (a Parsee), 180 Fed. 694; *In re* Akhay Kumar Mozumbar (a high caste Hindu), 207 Fed. 115; Dow *v.* United States, 226 Fed. 145 (a Syrian) *reversing* 213 Fed. 355, where Henry A. M. Smith, J., in the course of an exhaustive opinion, held that a Syrian "not being of European nativity or descent," was outside of the scope of the statute; *In re* Mohan Singh (a Hindu), 257 Fed. 209. *Contra, In re* Sadar Bhagwab Singh, 246 Fed. 496.

[6] *In re* Saito, 62 Fed. 126, and criticism thereof in *Am. L. Rev.* XXVIII, 818, cited in Moore, Dig., III, 331; *In re* Yamashita, 30 Wash. 234; also *In re* Buntaro Kumagai, 163 Fed. 922; Bessho *v.* United States, 178 Fed. 245.

That a native Mexican is eligible to American citizenship, see *In re* Rodriguez, 81 Fed. 337; also discussion of this case in Van Dyne, Naturalization, 46–48.

Deeming individuals regarded as half-white persons to be outside of the scope of the statute, see *In re* Knight, 171 Fed. 299; *In re* Young, 195 Fed. 645; s.c., 198 Fed. 715.

[7] Ozawa *v.* United States, 260 U. S. 178; Yamashita *v.* Hinkle, 260 U. S. 199; Morrison *v.* California, 291 U. S. 82.

[8] United States *v.* Bhagat Singh Thind, 261 U. S. 204, where it was said through Mr. Justice Sutherland: "What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is properly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs." (214–215.)

Also United States *v.* Cartozian, 6 F. (2) 919, where an Armenian was deemed eligible for naturalization.

That a person of the Japanese race, born in Japan, was not eligible to naturalization under the seventh subdivision of section 4 of the Act of June 29, 1906 (34 Stat. 601), as amended by the Act of May 9, 1918 (40 Stat. 542), or the Act of July 19, 1919 (41 Stat. 222), was the conclusion of the Supreme Court of the United States in the case of Toyota *v.* United States, 268 U. S. 402.

That a citizen of the Philippine Islands who had not enlisted or served in the United States Navy or Marine Corps, or in the Naval Auxiliary Services, was not eligible for naturalization under the existing statutory law, was the conclusion of the United States Circuit Court of Appeals, Ninth Circuit, May 20, 1935, in the case of Roque Espiritu de la Ysla *v.* United States, 77 F. (2) 988.

"a person having as much as one half of other than white or African blood is considered a person ineligible to citizenship." On July 16, 1934, the Department of Labor responded in the negative to an inquiry from the Department of State "whether, in view of the decision of the Supreme Court of the United States in the case of *Morrison et al.* v. *California* the Department of Labor had modified the position taken by it in 1926 with reference to aliens racially ineligible to citizenship." [9] In this case the Supreme Court had found occasion to declare through Mr. Justice Cardozo that "the privilege of naturalization is denied to all who are not white (unless the applicants are of African nativity or African descent); and men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test alway . . . being that of common understanding." [10]

The Nationality Act of 1940 declares that "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of sex or because such person is married." [11]

The same Act declares that "The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere: *Provided,* That nothing in this section shall prevent the naturalization of native-born Filipinos having the honorable service in the United States Army, Navy, Marine Corps, or Coast Guard as specified in section 324, nor of former citizens of the United States who are otherwise eligible to naturalization under the provisions of section 317." [12] There will of course be noted, in contrast to provisions of the earlier enactment, the absence of the word "free" as a qualification or limitation of "white persons" made eligible for naturalization. The employment of a hemispheric test of indigenous races whose descendants are eligible for naturalization presents a geographical problem as to the limits of the areas that are contemplated.[13]

The moral or political attitude of an individual may serve to render him ineligible for naturalization. The Nationality Act of 1940 lays down certain definite restrictions.[14] Again, some objectionable forms of conduct in seasons of war

[9] Hackworth, Dig., III, 48–49, and documents there cited.

[10] 291 U. S. 82, 86.

Interpretative of the racial test of eligibility as laid down in the statutory law as reflected in § 2169 Rev. Stat. are numerous judicial and other rulings set forth in Hackworth, Dig., III, § 226.

[11] Sec. 302. By an Act of March 3, 1931, 46 Stat. 1511, Section 5 of the Act of Sept. 22, 1922, 42 Stat. 1021, forbidding a woman whose husband was not eligible to citizenship to be naturalized during the continuance of the marital status, was repealed.

[12] Sec. 303.

According to Sec. 304: "No person except as otherwise provided in this Act shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot speak the English language. This requirement shall not apply to any person physically unable to comply therewith, if otherwise qualified to be naturalized."

[13] See, in this connection, Vilhjalmur Stefansson, "What is the Western Hemisphere?" *Foreign Affairs,* XIX, 343.

[14] Sec. 305. No person shall hereafter be naturalized as a citizen of the United States—

(*a*) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government; or

(*b*) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated

may likewise produce such a result. Thus according to the Nationality Act of 1940: "A person who, at any time during which the United States has been or shall be at war, deserted or shall desert the military or naval forces of the United States, or who, having duly enrolled, departed or shall depart from the jurisdiction of the district in which enrolled, or went or shall go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall, upon conviction thereof by a court martial, be ineligible to become a citizen of the United States; and such deserters shall be forever incapable of holding any office of trust or of profit under the United States, or of exercising any rights of citizens thereof." [15]

In 1931, the Supreme Court of the United States concluded that the Congress, through the existing law, had in effect exacted of an applicant a promise to bear arms, if required to do so, as a condition of its grant of naturalization.[16]

---

with any organization, association, society, or group that believes in, advises, advocates, or teaches —

(1) the overthrow by force or violence of the Government of the United States or of all forms of law; or

(2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or any other organized government, because of his or their official character; or

(3) the unlawful damage, injury, or destruction of property; or

(4) sabotage.

(*c*) Who writes, publishes, or causes to be written or published, or who knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, distribution, publication, or display any written or printed matter advising, advocating, or teaching opposition to all organized government, or advising, advocating, or teaching —

(1) the overthrow by force or violence of the Government of the United States or of all forms of law; or

(2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; or

(3) the unlawful damage, injury, or destruction of property; or

(4) sabotage.

(*d*) Who is a member of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (*c*).

For the purpose of this section —

(1) the giving, loaning, or promising of money or anything of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and

(2) the giving, loaning, or promising of money or anything of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching or affiliation.

The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes.

[15] Sec. 306.

[16] United States *v.* Macintosh, 283 U. S. 605. In a dissenting opinion by Chief Justice Hughes, with whom concurred Messrs. Justices Holmes, Brandeis and Stone, it was denied that the Congress had made such a requirement. *Id.*, 627.

It may be observed that an alien enemy is not necessarily ineligible for naturalization as a citizen of the United States. The existing statutory law lays down the precise conditions under which his admission to citizenship is possible.[17]

It should be noted that the Nationality Act of 1940 repealed the second proviso to Section 1 of the Act of August 31, 1918,[18] which declared: "That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States." [19]

It must be clear that the conditions on which persons who are nationals of the United States and owe allegiance to it, but who are not citizens thereof, may be admitted to citizenship are matters solely of domestic concern. In the absence of restrictions imposed by treaty they possess no international significance.[20] It may be observed that according to the Nationality Act of 1940, "a person not a citizen who owes permanent allegiance to the United States, and who is otherwise qualified may, if he becomes a resident of any State, be naturalized upon compliance with the requirements of this Act, except that in petitions for naturalization filed under the provisions of this section, residence within the United States within the meaning of this Act shall include residence within any of the outlying possessions of the United States." [21]

---

In the case of United States *v.* Schwimmer, 279 U. S. 644, the vagueness and uncertainty of the testimony of the applicant in indicating what she meant in relation to her objection to military service was deemed to fail to sustain the requisite burden resting upon her as an applicant for naturalization to show that she was attached to the principles of the Constitution. See dissenting opinion of Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, *id.*, 653.

[17] Sec. 326, Nationality Act of 1940.

*Cf.* Chap. 69, § 11, Act of May 9, 1918, 40 Stat. 545. It should be noted that this section repealed Rev. Stat., Section 2171. See, in this connection. *In re* Pfleiger, 254 Fed. 511; *In re* Pollock, 257 Fed. 350.

[18] 40 Stat. 955.

[19] The Nationality Act of 1940 repealed also the Act of Feb. 11, 1931, 46 Stat. 1087, which provided that notwithstanding any provision of law to the contrary, no alien should be debarred from becoming a citizen of the United States on the ground that he withdrew his intention to become such citizen in order to secure discharge from military service, if such withdrawal (and the application for it) and discharge took place after Nov. 11, 1918.

See also Neutral Persons and Property within Belligerent Territory, Military Service, Attitude of the United States, *infra*, §§ 626–627.

[20] Concerning American Indians, see Elk *v.* Wilkins, 112 U. S. 94; Boyd *v.* Thayer, 143 U. S. 135, 162.

According to an Act of June 2, 1924, 43 Stat. 253, all non-citizen Indians born within the territorial limits of the United States "are declared to be citizens of the United States: *Provided*, that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." See Act of June 19, 1930, 46 Stat. 787, conferring full rights of citizenship upon the Cherokee Indians resident in the State of North Carolina. This act was apparently confirmatory, with regard to the Cherokee Indians in question, of the Act of 1924, and intended merely to quiet doubts.

See section 5 *a* of Act of March 4, 1927, 44 Stat. 1418–1419, in relation to the naturalization of certain Porto Ricans. See Act of Feb. 25, 1927, 44 Stat. 1234–1235, in relation to the citizenship and naturalization of certain inhabitants of the Virgin Islands.

[21] Sec. 321.

(3)

§ 355. **Usual Legal Conditions.** According to the existing law, the conditions of naturalization in the United States are: establishment of lawful entry for permanent residence if the arrival was after June 29, 1906; [1] certification of arrival if the arrival was after June 29, 1906; [2] a declaration on oath of an intention to become a citizen; [3] a petition for admission to citizenship, to be filed not less than two nor more than ten years after the declaration of intention has been made; [4] a declaration on oath to support the Constitution of the United States, and also to support and defend the Constitution and laws of the United States against all enemies foreign and domestic, "and to bear true faith and allegiance to the same," [5] and to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty "of whom or which the petitioner was before a subject or citizen"; [6] proof of continuous residence for required periods of time; [7] proof of good moral character, attachment to the principles of the Constitution, and of being well disposed to the good order and happiness of the United States during all of the periods of required residence; [8] and express renunciation of foreign hereditary titles or orders of nobility.[9]

The Nationality Act of 1940 makes elaborate provision for preliminary and final hearings upon petitions for naturalization. Preliminary hearings are con-

---

Declared Mrs. Shipley, Chief of the Passport Division, Dept. of State, March 18, 1936, in a communication to Miss Leighton: "A careful search has been made of the files of the Department, and it has not disclosed that American citizenship has ever been given as an honor to an ambassador of a foreign State to the United States, or to any other foreign diplomatic representative to this country." (Hackworth, Dig., III, 54.)

§ 355. [1] Sec. 329, Nationality Act of 1940.

That the filing with the petition for naturalization of the certificate of arrival was under the requirements of Sec. 4 of the Act of June 29, 1906, 34 Stat. 596, 597, a condition precedent to the power of a court to grant naturalization, was the conclusion of the Supreme Court of the United States in Maney *v.* United States, 278 U. S. 17. See, also, United States *v.* Ness, 245 U. S. 319. See H. B. Hazard, "The Doctrine of Res Judicata in Naturalization Cases in the United States," *Am. J.*, XXIII, 50. According to Sec. 329 (*b*) of the Nationality Act of 1940: "No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person's lawful entry for permanent residence shall have been established and a certificate showing the date, place, and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner or a Deputy Commissioner to cause to be issued such certificate."

[2] See Sec. 332 (*c*) of Nationality Act of 1940.

[3] See Declaration of Intention, Requirements of the Law, *infra*, § 356; Exceptions, *infra*, § 357.

[4] Sec. 332, Nationality Act of 1940.

According to paragraph second of Sec. 4 of the Act of June 29, 1906, 34 Stat. 596, 597, the petition for naturalization was to be filed not less than two years nor more than seven years after the making of the declaration of intention. See in this connection United States *v.* Morena, 245 U. S. 392.

[5] Nationality Act of 1940, Sec. 335. It is here provided, however, that in the case of the naturalization of a child under the provisions of Sec. 315 or 316 of the Act, the naturalization court may waive the taking of such oath if in the opinion of the Court the child is too young to understand its meaning.

[6] Sec. 335 of Nationality Act of 1940.

[7] See Residence, Five Years' Rule, *infra*, § 359; Certain Exceptions, *infra*, § 360.

[8] Sec. 309 (*a*) of Nationality Act of 1940.

[9] *Id.*, Sec. 335 (*c*).

ducted by members of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner thereof, and whose function is to make findings and recommendations upon petitions to the relevant court.[10] The final hearing upon a petition for naturalization is to be had in open court before a judge or judges thereof.[11] The United States is given the right under the statute to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence and be heard in opposition to the granting of any petition in naturalization proceedings.[12]

(4)

DECLARATION OF INTENTION

(*a*)

§ 356. **Requirements of the Law.** According to the Nationality Act of 1940, "an applicant for naturalization shall make, under oath before, and only in the office of, the clerk of court or such clerk's authorized deputy, regardless of the place of residence in the United States of the applicant, not less than two nor more than seven years at least prior to the applicant's petition for naturalization, and after the applicant has reached the age of eighteen years, a signed declaration of intention to become a citizen of the United States," which declaration shall set forth in writing in triplicate eighteen specified averments.[1]

(*b*)

§ 357. **Exceptions.** The requirement as to a declaration of intention is removed in certain situations specified in the statutory law. In the Nationality Act of 1940, no declaration of intention is required in some cases pertaining to married persons,[1] children,[2] certain categories of former citizens of the United

[10] Sec. 333 (*a*). See also *id.*, (*b*).
[11] Sec. 334 (*a*). See also *id.*, (*b*), (*c*) and (*e*).
[12] *Id.*, (*d*).

See also Hackworth, Dig., III, § 232, and documents there cited, in relation to the construction of the earlier statutory law.

§ 356. [1] Sec. 331. These averments call for statements (among others) as to lawful entry for a permanent residence in the United States, absences therefrom, previous declarations of intention, the fact that the applicant is not an anarchist and not possessed of political views or affiliated with organizations in such wise as to render him ineligible for naturalization, the intention of the applicant to become a citizen of the United States and to reside permanently therein, and a promise before admission to citizenship, to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty concerned.

Notwithstanding the provisions of Sec. 331, it is declared in Sec. 332 (*a*) that "an applicant for naturalization shall, not less than two nor more than ten years" after his declaration of intention has been made file his petition for naturalization.

Concerning procedural requirements pertaining to the declaration of intention as laid down in the earlier statutory law, see documents in Hackworth's Dig., III, § 231.

§ 357. [1] Sections 310, 311 and 312.
[2] Sec. 315.

States,[3] persons misinformed of citizenship status[4] and certain persons serving in armed forces or on vessels.[5]

(*c*)

§ 358. **Does Not Confer Citizenship.** A declaration of intention is merely one of the steps to be taken by the alien seeking admission to citizenship.[1] It does not necessarily mark a renunciation of allegiance. It is rather an acknowledgment by the declarant of an obligation on his part to make such renunciation before being admitted to citizenship.[2] A declaration of intention does not, therefore, suffice of itself to bring about the acquisition of citizenship[3] or to effect naturalization.[4]

It should be noted that an Act of Congress approved May 9, 1918, provided that every seaman, being an alien, should, after his declaration of intention to become a citizen of the United States, and after he should have served three years upon merchant or fishing vessels of the United States, "be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States."[5] This enactment was, however, repealed by an Act of Congress approved June 15, 1935.[6]

[3] Sections 317, 318 and 319. See also Sec. 323, applicable to a person who while a citizen of the United States and during the World War in Europe, entered the military or naval service of any country at war with a country with which the United States was then at war, and who lost his citizenship by reason of an oath or obligation taken for the purpose of entering such service.

[4] Sec. 320.

[5] Sec. 324. See also Sec. 326 in relation to alien enemies.

See Hackworth, Dig., III, § 234 concerning "Expeditious Naturalization."

See also Sec. 322 with respect to specified categories of persons born in Puerto Rico of alien parents, who did not exercise the privilege granted of becoming citizens of the United States. Such persons are permitted to make the requisite declaration provided in the paragraph of the relevant statute "at any time," and from and after the making of such declaration shall be citizens of the United States.

§ 358. [1] Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, May 8, 1890, For. Rel. 1890, 695, Moore, Dig., III, 342.

[2] Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, Feb. 26, 1890, For. Rel. 1890, 694, Moore, Dig., III, 341; also Mr. Cass, Secy. of State, to Mr. Washburne, March 9, 1857, 46 MS. Dom. Let. 379, Moore, Dig., III, 338.

[3] Minneapolis *v.* Reum, 56 Fed. 576; *In re* Moses, 83 Fed. 995; Dorsey *v.* Brigham, 117 Ill. 250; Frick *v.* Lewis, 195 Fed. 693, 697; United States *v.* Uhl, 211 Fed. 628, 631. See executive order of President Roosevelt, April 6, 1907, concerning Citizenship, in relation to paragraph 143 of the existing Instructions to the Diplomatic Officers of the United States. Also Mr. Buchanan, Secy. of State, to Mr. Campbell, Consul at Havana, July 26, 1848, 10 MS. Desp. to Consuls, 473, Moore, Dig., III, 337; Circular Notice of Mr. Bryan, Secy. of State, respecting "Liability for Military Service in Foreign Countries of Persons Residing in the United States," Aug. 14, 1914.

[4] Mr. Fish, Secy. of State, to Mr. de Luna, April 22, 1869, 81 Dom. Let. 7, Moore, Dig., III, 338.

"The declaration of intention to become a citizen of the United States does not make one a citizen, and the certificate of a court that such declaration has been made is not evidence of citizenship. — E.O. Dec. 19, 1925." (Consular Regulations of the United States, as of March, 1933, section 142.)

See also Hinton *v.* Hinton, 196 N. C. 341, and Johnson *v.* Nickoloff *et al.*, 52 F. (2d) 1074.

[5] 40 Stat. 542, 544.

[6] 49 Stat. § 1.

(5)

RESIDENCE

(*a*)

§ 359. **Five Years' Rule.** According to the Nationality Act of 1940:

(*a*) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

(*b*) Absence from the United States for a continuous period of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the period between the date of filing the petition and the date of final hearing, shall be presumed to break the continuity of such residence, but such presumption may be overcome by the presentation of evidence satisfactory to the naturalization court that such individual has a reasonable cause for not sooner returning to the United States. Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence, except that in the case of an alien who has resided in the United States for at least one year, during which period he has made a declaration of intention to become a citizen of the United States, and who thereafter is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States or a subsidiary thereof, no period of absence from the United States shall break the continuity of residence if —

(1) Prior to the beginning of such period (whether such period begins before or after his departure from the United States) the alien has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, and

(2) Such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.[1]

The foregoing requirements in respect to continuity of residence afford an authoritative guidance to the Department of State as well as to the courts, which was not apparent in the earlier statutes prior at least to the enactment of the Act of March 2, 1929.[2] Prior to that enactment the continued term of residence prescribed by the law was regarded by the Department of State as not interrupted by a transient sojourn abroad,[3] the opinion being expressed, however, that an extended lodgment in a foreign country would be incompatible with the requirements of the statute,[4] and that it remained for the court of naturalization to decide in the particular case whether the absence sufficed to prevent the issuance of a certificate of citizenship.[5] The courts of the United States appeared to concur in the view that continuous residence might be interrupted. There seemed to be a tendency, however, to regard the intention of the applicant to give up his residence in the United States rather than the length of his sojourn abroad, the test of whether the requisite continuity had been broken.[6] The

§ 359. [1] Sec. 307.

According to the same section: "(*c*) No period of absence from the United States during the five years immediately preceding June 25, 1936, shall be held to have broken the continuity of residence required by the naturalization laws if the alien proves to the satisfaction of the Attorney General and the court that during all such period of absence he has been under employment by, or contract with, the United States, or such American institution of research, or American firm or corporation, described in subsection (*b*) of this section, and has been carrying on the activities described in that subsection in its behalf.

"(*d*) The following shall be regarded as residence within the United States within the meaning of this chapter:

"(1) Honorable service on vessels owned directly by the Government of the United States, whether or not rendered at any time prior to the applicant's lawful entry into the United States: *Provided,* That this subdivision shall not apply to service on vessels operating in and about the Canal Zone in connection with the maintenance, operation, protection, and civil government of the Panama Canal and Canal Zone.

"(2) Continuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization."

According to § 308: "Any alien who has been lawfully admitted into the United States for permanent residence and who has heretofore been or may hereafter be absent temporarily from the United States solely in his or her capacity as a regularly ordained clergyman or nun, shall be considered as residing in the United States for the purpose of naturalization, notwithstanding any such absence from the United States, but he or she shall in all other respects comply with the requirements of the naturalization laws. Such alien shall prove to the satisfaction of the Attorney General and the naturalization court that his or her absence from the United States has been solely in the capacity hereinbefore described."

[2] 45 Stat. 1512.

[3] Mr. Bayard, Secy. of State, to Mr. Cramer, Minister to Switzerland, No. 138, May 6, 1885, MS. Inst. Switzerland, II, 251, Moore, Dig., III, 356; Mr. Hill, Acting Secy. of State, to Mr. Leishman, Minister to Turkey, June 14, 1901, For. Rel. 1901, 520, Moore, Dig., III, 356.

[4] Mr. Olney, Secy. of State, to Mr. Breckinridge, Minister to Russia, No. 169, Jan. 27, 1896, MS. Inst. Russia, XVII, 406, Moore, Dig., III, 356; Mr. Bayard, Secy. of State, to Mr. Cramer, Minister to Switzerland, 1885 and 1886, Moore, Dig., III, 355, and documents there cited; Mr. Bacon, Acting Secy. of State, to Mr. White, Ambassador to Italy, May 25, 1906, For. Rel. 1906, II, 912.

[5] Mr. Hill, Acting Secy. of State, to Mr. Leishman, Minister to Turkey, June 14, 1901, For. Rel. 1901, 520, Moore, Dig., III, 356.

[6] *In re* Schneider, 164 Fed. 335; United States *v.* Aakervik, 180 Fed. 137; United States *v.* Cantini, 199 Fed. 857, 860; United States *v.* Rockteschell, 208 Fed. 530; *In re* Deans, 208

courts of the United States found in the Act of March 2, 1929, mandatory provisions in relation to residential requirements, and construed them accordingly.[7]

(i)

§ 360. **Certain Exceptions.** The requirement as to the Five Years' Rule of residence is relaxed in certain situations set forth in the statutory law. According to the Nationality Act of 1940, that period is lessened or dispensed with in some cases pertaining to married persons,[1] certain categories of children,[2] former citizens of the United States,[3] and certain persons serving in armed forces or on vessels.[4]

e

## Conventional Arrangements of the United States Concerning Naturalization

(1)

§ 361. **Essential Features of the Treaties Concluded Before World War I.** The naturalization treaties of the United States concluded prior to World War I, fall chronologically into two distinct series, the first of which occurred between 1868 (when George Bancroft signed the convention that bears his name with the North German Union) and 1872,[1] and the second between 1902 and 1911.[2] With two exceptions,[3] a European State was a party to each

---

Fed. 1018; United States *v.* Cantini, 212 Fed. 925. See, also, *In re* Cameron, 165 Fed. 112; also with respect to the requirements of the statute, United States *v.* Shanahan, 232 Fed. 169; United States *v.* Griminger, 236 Fed. 285; *In re* Reichenburg, 238 Fed. 859; *In re* Cook, 239 Fed. 782; United States *v.* Jorgenson, 241 Fed. 412; United States *v.* Ginsberg, 244 Fed. 209.

See United States *v.* Bragg, 257 Fed. 588, where physical absence for four years and seven months of the five-year period required for residence in the United States was decisive of failure to meet with the requirements of the Act.

See also Neuberger *v.* United States, 13 F. (2) 541; Petition of Schneider, 19 F. (2) 404; Petition of Oganesoff, 20 F. (2) 978; Petition of Covelli, 21 F. (2) 432; *In re* Barron, 26 F. (2) 106; *In re* Schradieck, 29 F. (2) 24, where a residence of over four years in the Philippine Islands was not regarded as constituting part of the required five years' residence within the United States.

[7] See United States *v.* Zilver, 55 F. (2) 250; also, *In re* Zapisecki, 41 F. (2) 859; *In re* Roerich, 44 F. (2) 241; *In re* Vitale, 44 F. (2) 241.

§ 360. [1] Secs. 310, 311 and 312. See also Sec. 317 (*b*).

[2] Sec. 314, and Sec. 316, relative to adopted children.

[3] Sec. 319. *Cf.* Sec. 322 in relation to persons born in Puerto Rico of alien parents.

[4] Secs. 324 and 325.

§ 361. [1] The treaties of the first series were concluded with the States named, in the following order: North German Union, Feb. 22, 1868, Malloy's Treaties, II, 1298; Bavaria, May 26, 1868, *id.*, I, 60; Mexico, July 10, 1868, *id.*, I, 1132; Baden, July 19, 1868, *id.*, I, 53; Württemberg, July 27, 1868, *id.*, II, 1895; Hesse, Aug. 1, 1868, *id.*, I, 949; Belgium, Nov. 16, 1868, *id.*, I, 80; Sweden and Norway, May 26, 1869, *id.*, II, 1758; Great Britain, May 13, 1870, *id.*, I, 691; Austria-Hungary, Sept. 20, 1870, *id.*, I, 45; Great Britain (supplemental convention), Feb. 23, 1871, *id.*, I, 698; Ecuador, May 6, 1872, *id.*, I, 434; Denmark, July 20, 1872, *id.*, I, 384.

[2] The treaties of the second series were concluded with the States named, in the following order: Haiti, March 22, 1902, Malloy's Treaties, I, 939; supplemental convention, Feb. 28, 1903, *id.*, I, 941; Peru, Oct. 15, 1907, *id.*, II, 1449; Salvador, March 14, 1908, *id.*, II, 1570; Brazil, April 27, 1908, U. S. Treaty Vol. III, 2502; Portugal, May 7, 1908, Malloy's Treaties, II, 1468; Honduras, June 23, 1908, *id.*, I, 958; Uruguay, Aug. 10, 1908, *id.*, II, 1829; Nic-

of the earlier group, while with one exception,[4] those of the later were concluded with States of Latin America.

The treaties of both series are alike in that they recognize the propriety of naturalization and the change of allegiance effected thereby. Almost all provide that a declaration of intention shall not serve to perfect naturalization.[5] It is a common, although not universal, provision that a naturalized citizen, upon his return to the State of former allegiance, may there be subjected to criminal prosecution for acts committed prior to emigration.[6] He is not, however, to be made punishable for the act of emigration, according to a provision common to the later treaties,[7] which also finds occasional expression in the earlier series.[8] With the exception of the convention with Great Britain of May 13, 1870, and that with Denmark of July 20, 1872, all of the earlier treaties make the recognition of naturalization depend upon a continuous or uninterrupted residence of five years within the territory of the State of adoption.[9]

The treaties usually provide that the renewal of residence by the naturalized citizen in the territory of the State of former allegiance, without intention to return to that of the State of adoption, shall constitute a renunciation of naturalization, and that such intention may be held to exist where such person resides more than two years in the domain of the former State.[10] The treaties of

---

aragua, Dec. 7, 1908, U. S. Treaty Vol. III, 2738; Costa Rica, June 10, 1911, *id.*, 2544; Nicaragua, Supplementary convention, June 17, 1911, U. S. Treaty Vol. III, 2739.

[3] The two treaties which constituted the exception concluded with Mexico, July 10, 1868, and with Ecuador, May 6, 1872, are no longer in force.

[4] The exceptional treaty is that concluded with Portugal, May 7, 1908.

[5] The treaty with Portugal of May 7, 1908, is the one convention of the later series which lacks this provision. Of the earlier series it is not found in conventions with Belgium, Great Britain and Denmark.

[6] A limitation is commonly expressed in case the right to punish has been lost by lapse of time as provided by law. See Naturalization Not Retroactive, *infra*, § 364.

[7] *Compare,* however, in this respect, Art. II, convention with Portugal, May 7, 1908, Malloy's Treaties, II, 1468.

[8] Protocol relating to Art. II of the treaty with Bavaria of May 26, 1868, Malloy's Treaties, I, 62; also protocol relating to Art. II of the treaty with Sweden and Norway of May 26, 1869, *id.*, II, 1760.

The treaty with Baden of July 19, 1868, and that with Austria-Hungary of Sept. 20, 1870, provide that one who, by or after his emigration has transgressed the legal provisions on military duty by any acts or omissions beyond those enumerated in the convention, is not thereafter to be subjected to military service or criminal prosecution for the non-fulfillment of such military duty.

[9] In the treaty with Belgium of Nov. 16, 1868, the five years' residence is made necessary merely to secure a release from military service. In that with Sweden and Norway of May 26, 1869, it is not essential if the individual has been discharged from his original citizenship. Moore, Dig., III, 407–408.

[10] While this exact provision is not found in some of the earlier treaties (such as those with Baden, Belgium, Great Britain and Austria-Hungary), it is present in all of the later ones. Concerning the interpretation of this provision in the German treaties, see documents in Moore, Dig., III, 744–754.

According to a protocol annexed to the convention with Sweden and Norway of May 26, 1869, it was agreed that "If a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship."

"The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway." Malloy's Treaties, II, 1761. In 1911, the Department of State announced, in correspondence with the Norwegian Government, that the protocol was interpreted to mean "that a former Norwegian who secures naturalization in the United States may be deemed to have renounced his American citizenship before

the later series commonly provide, however, that this presumption may be destroyed by evidence to the contrary.[11]

A provision peculiar to the later treaties, and present in all but two of them,[12] declares that the term "citizen," as therein employed, signifies a person to whom the nationality of either of the contracting parties attaches.[13] These agreements would appear, therefore, to embrace within their scope any persons of American nationality, whether or not citizens of the United States.[14]

On January 28, 1913, President Taft made proclamation of the naturalization convention signed August 13, 1906, at the Third International American Conference at Rio de Janeiro, and purporting to establish the status of naturalized citizens who should again take up their residence in the country of their origin.[15] The agreement provided that if a citizen, a native of any of the countries signing the convention, and naturalized in another, should take up his residence in his native country without the intention of returning to the country in which he had been naturalized, he would be considered as having reassumed his original citizenship, and as having renounced the citizenship acquired by naturalization. It was declared that the intention not to return would be presumed to exist when the naturalized person should have resided in his native country for more than two years. Such a presumption might, it was said, be destroyed by evidence to the contrary.[16]

---

the expiration of the two years if it be satisfactorily shown that he does not intend to return to the United States." For. Rel. 1911, 673. See, also, in this connection, United States *v.* Howe, 231 Fed. 546.

[11] This provision was employed in the treaty with Mexico of July 10, 1868, and again in that with Ecuador of May 6, 1872, both of which agreements are no longer in force. It did not again find expression until the convention with Peru of Oct. 15, 1907. Since then it has been commonly embodied in the naturalization treaties of the United States. An exception, however, is seen in that with Portugal of May 7, 1908. See, also, in this connection, Sec. 2, Act of March 2, 1907, 34 Stat. 1228, in reference to the Expatriation of Citizens and their Protection Abroad.

[12] The exceptions are the treaties with Haiti of March 22, 1902, and with Portugal of May 7, 1908.

[13] According to Art. V of the Convention with Nicaragua of Dec. 7, 1908: "It is agreed . . . to define the word 'citizenship,' as used in this Convention, to mean the status of a person possessing the nationality of the United States or Nicaragua." (U. S. Treaty Vol. III, 2739.)

[14] For further documents interpretative of the naturalization treaties of the United States which were concluded prior to World War I, see Hackworth, Dig., III, 377–398; and especially the case of Perkins *v.* Elg, 307 U. S. 325, 335–340, with respect to the naturalization convention with Sweden and Norway, concluded May 26, 1869, Malloy's Treaties, II, 1758.

[15] U. S. Treaty Vol. III, 2882. The proclamation announced that the convention had been duly ratified by the United States, by and with the advice and consent of the Senate thereof, and by the Governments of Colombia, Chile, Costa Rica, Nicaragua, Guatemala, Brazil, the United States of Mexico, Ecuador, Honduras, Panama, Salvador, and the Argentine Republic.

[16] Arts. I and II. Mr. R. W. Flournoy, of the Department of State, has declared that this convention is in effect a naturalization treaty, in which the usual provisions concerning recognition of naturalization, although not expressed, are to be necessarily implied.

Declared the Department of State in its communication of March 16, 1929, for the Preparatory Committee of The Hague Conference on the Codification of International Law: "While the various naturalization conventions to which the United States is a party are not identical, they all contain as their principal provision an article to the effect that nationals of the one country who have obtained naturalization in the other shall be deemed to have lost their original nationality. Most of them contain a provision to the effect that naturalized citizens of either State remain liable to punishment in the State of origin for offenses committed before their emigration. Several contain provisions to the effect that, when a naturalized citizen resumes residence of a permanent character in his country of origin, he shall

(2)

§ 362. **Controversies with Germany.** The return to Germany of former subjects naturalized in the United States pursuant to the terms of conventions with the German States gave rise to prolonged controversy.[1] The Bancroft treaties with the North German Union, Bavaria, Württemberg and Hesse, contained the common provision that renewal of residence by a naturalized citizen in the territory of the State of former allegiance, without intention to return to that of the State of adoption, should constitute renunciation of naturalization, and that such intention might be held to exist after more than two years' residence in the domain of the former State.[2] The United States contended that this provision, especially in the light of Article I of the treaty with Prussia of May 1, 1828 (conferring upon the inhabitants of the respective States the right to reside in the territories of each party),[3] gave to the naturalized American citizen the right to return and reside for at least two years in the State from which he had come and whose allegiance he had renounced, in the absence of any prior manifestation of an intention not to return again to the United States, and provided also that his conduct throughout such sojourn was blameless.[4] Germany, on the other hand, contended that nothing in the naturalization treaties, or in the earlier treaty with Prussia, conferred upon the naturalized American citizen an absolute right to reside in a treaty State for two years, or deprived such State of the right to expel him from its domain during that period.[5] It was urged that when a German had emigrated to the United States for the purpose of evading military service and had there become naturalized, his return to and

---

be deemed to have renounced the nationality acquired through naturalization and this provision is usually coupled with a provision to the effect that an intent not to return to the country of naturalization may be presumed to exist when the naturalized citizen has resided for two years in his country of origin.

"The Pan-American Convention of 1906 relates expressly to the status of naturalized persons who return to the countries of which they were formerly nationals and take up a permanent residence therein. It provides that such a person will be considered, not only 'as having renounced the citizenship acquired by the said naturalization,' but also 'as having reassumed his original citizenship.' In the clause last quoted, they go further than the naturalization conventions mentioned above, which provide merely for the termination of the nationality acquired through naturalization in these cases." (Bases of Discussion, I Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 151.)

§ 362. [1] See, generally, Moore, Dig., III, 376–406, and documents there cited.

*Alsace-Lorraine.* Concerning the controversy respecting the applicability of the Bancroft treaties to Alsace-Lorraine, and the endeavor of the United States to secure from the German Government an arrangement serving to place American citizens born in Alsace-Lorraine upon the same footing as other American citizens of German origin returning to that country for legitimate purposes, see documents in Moore, Dig., III, 364–376; also For. Rel. 1905, 470–472; *id.*, 1906, I, 648–653; *id.*, 1907, I, 511–514; *id.*, 1908, 376–377; also notice to citizens formerly subjects of Germany who contemplated returning to that country, Dept. of State, March 29, 1912.

[2] See, for example, Art. IV of the convention with the North German Union, of Feb. 22, 1868, Malloy's Treaties, II, 1299. The convention with Baden of July 19, 1868, contained a somewhat different provision, *id.*, I, 53.

[3] Malloy's Treaties, II, 1496.

[4] Mr. Bayard, Secy. of State, to Mr. Pendleton, Minister to Germany, March 12, 1886, For. Rel. 1887, 369, Moore, Dig., III, 383; same to Mr. von Alvensleben, German Minister, March 4, 1887, For. Rel. 1887, 419, Moore, Dig., III, 395, 397–398.

[5] Mr. von Alvensleben, German Minister, to Mr. Bayard, Secy. of State, July 8, 1886, For. Rel. 1887, 416, Moore, Dig., III, 391.

prolonged residence in Germany was so detrimental to its welfare by reason of the pernicious influence of his example, that his expulsion became necessary and hence justifiable.[6] Moreover, the bare fact of emigration (when followed by naturalization) was regarded as *prima facie* evidence of an intention to evade military service.[7]

Admitting the obvious possession by Germany of the right of expulsion, the just exercise of which was not supposedly curtailed by the treaties, the United States persistently contended that, in view of the conventions, the exercise of that right became arbitrary when applied to a naturalized American citizen of German origin, who committed no illegal act during his stay on German soil; [8] and that an intention to evade military service was not to be presumed from the bare fact of emigration, especially in a case when, at the time of emigration, military service was not due.[9]

In practice the German Government became disposed to relax the rigor of its rules in cases where, upon adequate representation by the American Legation or Embassy, it appeared that the naturalized citizen had not in fact sought by emigration to evade military service.[10]

While the design of the treaty provision was doubtless to express agreement respecting the renunciation of naturalization, rather than to accord a right of residence, the language employed seemed to justify the claim that residence in the territory of the State of former allegiance should not itself be deemed unreasonable, still less provocative of the exercise of the right of expulsion, so long as the resident committed no offense. If the exigencies of domestic policy made it of supreme importance to the German contracting States to reserve the right to expel any member of an entire class of law-abiding aliens who might attempt to reside on German soil, the treaties should have definitely proclaimed the fact.[11]

[6] *Id.;* also Count H. v. Bismarck, Imperial Secy. for Foreign Affairs, to Mr. Pendleton, Minister to Germany, Jan. 6, 1886, For. Rel. 1886, 316, Moore, Dig., III, 382; Baron Marschall, Imperial Minister for Foreign Affairs, to Mr. Uhl, American Ambassador, March 27, 1897, For. Rel. 1897, 209, Moore, Dig., III, 399.

[7] Mr. White, Ambassador to Germany, to Mr. Hay, Secy. of State, Feb. 16, 1901, For. Rel. 1901, 159, Moore, Dig., III, 404.

[8] Mr. Bayard, Secy. of State, to Mr. von Alvensleben, German Minister, March 4, 1887, For. Rel. 1887, 419, Moore, Dig., III, 395.

[9] Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, Feb. 5, 1901, For. Rel. 1901, 158, Moore, Dig., III, 403–404.

In a notice to American citizens formerly subjects of Germany, who contemplated returning to that country, issued by the Department of State, March 29, 1912, it was declared that: "a naturalized American of German birth is liable to trial and punishment upon return to Germany for an offense against German law committed before emigration, saving always the limitations of the laws of Germany. If he emigrated after he was enrolled as a recruit in the standing army, if he emigrated while in service or while on leave of absence for a limited time, if, having an unlimited leave or being in the reserve, he emigrated after receiving a call into service or after a public proclamation requiring his appearance, or after war broke out, he is liable to trial and punishment on return."

[10] See important and interesting communication of Mr. White, Ambassador to Germany, to Mr. Hay, Secy. of State, April 21, 1900, For. Rel. 1900, 25–26, Moore, Dig., III, 401.

[11] In a communication to Consul General Jenkins, of Nov. 12, 1935, the Dept. of State declared: "It is clear . . . that if a citizen of the North German Confederation, the Kingdom of Bavaria, the Grand Duchy of Hesse, or the Kingdom of Württemberg, naturalized in the United States, renewed, prior to April 6, 1917, his residence in the North German Confederation, the Kingdom of Bavaria, the Grand Duchy of Hesse, or the Kingdom of

(3)

§ 363. **Controversies with Austria-Hungary.** The naturalization treaty with Austria-Hungary of September 20, 1872,[1] differed from the Bancroft treaties with the German States (with the exception of that with Baden of July 19, 1868), in that it seemed to import, as Mr. Hay, Secretary of State, declared in 1900, that a naturalized American citizen might reside indefinitely in the country of his origin without incurring any disability, and without being obliged to resume his original citizenship.[2] The treaty provided also that the right to try and punish a former national of the Austro-Hungarian Monarchy, who had become a naturalized American citizen, for non-fulfillment of military duty prior to emigration was restricted to acts or omissions enumerated in the convention.[3]

Without any allegation of offense within the terms of the treaty, but rather upon the ground that the individual had emigrated in order to avoid military service, and that his presence in the country thereafter was undesirable, the Austro-Hungarian Government oftentimes sought to expel its former citizens of American nationality upon their return to, and residence within, its domain.[4] The United States maintained, on the other hand, that the propriety of expulsion depended upon the particular circumstances of each case, that the pernicious character of the returning person should be affirmatively shown in justification of the extreme resort to expulsion, and that the exercise of that right should not rest upon "a vague and general theory of inconvenient example."[5]

The controversies with both the German and Austro-Hungarian Governments are now sufficiently remote in point of time to shed light on the solution of problems which until solved retard the conclusion of naturalization conventions. Those controversies suggest the insufficiency of treaties which fail to cause a resumption of permanent residence by a naturalized citizen in the territory of

---

Württemberg, respectively, without the intent to return to the United States, he should be considered as having renounced his naturalization in the United States." (Hackworth, Dig., III, 384.)

§ 363. [1] Art. IV, Malloy's Treaties, I, 46.

[2] Communication to Mr. Harris, Minister to Austria-Hungary, July 19, 1900, For. Rel. 1900, 22, Moore, Dig., III, 421–422. See, however, Sec. 2, Act of March 2, 1907, 34 Stat. 1228, in reference to the Expatriation of Citizens and Their Protection Abroad.

[3] See documents cited in Moore, Dig., III, 414–415, indicating a desire on the part of the Imperial and Royal Government in 1899, to modify the treaty in this and other respects. Concerning the interpretation placed by the United States upon the provision respecting uninterrupted residence for five years as a condition precedent to naturalization, see Mr. Tripp, Minister to Austria-Hungary, to Mr. Gresham, Secy. of State, Aug. 23, 1894, and Mr. Uhl, Acting Secy. of State, to Mr. Tripp, Sept. 14, 1894, For. Rel. 1894, 36, 38, 46, Moore, Dig., III, 411–412.

See case of Morris Reich, referred to in For. Rel. 1913, 21–23.

[4] Mr. Adee, Acting Secy. of State, to Mr. Hunter, April 12, 1895, 201 MS. Dom. Let. 480, Moore, Dig., III, 418; also Count Szecsen, Minister of Foreign Affairs, to Mr. Harris, American Minister, June 5, 1900, For. Rel. 1900, 21, 22, Moore, Dig., III, 420–421.

[5] Mr. Hay, Secy. of State, to Mr. Herdliska, American Chargé at Vienna, July 9, 1901, For. Rel. 1901, 10, Moore, Dig., III, 422; same to Mr. Harris, Minister to Austria-Hungary, July 19, 1900, For. Rel. 1900, 22, Moore, Dig., III, 421–422; President McKinley, Annual Message, Dec. 3, 1900, For. Rel. 1900, xvi, Moore, Dig., III, 423. Also For. Rel. 1910, 67–71, respecting the emigration and military service law of Hungary.

the State of origin to produce immediately not only loss of the nationality acquired by naturalization but also a re-assumption of the nationality of the State of origin.[6] The United States has and should have no desire to claim the allegiance of naturalized American citizens who resume a residence of such a character, and no treaties of naturalization should serve to render equivocal the nationality of those who do so. Again, as is observed later,[7] it may be doubted whether a treaty of naturalization should register the attempt to safeguard the naturalized citizen from penalties sought to be imposed upon him by the State of origin on account of disobedience to its laws at any time before he ceased to be its national. The appeal of naturalization as an instrument of justice worthy of recognition as such in the conventional law of nations is not enhanced by pleas which labor to belittle the equities of the State of origin in either of the foregoing situations.

(4)

§ 363A. **Treaties Restoring Friendly Relations After World War I.** By its treaty with Germany "restoring friendly relations," concluded August 25, 1921, the United States gained the undertaking by Germany to accord to it "all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."[1] These embraced the undertakings of Germany set forth in Article 278 of that treaty "to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalization or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin."[2] As Mr. Hackworth points out: "Similar provisions are contained in article 1 of the respective peace treaties with Austria and Hungary (Austria, August 24, 1921, 42 Stat. 1946, 3 Treaties, etc. [Redmond, 1923] 2493; Hungary, August 29, 1921, 42 Stat. 1951, 3 Treaties, etc. [Redmond, 1923] 2693), and the United States accordingly enjoys the benefits provided in article 230 of the Treaty of Saint Germain-en-Laye and in article 213 of the Treaty of Trianon which are substantially similar in terms to article 278 of the Treaty of Versailles."[3]

[6] See Naturalization Convention concluded at the Third International Conference of American States, at Rio de Janeiro, Aug. 13, 1906, U. S. Treaty Vol. III, 2882. Also, Art. 16, Harvard Draft convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 15.

[7] See Expatriation, Relation to Emigration, *infra*, § 377.

§ 363A. [1] Art. 1, U. S. Treaty Vol. III, 2598.

[2] U. S. Treaty Vol. III, 3449. Interpreting the privileges acquired by the United States in virtue of that Article, see communication of the Department of State to the Embassy at Berlin, of Oct. 11, 1938, Hackworth, Dig., III, 401–402, with respect to the case of Ransom Otto Theodore Rupprecht. *Cf.* views of the German Foreign Office of April 11, 1938, *id.*, 400.

[3] Hackworth, Dig., III, 399.

(5)

§ 363B. **Treaties Concluded since World War I.** The first of the bi-partite treaties in respect to naturalization concluded by the United States after World War I was that with Bulgaria, of November 23, 1923.[1] It was followed by a treaty with Czechoslovakia, signed at Prague, July 16, 1928.[2] Both instruments announce that naturalization produces loss of previous nationality.[3] Renewal of residence by a naturalized national within the territory of the State of origin "without the intent to return to that in which he was naturalized" causes such an individual to be deemed "to have renounced his naturalization," according to the terms of the arrangement with Bulgaria; [4] or, according to that with Czechoslovakia, "to have lost the nationality acquired by naturalization." [5] Moreover, both conventions announce that the intent not to return may be held to exist "when a person naturalized in the one country shall have resided more than two years in the other." [6] Both conventions purport to safeguard the naturalized person upon returning to the territory of the State of his origin as against the punishment by that State in certain situations. Thus, according to the convention with Bulgaria, he is not to be punishable for the original act of emigration, or for failure, prior to naturalization, to respond to calls for military service not accruing until after bona fide residence was acquired in the territory of the country whose nationality was obtained by naturalization.[7] According to that with Czechoslovakia, he is not to be prosecuted or punished "for expatriation" or for having failed, prior to naturalization to answer a summons to military service served upon him within a period of five years preceding naturalization.[8]

The injunction against punishment "for expatriation" seemingly has reference to expatriation through naturalization, and is therefore, greatly to be preferred to that imposing upon the contractual State of origin a duty not to inflict punishment on account of the original act of emigration. The difference in this respect between these conventions is important. That with Czechoslovakia apparently reflects a theory less likely to encounter opposition abroad than that which is rigidly accentuated in the earlier arrangement with Bulgaria. The later convention is, therefore, believed to offer a model increasingly calculated to win a friendly reception in many quarters as the precise views of the United States in respect to the connection of expatriation with naturalization become better understood.

By way of response to the terms of the statutory law of the United States,

§ 363B. [1] Treaty Vol. IV, 3972. In relation to the negotiation and interpretation of the treaty with Bulgaria, see documents in Hackworth, Dig., III, 403–407.

[2] Treaty Vol. IV, 4063.

[3] Art. I of each convention.

[4] Art. III.

[5] Art. III.

[6] Art. III of each convention.

[7] Art. II.

[8] Art. II. "The five-year limitation which was inserted in this article upon the suggestion of Czechoslovakia is not contained in article II of the Albanian treaty, the parallel provision in that article providing, 'or for failure to respond to calls for military service accruing after bona fide residence was acquired in the territory of the country whose nationality was obtained by naturalization.'" (Hackworth, Dig., III, 407.)

both conventions are rendered inapplicable in the case of a national of a contracting party "who obtains naturalization in the other while his country is at war." [9] Moreover, the word "naturalized" is said to refer "to the naturalization of a person over twenty-one years of age, granted upon his own application, while he is permanently residing within the country of naturalization, and to the naturalization of a person under twenty-one years of age through the naturalization of a parent, provided such person has acquired a permanent residence within the country of naturalization." [10]

In a naturalization treaty concluded with Albania on April 5, 1932, the convention with Bulgaria of November 23, 1923, rather than that with Czechoslovakia of July 16, 1928, was duplicated through the provisions of Article II, forbidding the punishment of a former national on account of the original act of emigration.[11] It was declared in Article I that minor children of persons naturalized in either country should not acquire the nationality of that country until they had established their habitual residence there.[12] According to Article IV, it was provided that a person born within the territory of one party of parents who were nationals of the other party, and having the nationality of both parties under their laws, should not, if he had his habitual residence, that is to say, the place of his general abode, in the territory of the State of his birth, be held liable for military service or any other act of allegiance during a temporary stay in the territory of the other party.[13]

(6)

§ 364. **Naturalization not Retroactive.** Naturalization cannot retroactively affect a penalty previously enunciated and fixed by the State of origin and remaining unfulfilled when naturalization took place.[1] When an alien who has been naturalized in the United States voluntarily returns to his native country with legal obligations contracted before he left there, the naturalization is not held to absolve him therefrom if the government or individual to whom they may be due shall think proper to enforce them.[2] In such a spirit the naturaliza-

[9] Art. I of both conventions.

[10] Art. I of convention with Czechoslovakia.

[11] U. S. Treaty Vol. IV, 3922, 3923. It is to be regretted that such a course was followed.

[12] *Cf.* the provisions in the final paragraph of Art. I of the treaty with Czechoslovakia of July 16, 1928, U. S. Treaty Vol. IV, 4063.

[13] The Article served to restrict, in a sensible manner, the application of the doctrine of dual allegiance in the situation for which provision was made.

§ 364. [1] See statement in Moore, Dig., III, 426, based upon a communication of Mr. Adee, Acting Secy. of State, to Mr. Kunze, Aug. 3, 1897, 220 MS. Dom. Let. 38. See, also, Opinion of Mr. Black, Atty. Gen., 9 Ops. Attys. Gen., 356, Moore, Dig., III, 424; Mr. Bayard, Secy. of State, to Mr. Turner, Sept. 10, 1885, 157 MS. Dom. Let. 109, Moore, Dig., III, 425.

"It is not the practice of the Department to present claims arising out of the military arrest and detention of naturalized American citizens who return to the country of their birth." Mr. Adee, Acting Secy. of State, to Mr. Harris, Minister to Austria-Hungary, Sept. 20, 1899, For. Rel. 1899, 75, Moore, Dig., III, 426. For a contrary view expressed in certain earlier instances, see documents cited in Moore, Dig., III, 426.

[2] The language of the text is that of Mr. Marcy, Secy. of State, to Mr. Vroom, Minister to Prussia, No. 37, Dec. 26, 1856, MS. Inst. Prussia, XIV, 242, Moore, Dig., III, 424. That the decree of naturalization does not operate retroactively, see *Ex parte* Kyle, 67 Fed. 306; State *v.* Boyd, 48 N. W. 739 (Neb.); Dryden *v.* Swinburne, 20 W. Va. 89; Wulff *v.* Manuel, 23 Pac. 723 (Mont.), all cited in Moore, Dig., III, 423.

tion treaties of the United States have been conceived. Provision is commonly made, as has been observed, for the punishment of a naturalized American citizen upon his return to the State of former allegiance for the violation of its criminal laws prior to the date of emigration, unless the right to punish has been lost by the lapse of time provided by law.[3] Desertion from active military service is not condoned by treaty,[4] or any other form of disobedience to the command of the former sovereign with respect to military service issued prior to emigration.[5]

## f

## Marriage Between Persons of Differing Nationalities

### (1)

### Marriage of American Women to Aliens. Reversion of Nationality

### (*a*)

§ 365. **The Act of March 2, 1907.** The effect produced upon the nationality of an American woman by her marriage to a foreigner was not prescribed by any Act of Congress prior to that of March 2, 1907. Probably no requirement of international law obliged the United States to regard expatriation as the necessary consequence of such a marriage.[1] Where the State of which the husband was a national clothed the wife with its nationality, in virtue of her marriage, and the couple proceeded to reside within its domain, it was not unreasonable for the United States, in the light of those circumstances, to acknowledge that the woman had acquired her husband's nationality. For many years before the passage of the Act in 1907, the practice of the Department of State is said to have "conformed to this general international rule."[2] In January,

[3] Concerning cases relating to statutes of limitations under German treaties, see Moore, Dig., III, 437–441, and documents there cited.

[4] Mr. Hill, Assist. Secy. of State, to Mr. Whelden, June 19, 1900, 245 MS. Dom. Let. 664, Moore, Dig., III, 425; also For. Rel. 1903, 442.

[5] See German military service cases in Moore, Dig., III, 427–437. See Department of State Circular Concerning Liability for Military Service in Foreign Countries of Persons Residing in the United States, Aug. 14, 1914, For. Rel. 1914, 17; Circulars Relating to Citizenship, 1916, p. 62; also Mr. Lansing, Secy. of State, to Messrs. Hubbard & Hubbard, Aug. 18, 1915, *id.*, 80.

See, also, Expatriation, Difficulties with Certain Foreign States, Respecting Military Service, *infra*, § 381; Relation of Expatriation to Emigration, *infra*, § 377.

That a member of the reserve corps who does not respond to a call to active service made after his emigration to the United States should not, after his naturalization therein, upon his return to the State of origin, be punished as a deserter, under the German and Austro-Hungarian treaties, see respectively, Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, No. 111, July 21, 1875 (in the case of Henry Mumbour), MS. Inst. Germany, XVI, 76, Moore, Dig., III, 430; and Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, May 10, 1900, For. Rel. 1900, 30, 31, Moore, Dig., III, 444.

§ 365. [1] Concerning the divergent opinions expressed in the United States prior to the enactment of the Act of March 2, 1907, see documents in Moore, Dig., III, 448–454; Van Dyne, Naturalization, 242–255. See also numerous documents in Hackworth, Dig., III, § 247. Among the judicial decisions there cited may be noted *In re* Wohlgemuth, 35 F. (2d) 1007; *In re* Krausmann, 28 F. (2d) 1004; *In re* Fitzroy, 4 F. (2d) 541; Petition of Zogbaum, 32 F. (2d) 911; *In re* Lynch, 31 F. (2d) 762.

See, also, Thornton, Umpire, in M. J. de Lizardi Case, Mexican-American Commission, convention of July 4, 1868, Moore, Arbitrations, II, 2483; same Umpire, in Case of Heirs of Felix Maxan, before same Commission, *id.*, 2485. [2] Hackworth, Dig., III, 247.

1925, Secretary Hughes concluded in the case of Mrs. Louise Gehring Marshall, that a woman born in Cleveland in 1862, who had married a British subject in the United States prior to March 2, 1907, and who continued to reside with him therein, could not be regarded as having lost her American citizenship, and that she was entitled to a passport. The ruling of the Secretary applied, however, "only to a native American woman who, after her marriage to an alien, continued to reside in the United States." [3]

According to Section 3 of the Act of March 2, 1907: "Any American woman who marries a foreigner shall take the nationality of her husband." [4] That her

[3] Hackworth, Dig., III, 247–248. The reason for this conclusion was that Mr. Justice McKenna, in rendering the decision of the Supreme Court in the case of Mackenzie *v.* Hare, 239 U. S. 299, took occasion to observe with reference to Section 3 of the Act of March 2, 1907: "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences." (311) Here was a strong intimation that a native American woman might not be deemed by the Court to have lost her American citizenship through marriage to an alien before the passage of the Act.

"*Loss of citizenship by marriage prior to March 2, 1907, of an American woman to an alien.* An American woman who married an alien prior to March 2, 1907, lost her American citizenship (a) if she took up a permanent residence abroad with her husband at any time prior to September 22, 1922, and (b) if she acquired as a result of the marriage the nationality of the country of which her husband was a citizen or subject.

"If an American woman who was married to an alien continued to reside in the United States until after September 22, 1922, she did not lose her American citizenship by reason of such marriage; nor did she lose such citizenship if she took up a permanent residence abroad with her husband prior to September 22, 1922, unless she acquired the nationality of the country of which her husband was a citizen or subject under its laws.

"An American woman who was married to an alien prior to March 2, 1907, and who lost her American citizenship under the conditions mentioned in the first paragraph of this note could re-acquire American citizenship if the marital status terminated prior to March 2, 1907, by resuming a permanent residence in the United States. From March 2, 1907, to September 22, 1922, the conditions under which American citizenship could be resumed by such a woman were governed by the provisions of section 3 of the act of March 2, 1907. This section was repealed by the act of September 22, 1922.

"Under the interpretation placed by the Department upon section 3 of the act of September 22, 1922, an American woman who was married to an alien prior to March 2, 1907, and who took up a permanent residence abroad with her alien husband subsequent to September 22, 1922, came within the purview of section 3 of the act of September 22, 1922, and if the presumption of having ceased to be an American citizen was resting against her prior to the repeal of the presumption provision of that section by the act of July 3, 1930, she must overcome it under the rules prescribed by the Department before she may be extended protection and recognition as an American citizen while abroad." (Note 2, section 140 of the Consular Regulations of the United States, as of March, 1933.) See also documents in Hackworth, Dig., III, 338–344.

See Edwin M. Borchard, "The Citizenship of Native-Born American Women Who Married Foreigners Before March 2, 1907, and Acquired a Foreign Domicile," *Am. J.*, XXIX, 396.

[4] § 3, Chap. 2534, Act of March 2, 1907, 34 Stat. 1228.

In the course of the opinion sustaining the law in Mackenzie *v.* Hare, 239 U. S. 299, Mr. Justice McKenna said: "The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity in international policy. And this was the dictate of the act in controversy." (311.)

See, also, *In re* Rionda, 164 Fed. 368; United States *v.* Cohen, 179 Fed. 834; Techt *v.* Hughes, 128 N. E. 785 (New York), 229 N. Y. 222.

See Fred K. Nielsen, "Some Vexatious Questions Relating to Nationality," *Columbia Law Rev.*, XX, 840.

domicile or residence at the time of marriage was deemed to be unimportant seems to be obvious. "Not long after the passage of the act of March 2, 1907, the Department of State was called upon in numerous cases to decide whether the first sentence in section 3, that 'any American woman who marries a foreigner shall take the nationality of her husband,' applied to the case of a woman whose husband became a foreigner by naturalization abroad after the marriage. It was held that it did." [5]

By virtue of the same Act, the woman might, upon the termination of the marital relationship, resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relationship, by continuing to reside therein.[6] Thus, the termination of that relationship by whatsoever process did not in itself produce a reversion of American nationality but simply endowed the woman with capacity to resume the same upon compliance with the conditions prescribed. That such resumption, in order to operate as the natural consequence of the termination of the marital relationship, was conditioned upon a returning to reside in, or a continued residence in the United States, was a reasonable provision, in harmony with the views expressed by the Department of State.[7] That resumption might be effected also, in case of absence from the United States, by formal election manifested through registration with a consul, was a wise provision.[8]

[5] Hackworth, Dig., III, 353–354, citing opinion of the Solicitor for the Dept. of State, Jan. 23, 1924.

Concerning the effect upon the nationality of an American woman (under provisions of § 3 of the Act of March 2, 1907) of the taking of an oath of allegiance to a foreign State by her American husband, see documents in Hackworth, Dig., III, 255–257, especially as indicated in an opinion by the Solicitor for the Dept. of State of Oct. 29, 1925, in the case of Mrs. Guilia Casella, Hackworth, Dig., III, 255.

[6] § 3, Act of March 2, 1907, 34 Stat. 1228.

See Case of Mary Barchard Williams, Mixed Claims Commission, United States and Germany, No. 594, Consolidated Edition of Decisions and Opinions, 1925, 221, 225.

For cases arising prior to the Act of 1907, see Documents in Moore, Dig., III, 454–456; especially the Case of Nellie Grant Sartoris, daughter of President Grant, who had married a British subject, had resided in England until his death in 1896, and was by joint resolution of Congress of May 18, 1898, 30 Stat. 1496, "on her own application, unconditionally readmitted to the character and privileges of a citizen of the United States," pursuant to Art. III of the Naturalization Convention with Great Britain of May 13, 1870. Malloy's Treaties, I, 692.

[7] Mr. Bacon, Acting Secy. of State, to Mr. Clay, Minister to Switzerland, Jan. 26, 1906, For. Rel. 1906, II, 1371; Mr. Root, Secy. of State, to Mr. Vogel, Swiss Minister, June 2, 1906, in which he declared: "Under the practice of the Department of State a widow or a woman who has obtained an absolute divorce, being an American citizen and who has married an alien, must return to the United States, or must have her residence here in order to have her American citizenship revert on becoming *femme sole*." *Id.*, II, 1365.

See, also, opinion of Plumley, Umpire, in the Stevenson Case, British-Venezuelan Commission, 1903, Ralston's Report, 442, 453. *Compare* Case of Martha M. Calderwood, No. 360, American and British Claims Commission, treaty of May 8, 1871, Moore, Arbitrations, III, 2485–2486; also, comment on this and other cases in Hale's Report, 17, Moore, Arbitrations, III, 2486.

[8] See Circular Instruction to American Diplomatic and Consular Officers concerning the "Registration of Women Who Desire to Resume or Retain American Citizenship," April 19, 1907, For. Rel. 1907, I, 10–13.

(*b*)

§ 365A. **The Cable Act of September 22, 1922.** According to the Act of September 22, 1922, known as the Cable Act: "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided,* that any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States." [1] This limitation was subsequently stricken out.[2]

The Act thus served to repeal the conflicting provisions of section 3 of the Act of March 2, 1907. Such repeal did not, however, restore citizenship lost, or terminate citizenship resumed, under the earlier Act. Thus a woman who by virtue thereof resumed her citizenship lost through marriage to an alien was regarded by the Department of State as having, for all purposes, upon the passage of the Cable Act, "the same citizenship as immediately preceding her marriage." [3]

According to the Act of March 3, 1931, § 3 of the Cable Act of September 22, 1922, was amended so as to read as follows: "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over the naturalization of aliens." [4]

According to § 3 of the Act of May 24, 1934: "A citizen of the United States may upon marriage to a foreigner make a formal renunciation of his or her United States citizenship before a court having jurisdiction over naturalization of aliens, but no citizen may make such renunciation in time of war; and if war shall be declared within one year after such renunciation, then such renunciation shall be void." [5]

§ 365A. [1] § 3, 42 Stat. 1021. See, R. W. Flournoy, "The New Married Women's Citizenship Law," *Yale L.J.*, XXXIII, 159; C. D. Hill, "Citizenship of Married Women," *Am. J.*, XVIII, 720; Jesse S. Reeves, "Nationality of Married Women," *Am. J.*, XVII, 97.

Section 3 of the Act contained also the following provisions. "If at the termination of the marital status she is a citizen of the United States, she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the Act entitled 'An Act in reference to the expatriation of citizens and their protection abroad,' approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of section 2 of the Expatriation Act of 1907 with reference to expatriation." These provisions were repealed by an Act of July 3, 1930, which declared, however, that the repeal should not restore citizenship lost under section 3 of the Act of Sept. 22, 1922, before its repeal. 46 Stat. 854.

[2] See Sec. 4 of Act of March 3, 1931, 46 Stat. 1511.

[3] See Executive Order of Aug. 4, 1930, Section 140 of the Consular Regulations of the United States, as of August, 1930.

[4] 46 Stat. 1511.

[5] 48 Stat. 797.

Declared the Dept. of State in a circular instruction of July 15, 1936: "It seems clear that Congress intended that an American woman should not cease to be an American citizen unless she married an alien ineligible to citizenship during the period between September 22,

It has recently been observed that: "Although under the terms of Section 3 of the Act of September 22, 1922, as amended, an American woman did not lose her nationality through marriage to an alien, the Department of State has held that she did lose her nationality when, in connection with marriage to an alien, she performed some positive, affirmative act required by the law of her husband's State as a prerequisite to the acquisition of his nationality. In such a case the woman was considered to have lost her nationality under the provisions of section 2 of the act of March 2, 1907, through naturalization in a foreign State in accordance with its laws." [6]

(2)

§ 366. **Marriage of Alien Women to American Citizens. Reversion of Nationality.** Under the former statutory law of the United States: "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." [1] That law was, moreover, deemed applicable to a woman who was married to an alien who subsequently himself became a naturalized American citizen.[2] "With two or three exceptions the Federal courts and Attorneys General have agreed in holding that alien women who were at the time of marriage to American citizens inadmissible under the immigration laws of the United States or subject to deportation thereunder, nevertheless, acquired citizenship of the United States under section 1994 of the Revised Statutes, if they might 'be lawfully natu-

---

1922, and March 3, 1931, or unless she made a formal renunciation of her American citizenship before a court having jurisdiction over the naturalization of aliens, provision for which was made in the Acts of September 22, 1922, March 3, 1931, and May 24, 1934, or unless she voluntarily expatriated herself under the provisions of the first paragraph of Section 2 of the Act of March 2, 1907, by being naturalized in a foreign State as a result of affirmative individual action on her part, or by taking an oath of allegiance to a foreign State." (Hackworth, Dig., III, 259–260.)

"It has been held by the Department of State that an American woman who married an alien after September 22, 1922, did not lose her American nationality as a result of such marriage, even though she became naturalized by her marriage as a citizen of the country to which her husband belonged, and even though there existed between that country and the United States a naturalization treaty requiring this country to recognize the naturalization of American citizens in the other country concerned." (Hackworth, Dig., III, 264.)

[6] Hackworth, Dig., III, 258, where reference is made to the case of Mrs. Dorothy Davidson Chamorro Dupont, "who upon being married in 1931 to a French citizen made a declaration before French officials to the effect that, 'being about to contract marriage with Mr. Pierre Dupont, of French nationality, she intended expressly to claim that nationality.'"

". . . American citizenship is not lost by the use of passports issued to American women by the country whose nationality they acquired as a result of marriage or the naturalization or reacquisition of nationality on the part of their husbands, nor is American citizenship lost by the exercise of the rights of foreign nationality acquired in the manner just indicated, but the Department may after a careful examination of all of the facts in each particular case consider that the protection of the United States should no longer be extended to the individual concerned. . . ." (Hackworth, Dig., III, 260, citing Circular Instruction to the diplomatic and consular officers, July 15, 1936.)

§ 366. [1] Rev. Stat. § 1994. Concerning the application of the statute, see documents cited in Moore, Dig., III, 456–458; also Low Wah Suey *v.* Backus, 225 U. S. 460, 473–474; *In re* Nicola, 184 Fed. 322; Sprung *v.* Morton, 182 Fed. 330; United States *v.* Williams, 173 Fed. 626; Opinion of Mr. Wickersham, Atty. Gen., respecting case of Nazara Gossin, 28 Ops. Attys. Gen., 504; also Persons Capable of Naturalization as American Citizens, *supra*, § 354.

[2] Kelly *v.* Owen, 7 Wall. 496; Headman *v.* Rose, 63 Ga. 458; Burton *v.* Burton, 1 Keyes, 359; all cited in Moore, Dig., III, 456. See, also, Van Dyne, Naturalization, 231–233.

ralized.' " [3] That section was amended by the proviso in section 19 of the Immigration Act of February 5, 1917, which declared that the marriage of an immoral alien female to an American citizen should not invest her with citizenship if her marriage were solemnized after her arrest or after the commission of acts which made her liable to deportation under the Act.[4]

By virtue of the Act of March 2, 1907, any foreign woman who acquired American citizenship by marriage to an American was assumed to retain the same after the termination of the marital relationship if she continued to reside in the United States, unless she made formal renunciation thereof before a court having jurisdiction to naturalize aliens; or, if she resided abroad, she might retain her citizenship by registering before a United States consul within one year after the termination of the marital relationship.[5] Thus the termination did not itself effect a change of nationality, but simply left the woman free to follow her own choice, requiring of her a formal election only in case she desired to renounce or not resume, as the case might be, the nationality of the State within whose domain she continued to reside.

(3)

**§ 366A. The Cable Act of September 22, 1922, as Amended. The Nationality Act of 1940.** It was provided by the Cable Act of September 22, 1922:

1. That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.

2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(*a*) No declaration of intention shall be required;

(*b*) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.[1]

[3] Hackworth, Dig., III, 85, and documents there cited, embracing opinion of July 30, 1909, of the Attorney General, 27 Ops. Attys. Gen. 507, 515, 520.

[4] 39 Stat. 889.

[5] § 4, 34 Stat. 1229. See, in this connection, Circular Instruction of Mr. Root, Secy. of State, to American Diplomatic and Consular Officers, April 19, 1907, For. Rel. 1907, I, 10–13.

§ 366A. [1] 42 Stat. 1021.

In consequence of this legislation the alien woman, who was a national of a State by the laws of which expatriation resulted from her marriage to a foreigner, found herself in a grave predicament. Her marriage to an American citizen served to divest her of the nationality of her own country without clothing her with that of any other, and so left her without nationality.

See, Cyril D. Hill, "Citizenship of Married Women," *Am. J.*, XVIII, 720, 728, where the consequences of the "statelessness" of the alien wife of an American citizen are depicted.

"Minor alien children or an alien wife may *not* be included in the passport of a parent or husband." Note 3 to Section 165 of the Consular Regulations of the United States as of

In section 2 of the Act of July 3, 1930, the following provision amendatory of Section 4 of the Cablė Act was made for the naturalization of women who had lost their American citizenship by reason of marriage to aliens:

(*a*) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions;
(1) No declaration of intention and no certificate of arrival shall be required, and no period of residence within the United States or within the county where the petition is filed shall be required;
(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;
(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;
(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

(*b*) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after this section, as amended, takes effect.[2]

It was also declared that the amendment thus made to section 4 of the Cable Act should not terminate citizenship acquired under that section prior to the amendment.

By section 5 of the Cable Act, "No woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status." [3] According to the amendatory Act of March 3, 1931:

(*b*) Any woman who before this section, as amended, takes effect, has lost her United States citizenship by residence abroad after marriage to an alien or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 4 of this Act, as amended. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 4 on account of her race.

(*c*) No woman shall be entitled to naturalization under section 4 of this Act, as amended, if her United States citizenship originated solely by

---

August, 1930. Also Instruction to American Diplomatic and Consular Officers, April 12, 1924, concerning the "Mention of Alien Wives in Husbands' American Passports," Compilation of Certain Departmental Circulars relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc., Washington, 1925, p. 123.

[2] 46 Stat. 854.

[3] By § 6 of the Cable Act: "Section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907."

reason of her marriage to a citizen of the United States or by reason of the acquisition of United States citizenship by her husband.[4]

It may be observed that an Act of May 24, 1934, declared that an alien who married a citizen of the United States after that date, or an alien whose husband or wife was naturalized after that date, should "not become a citizen of the United States by reason of such marriage or naturalization"; but that, if eligible to citizenship, either spouse might be naturalized under conditions that relaxed certain requirements in relation to the declaration of intention and periods of residence.[5]

The Nationality Act of 1940 made provision that

Any alien who, after September 21, 1922, and prior to May 24, 1934, has married a citizen of the United States, or any alien who married prior to May 24, 1934, a spouse who was naturalized during such period and during the existence of the marital relation may, if eligible to naturalization, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: [6]

Any alien who, on or after May 24, 1934, has married or shall hereafter marry a citizen of the United States, or any alien whose husband or wife was naturalized on or after May 24, 1934, and during the existence of the marital relation or shall hereafter be so naturalized may, if eligible for naturalization, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: [7]

A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States, or whose spouse is naturalized after the effective date of this section, if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions.[8]

[4] 46 Stat. 1511.

According to the Act of June 27, 1934: "Any woman, native of Puerto Rico and permanently residing therein, who, prior to March 2, 1917, had lost her American nationality by reason of her marriage to an alien eligible to citizenship, or by reason of the loss of the United States citizenship by her husband, may be naturalized under the provisions of section 4 of the Act of September 22, 1922, entitled 'An Act relative to the naturalization and citizenship of married women,' as amended." (48 Stat. 1245.)

[5] 48 Stat. 797, 8 U.S.C.A. § 368.

See Declaration of Intention, Exceptions, *supra*, § 357; Residence, Five Years' Rule, Exceptions, *supra*, § 360.

[6] Sec. 310 (*a*). The exceptions relaxed normal requirements pertaining to declaration of intention and the five-year period of residence.

[7] Sec. 310 (*b*). The exceptions likewise relaxed normal requirements pertaining to declaration of intention and the five-year period of residence.

[8] Sec. 311. The exceptions likewise relaxed normal requirements pertaining to declaration of intention and the five-year period of residence.

According to Sec. 312: "An alien, whose spouse is (1) a citizen of the United States, (2) in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney-General, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof, and (3) regularly stationed abroad in such employment, and who is (1) in the United States at the time of naturalization, and

g

**§ 367. Effect of Parents' Naturalization on Infants. The Naturalization of Children.** In determining what effect the naturalization of the parents should have upon the nationality of their infant children, the United States has heeded two principles, the disregard of either of which would tend to produce a conflict of allegiance.[1] The first is the right of a foreign State to claim the allegiance of children born to its own nationals, while such children reside within its domain. The second is "that it is not within the power of a parent to eradicate the original nationality of his child, though he may, during the minority of such child, invest him with rights or subject him to duties which may or may not be claimed or performed." [2] Deference for the latter has, however, at times been obscure.

It may be observed that the American delegation at The Hague Conference of 1930 for the Codification of International Law, proposed that the naturalization of a parent having lawful custody of an unmarried child might, if the local law so provided, involve that of such child, who, while a minor, resided in or came to reside in the country of naturalization.[3] Such requirements in respect to the residence of the child found no place, however, in the Convention on Nationality that emanated from the Conference.[4]

According to Section 314 of the Nationality Act of 1940:

> A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

---

(2) declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all requirements of the naturalization laws, with the following exceptions:

(*a*) No declaration of intention shall be required; and

(*b*) No prior residence within the United States or within the jurisdiction of the naturalization court or proof thereof shall be required."

§ 367. [1] Zartarian *v.* Billings, 204 U. S. 170, 174, 175; Van Dyne, Naturalization, 202, 203.

[2] Mr. Blaine, Secy. of State, to Mr. Phelps, Minister to Germany, Feb. 1, 1890, in the case of Carl Heisinger, For. Rel. 1890, 301, Moore, Dig., III, 467. Secretary Blaine added: "For this reason, also, it is provided that children not born citizens of the United States are, by virtue of the naturalization of their parents, to be considered as citizens of the United States 'if dwelling' therein."

*Cf.* Mr. Wharton, Acting Secy. of State, to Mr. Phelps, Minister to Germany, Sept. 8, 1890, For. Rel. 1891, 496, Moore, Dig., III, 473.

See E. J. Hover, "Derivative Citizenship in the United States," *Am. J.*, XXVIII, 255, 269.

[3] This, with other proposals, was offered on March 18, 1930, in the First Committee on Nationality. See also statements by R. W. Flournoy, a delegate of the United States before the First Committee on March 24, 1930, (seventh meeting), and on March 27, 1930 (tenth meeting); also views of Mr. Dowson, a delegate of the British Empire, on March 27, 1930 (tenth meeting), in harmony therewith.

[4] According to Art. 13 thereof: "Naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted. In such case the law of that State may specify the conditions governing the acquisition of its nationality by the minor children as a result of the naturalisation of the parents.

"In cases where minor children do not acquire the nationality of their parents as the result of the naturalisation of the latter, they shall retain their existing nationality." (*Am. J.*, XXIV, *Documents*, 194.)

(a) The naturalization of both parents; or
(b) The naturalization of the surviving parent if one of the parents is deceased; or
(c) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents; and if —
(d) Such naturalization takes place while such child is under the age of eighteen years; and
(e) Such child is residing in the United States at the time of the naturalization of the parent last naturalized under subsection (a) of this section, or the parent naturalized under subsection (b) or (c) of this section, or thereafter begins to reside permanently in the United States while under the age of eighteen years.[5]

According to Section 313 of the Nationality Act of 1940:

A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such alien parent is naturalized, be deemed a citizen of the United States, when —
(a) Such naturalization takes place while such child is under the age of eighteen years; and
(b) Such child is residing in the United States at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of eighteen years.[6]

According to Section 315 of the Nationality Act of 1940:

A child born outside of the United States, one of whose parents is at the time of petitioning for the naturalization of the child, a citizen of the United States either by birth or naturalization, may be naturalized if under the age of eighteen years and not otherwise disqualified from becoming a citizen and is residing permanently in the United States with the citizen parent, on the petition of such citizen parent, without a declaration of intention, upon compliance with the applicable procedural provisions of the naturalization laws.

In view of the character of the provisions of the Nationality Act of 1940, it

[5] *Cf.* § 5, Act of March 2, 1907, 34 Stat. 1229, of which the Act of May 24, 1934, 48 Stat. 797, was amendatory.

[6] "An adopted child may, if not otherwise disqualified from becoming a citizen, be naturalized before reaching the age of eighteen years upon the petition of the adoptive parent or parents if the child has resided continuously in the United States for at least two years immediately preceding the date of filing such petition, upon compliance with all the applicable procedural provisions of the naturalization law, if the adoptive parent or parents are citizens of the United States, and the child was:
(a) Lawfully admitted to the United States for permanent residence; and
(b) Adopted in the United States before reaching the age of sixteen years; and
(c) Adopted and in the legal custory of the adoptive parent or parents for at least two years prior to the filing of the petition for the child's naturalization." (Sec. 316 of the Nationality Act of 1940.)

In June, 1935, the Attorney General announced the opinion that a child born in Switzerland, and adopted at the age of four years by a woman then a Swiss citizen, did not become a citizen of the United States by virtue of the naturalization of her adoptive mother, 38 Ops. Attys. Gen., 217.

is not deemed necessary to embark upon a discussion of implications concerning the naturalization of foreign-born children attributable to the presence or absence of relevant terms in former enactments. It has been observed that "there were two statutory provisions concerning the derivation of nationality of the United States by alien minor children through the naturalization of the parent or parents, section 2172 of the Revised Statutes and section 5 of the act of March 2, 1907, as amended by section 2 of the Act of May 24, 1934 (48 Stat. 797; 8 U.S.C. § 8), in force prior to the enactment of the Nationality Code in 1940." [7]

h

## Naturalization Ineffective as to Absent Family

(1)

§ 368. **Application to Wives and Children.** The naturalization of an alien in the United States is ineffective with respect to his absent family. The minor children, until they begin to reside permanently within the United States, under circumstances heretofore observed, undergo no change of nationality.[1]

Prior to the enactment of the existing statutory law there had long appeared to be doubt as to the effect under the Act of February 10, 1855, of the American naturalization of a husband upon the nationality of his absent wife.[2] For some time, however, the Department of State consistently held that the wife gained the benefit of her husband's naturalization prior to her entering the territory of the United States.[3] With the modification of the statutory law through the Cable Act of September 22, 1922,[4] which did not permit the naturalization of the husband to cause the naturalization of the wife, the problem ceased to present itself as a possible incident of marriages thereafter contracted.

(2)

§ 369. **Good Offices for Emigration.** The United States does not assert any right of interposition to secure the emigration from the State of origin of the

---

[7] Hackworth, Dig., III, 71.

For documents interpretative of the statutory law here referred to, see Hackworth, Dig., III, § 235.

§ 368. [1] See Effect of Parents' Naturalization on Infants, The Naturalization of Children, *supra*, § 367.

Mr. Buchanan, Secy. of State, to Mr. Rosset, Nov. 25, 1845, 35 MS. Dom. Let. 330, Moore, Dig., III, 487; Mr. Trescot, Assist. Secy. of State, to Mr. Capelle, June 18, 1860, 52 MS. Dom. Let. 358, Moore, Dig., III, 487.

"This rule *a fortiori* applies to other relations, such as that of mother or sister." Moore, Dig., III, 487, *citing* Mr. Olney, Secy. of State, to Mr. Torrey, June 17, 1896, 210 MS. Dom. Let. 686; Same to Mrs. James, July 18, 1896, 211, *id.*, 410.

[2] Mr. Seward, Secy. of State, to Mr. Tinelli, April 1, 1868, 78 MS. Dom. Let. 275, Moore, Dig., III, 485; Mr. Foster, Secy. of State, to Mr. Thompson, Minister to Turkey, Feb. 9, 1893, For. Rel. 1893, 598, Moore, Dig., III, 486; Mr. Gresham, Secy. of State, to Mr. Watrous, Jan. 23, 1895, MS. Dom. Let. 346, Moore, Dig., III, 487. See, also, United States *ex rel.* Nicola *v.* Williams, 173 Fed. 626; opinion of Mr. Wickersham, Atty. Gen., in case of Jebran Gossin, Dec. 1, 1910, 28 Ops. Attys. Gen., 504.

[3] For the statement in the text, the author acknowledges his indebtedness to Mr. R. W. Flournoy. See also materials in Hackworth, Dig., III, § 236.

[4] 42 Stat. 1021.

non-resident alien wife or children of a naturalized American citizen.[1] The Department of State has, however, frequently instructed American diplomatic representatives (especially those accredited to Turkey), to exert their good offices on proper occasions, to secure permission for the departure of such persons for the United States upon satisfactory assurance of their possession of funds sufficient to defray the expenses of the journey.[2]

Since the enactment of the Cable Act of September 22, 1922, and the Immigration Act of May 26, 1924, the United States has not hesitated to encourage States themselves concerned with, and engaged in regulating, the emigration of their nationals, to place no obstacle in the way of those of them who are women, who have become the wives of American citizens and who seek to join their husbands within, or accompany them to, its territory.

i

## Impeachment and Revocation of Naturalization

(1)

§ 370. **The Law of the United States.** The Nationality Act of 1940 makes appropriate provision for the revocation of naturalization obtained by fraud or illegal procurement. To that end, three distinct yet coördinated means are employed:

First, the duty is imposed upon the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in a particular section of the Act and in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.[1]

§ 369. [1] Mr. Wharton, Acting Secy. of State, to Mr. Terzian, May 14, 1891, 182 MS. Dom. Let. 9, Moore, Dig., III, 488.

[2] Report of Mr. Olney, Secy. of State, to the President, Jan. 22, 1896, For. Rel. 1895, II, 1471–1473, Moore, Dig., III, 489; Same to Same, Dec. 7, 1896, *id.*, 1896, lxxxix, Moore, Dig., III, 491; Mr. Hay, Secy. of State, to Mr. Straus, Minister to Turkey, Feb. 24, 1899, MS. Inst. Turkey, VII, 323, Moore, Dig., III, 491; also other documents cited in Moore, Dig., III, 488–492.

For statements indicating unwillingness of the United States to solicit permission for the emigration from Turkey of a minor brother, see Mr. Moore, Assist. Secy. of State, to Mr. Greene, May 14 and May 24, 1898, 228 MS. Dom. Let. 486, and 227, *id.*, 589, Moore, Dig., III, 490. "Personal good offices were used in the case of an intended wife." (Moore, Dig., III, 490, *citing* Mr. Hay, Secy. of State, to Mr. Straus, Minister to Turkey, Feb. 20, 1899, MS. Inst. Turkey, VII, 322.)

See provisions of the Immigration Act of May 26, 1924, as amended, in section 4 in relation to non-quota immigrants and in section 9 in relation to the issuance of immigration visas to relatives. 8 U.S.C.A. §§ 204, 209.

§ 370. [1] Sec. 338 (a).

*Cf.* § 15, Act of June 29, 1906, 34 Stat. 596, 601. Sustaining the constitutionality of this Act and upholding the right of Congress to authorize direct proceedings to attack certificates of citizenship on the ground of fraud and illegality, see Johannessen *v.* United States, 225 U. S. 227. See also Hackworth, Dig., III, § 237, and documents there cited.

Concerning the practice under prior laws, see Van Dyne, Naturalization, 138–141, and cases cited.

That an order or decree cannot be impeached collaterally, see Campbell *v.* Gordon, 6

Secondly, if a person who shall have been naturalized, within five years after naturalization, returns to the country of his nativity or goes to any other foreign country, and takes permanent residence therein, "it shall be considered *prima facie* evidence of a lack of intention" on his part to become "a permanent citizen of the United States" at the time of his filing his petition for naturalization; and, in the absence of countervailing evidence shall suffice in the proper proceeding to authorize the revocation and setting aside of the order admitting him to citizenship, and the cancellation of the certificate of naturalization as having been obtained through fraud.[2]

Thirdly, it is made the duty of American diplomatic and consular officers in

---

Cranch, 175; Spratt *v.* Spratt, 4 Pet. 393, and other cases in Moore, Dig., III, 499–501. That a judgment admitting to citizenship one who is ineligible therefor may be regarded as void or attacked collaterally, see *In re* Yamashita, 30 Wash. 234; *In re* Hong Yen Chang, 84 Cal. 163; *In re* Gee Hop, 71 Fed. 274; Opinion of McKenna, Atty. Gen., 21 Ops. Attys. Gen., 581, all cited in Moore, Dig., III, 499 and 501.

PROOF OF NATURALIZATION. Sec. 309 of the Nationality Act of 1940 lays down requirements as to proof to be made by a petitioner as a condition precedent to naturalization.

In the endeavor to prove the fact of naturalization it has been observed that "the proper evidence of naturalization is the judicial record, or an exemplified copy of it, and parol evidence is admissible only in case of the loss or destruction of such record." (Statement by Prof. Moore, in his Digest, III, 493, citing Green *v.* Salas, 31 Fed. Rep. 106, Slade *v.* Minor, 2 Cranch C. C. 139, Dryden *v.* Swinburne, 20 W. Va. 89, People *v.* McNally, 59 How. (N. Y.) Pr. 500, Bode *v.* Trimmer, 82 Cal. 513, Prentice *v.* Miller, *id.*, 570. See also documents, *id.*, 493–499.)

Among the documents and copies issued by the Commissioner or a Deputy Commissioner of Immigration and Naturalization, under Sec. 341 of the Nationality Act of 1940, is a special certificate of naturalization for use by a naturalized citizen "only for the purpose of obtaining recognition as a citizen of the United States by a foreign State." Such certificate when issued is to be furnished to the Secretary of State for transmission to the proper authority in such foreign State. According to Sec. 336 of the Act, "a person, admitted to citizenship by a naturalization court in conformity with the provisions of this Act, shall be entitled upon such admission to receive from the clerk of such court a certificate of naturalization." See also statement in Hackworth, Dig., III, 351.

[2] Sec. 338 (c).

Commenting on § 15 of the Act of June 29, 1906, it was declared by Mr. Justice Van Devanter, in Luria *v.* United States, 231 U. S. 9, 23: "These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name — that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past." See also United States *v.* Ness, 245 U. S. 319; Maney *v.* United States, 278 U. S. 17.

See United States *v.* Wursterbarth, 249 Fed. 908, where the respondent, a native of Germany, had been admitted to citizenship in 1882, under Rev. Stat. § 2165, requiring an applicant for admission to make oath that he would support the Constitution of the United States, and that he absolutely adjured and renounced all allegiance to any foreign prince or sovereignty. Proof that when the United States and Germany engaged in war in 1917, the respondent desired the success of Germany, and recognized an allegiance to Germany superior to that due to the United States, was held, while unexplained, to warrant cancellation of his certificate of citizenship on the ground that it was procured by fraud, in that his oath to renounce allegiance to any foreign sovereignty was false, and excepted the land of his nativity.

See, also, United States *v.* Swelgin, 254 Fed. 884, where in a suit to cancel a certificate of naturalization on the ground that at the time the holder was naturalized and during the five-year period immediately preceding, he was not attached to the principles of the Constitution of the United States or well disposed to the order and happiness of the same, and that he had been and was a member of an organization commonly called the I. W. W., the evidence was held to show that that organization advocated anarchy and the overthrow of established order, and to warrant the annulment of the certificate of naturalization, where the holder of it admitted adherence to the principles of the organization.

foreign countries, from time to time through the Department of State, to furnish the Department of Justice with the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country; and such statements, duly certified, are to be admissible as evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.[3]

These measures appear to be designed also to lessen the danger of international controversy produced by the acquisition by an alien of American citizenship for the sole and fraudulent purpose of enabling him to resume residence within the domain of the State of his origin, immune from common burdens there imposed upon its nationals.

The following pertinent observation by Mr. Hackworth in relation to the statutory law is to be noted:

> Two types of cases of cancelation of naturalization certificates on the ground of fraud in their procurement were contemplated by section 15 of the act of June 29, 1906, in addition to cancelation on the ground that they were illegally procured. 34 Stat. 601; 8 U.S.C. § 405. The first paragraph provided for the institution of proceedings for canceling certificates of citizenship "on the ground of fraud" in their procurement. The second paragraph provided that the taking up of a permanent residence abroad within five years after obtaining a certificate of naturalization would constitute a *prima facie* case of fraud in obtaining the certificate of naturalization. Similar provisions are contained in section 338 (a) and (c) of the act of October 14, 1940. 54 Stat. 1158–1159.
>
> The cases do not always distinguish clearly between cancelation "on the ground of fraud" and cancelation on the ground that the certificate was "illegally procured." However, to constitute fraud it appears that the defendant must have "misrepresented or willfully withheld from the court any of the concrete, probative facts." If fraud was charged, "To be sufficient, the petition must, in harmony with the general rule of pleading fraud, point out specifically in what particular respect the representations were false." *United States* v. *Rockteschell.* (208 Fed. 530, 533.) If, on the other hand, the basic charge was that the certificate was "illegally procured," it was sufficient, in general, to show irregularities in the proceedings leading to the issuance of the certificate of naturalization amounting to a failure to comply with the requirements of the law.[4]

[3] Sec. 338 (c).

According to Sec. 338 (d): "The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: *Provided,* That this subsection shall not apply in any case where the revocation and setting aside of the order was the result of actual fraud."

See also Sec. 338, paragraphs (b), (e), (f) and (g).

[4] Hackworth, Dig., III, 93. See documents interpretative of the statutory law, with reference to fraud, *id.*, 93–105.

It is obvious that no requirement of international law restricts the United States in its endeavor to safeguard itself against efforts by aliens fraudulently to acquire American nationality.

As has been observed, the Nationality Act of 1940, as did the earlier statutory law, makes provision for the revocation of naturalization on the ground that the order and certificate of naturalization were illegally procured.[5] This ground is distinct from that of fraud and suffices for the purpose of effecting the cancellation of the certificate of naturalization in a variety of situations where there was no proof of fraud, and where, nevertheless, naturalization was illegally procured.[6] "Although subject to direct attack on the grounds of fraud or illegality, it is well settled in the courts of the United States that naturalization proceedings are judicial in character, and that the decrees issued in such proceedings, like other judgments, are not subject to collateral attack." [7]

(2)

§ 370A. **The Position of the Department of State with Respect to Passports.** A decree of naturalization cannot be attacked collaterally by the Department of State. The matter is not one for its decision when there has been a judicial decree. If the Department is possessed of evidence of fraud by an applicant for American citizenship in procuring naturalization, it may well suspend temporarily the granting of a passport until there has been an adjudication in a proceeding to cancel the certificate of naturalization.

Where there has been fraud in the procuring of a passport, pointing to the acquisition of naturalization by illegal means, naturalization will still be regarded as voidable rather than void, remaining in force until judicially set aside. In such a situation the matter is called to the attention of the Department of Justice, evidence being forwarded thereto; and there is commonly a suspension of action on the application for a new passport while the Department of Justice is acting in the matter. If that Department does not, however, see fit to proceed with the case, as by taking appropriate steps to procure the cancellation of naturalization, the responsibility of the Department of State is believed to be ended; and it finds itself thereafter without reason for refusing to issue a passport.

Where on the face of an affidavit it appears that the applicant for a passport has not resided for five years in the United States and was, nevertheless, naturalized, the Department of State regards the naturalization as voidable rather than void.

Again, if there be a question touching the eligibility to American citizenship of the applicant, and the Department of State finds itself confronted with a conflict of opinion on the part of the lower courts in like cases, it feels obliged in each case to follow the decision which is applicable to that of the particular

[5] Sec. 338 (a).

[6] For a discussion of the cases interpretative of the prior law, see Hackworth, Dig., III, § 239, and documents there cited.

See especially, United States *v.* Ness, 245 U. S. 319; Maney *v.* United States, 278 U. S. 17.

[7] Hackworth, Dig., III, citing Tutun *v.* United States, 270 U. S. 568, 577–578.

individual with whom it is concerned. Where, however, a question of principle is involved in which there is a conflict of opinion in the lower courts, the Department of State is inclined under appropriate conditions to refer the matter to the Department of Justice, or if it is felt by the Department of State that naturalization was in fact valid, it may grant a passport in spite of an adverse opinion on the principle involved.

A decision of the Supreme Court of the United States may arise in three situations: first, where there is no doubt that the person concerned is in the ineligible class; secondly, where there is doubt as to the fact whether the individual is within the ineligible class; and thirdly, where there is doubt whether the decision of that court does in fact announce the rule of law from the record of the case. Obviously the second and third situations are to be distinguished from the first.

When the Supreme Court decides that there is no authority of law to grant naturalization to a particular individual or to one of a particular class or race, the naturalization of such a person or of one within such a category must be looked upon as void. In such case obviously no passport should or would be issued. In this connection it should be noted that the bare effect of cancellation of a naturalization that was void is not to invalidate the certificate of naturalization, but merely to remove an encumbrance from the record. A cancellation serves to invalidate a previous certificate of naturalization only when the same was voidable.[1]

(3)

§ 371. **Rule of International Action.** The Department of State "possesses no power to vacate decrees of naturalization; but it exercises, under the direction of the President, plenary jurisdiction over the conduct of foreign relations." [1]

§ 370A. [1] The material in the text of this section is based upon views expressed by Secretary Hughes to the author on July 7, 1923, in relation to the cancellation of naturalization certificates.

See also discussion in Hackworth, Dig., III, 113–115.

In the case of Yamashita *v.* Hinkle, 260 U. S. 199, the Supreme Court of the United States held that a judgment purporting to naturalize individuals whose "ineligibility appeared upon the face of the judgment" was void.

That the doctrine of *res judicata* may be properly invoked against the Government of the United States by way of defense to a suit to cancel naturalization for illegal procurement thereof, even though the Government appeared in the naturalization court and contested its jurisdiction (because a certificate of arrival was not filed until *after* the filing of the petition for naturalization), was denied by the Supreme Court of the United States in the case of Maney *v.* United States, 278 U. S. 17. See, in this connection, H. B. Hazard, in *Am. J.*, XXIII, 50, 53.

§ 371. [1] Statement by Prof. Moore, Dig., III, 501, where it was added: "In the exercise of this jurisdiction, the Department, as has often been held, will, so far as any action of its own is concerned, treat as invalid a certificate of naturalization that has been improperly obtained.

"The grounds on which the Executive so acts have perhaps never been stated more concisely, nor yet with greater clearness and profundity of reasoning, than by the Commander Bertinatti, as umpire of the Costa Rican Commission, 3 Moore, Int. Arbitrations, 2586–2589." *Id.*

Illustrative of the practice of the United States, see Mr. Fish, Secy. of State, to Mr. Maynard, Minister to Turkey, No. 40, Feb. 11, 1876, MS. Inst. Turkey, III, 163, Moore, Dig., III, 503; Mr. Bayard, Secy. of State, to Mr. Scruggs, Minister to Colombia, May 16, 1885, For. Rel. 1885, 211, Moore, Dig., III, 510; Same to Mr. McLane, Minister to France, Dec. 8, 1888, For. Rel. 1888, I, 565, Moore, Dig., III, 511; Mr. Olney, Secy. of State, to Clerk of

In so doing, the Department found it possible, prior to the enactment of the existing statutory law, to repudiate naturalization which had been improperly obtained in the United States.

The United States, whether or not itself a party to the naturalization proceedings,[2] cannot with reason deny the right of a foreign State, not a party thereto, to contest the validity of the naturalization of one who relies upon a decree obtained by fraud, or otherwise in defiance of the law.[3] By acting accordingly, the Department of State does not attempt to denationalize an American citizen, but simply declines to give support to the pretenses of him who claims to be such.[4] It does not necessarily admit that the United States is without power to naturalize an alien by a process other than that prescribed by the general law; it merely concedes that he who claims the benefit of that law must not perpetrate a fraud upon it or otherwise hold it in contempt.[5] Again, the Department of State would seem to be obliged to acknowledge that when a foreign State is possessed of convincing proof that an American certificate of naturalization was procured by fraud, that State is entitled to demand that diplomatic interposition by the United States in behalf of the holder of such certificate, on the theory that he is an American citizen, be suspended "until evidence of the alleged fraud shall have been submitted and considered."[6]

The United States does not, however, admit the right of a foreign government to pass judgment on the validity of a decree of naturalization, reserving to itself the right, and manifesting also the disposition, in all proper cases, to inquire into the regularity of a judgment that is open to impeachment.[7]

If the validity of the naturalization of an individual claimant (or of one

---

Common Pleas, New York City, Jan. 13, 1897, 215 MS. Dom. Let. 202, Moore, Dig., III, 512; Mr. Day, Assist. Secy. of State, to Mr. Stewart, Nov. 11, 1897, 222 MS. Dom. Let. 359, Moore, Dig., III, 513.

[2] Through § 11, of the Act of June 29, 1906, the United States exercised the right to appear in naturalization proceedings, and to oppose the granting of any petition.

See also Sec. 333 (d) of Nationality Act of 1940.

[3] See, in this connection, Mr. Evarts, Secy. of State, to the Spanish Minister at Washington, March 4, 1880, respecting the Case of Fernando Dominguez, before the Spanish Claims Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2599.

[4] *Compare* Mr. Blaine, Secy. of State, to Mr. Durant, American Advocate for the United States, Nov. 30, 1881, respecting the Case of Pedro D. Buzzi, before the Spanish Claims Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, 2618.

According to Art. 17 of the Harvard Draft convention on Nationality: "When a person's nationality based upon his alleged naturalization is in question between two States, such naturalization may ordinarily be established by a certificate issued by the competent authority of the naturalizing State; but the validity of such a certificate may be impeached upon the ground that it was procured fraudulently or issued in violation of the provisions of a convention to which the naturalizing State is a party." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 15; also, Comment by R. W. Flournoy, Reporter, *id.*, 58–60.)

[5] Opinion of Commander Bertinatti, in the Medina Case, American-Costa Rican Commission, convention of July 2, 1860, Moore, Arbitrations, III, 2586.

[6] Comment by R. W. Flournoy, Reporter, on Art. 17 of the Harvard Draft convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 59. See also same writer, "Naturalization and Expatriation," *Yale L. J.*, XXXI, 702 and 848.

[7] Mr. Fish, Secy. of State, to Mr. Nelson, Minister to Mexico, Feb. 13, 1872, For. Rel. 1872, 387, Moore, Dig., III, 513; Mr. Bayard, Secy. of State, to Mr. Bluhdorn, Aug. 21, 1888, MS. Notes to Austrian Legation, VIII, 575, Moore, Dig., III, 514; Mr. Gresham, Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Sept. 4, 1893, For. Rel. 1893, 23, 25, Moore, Dig., III, 515.

through whom a claim is derived) is challenged in a case before an international tribunal, the Department of State appears to recognize the reasonableness both of the right of contest and of the decision of the question by the arbitral court.[8] The consent to its jurisdiction is believed to be implied from the agreement for the submission of claims. Such tribunals have not hesitated to impeach certificates of naturalization when the evidence warranted such action.[9]

## 5

## Double Nationality

### a

§ 372. **The Problem.** Two States may in fact lay claim to the same individual as a national at the same time. This circumstance does not, however, place the claimants on an equal footing. The equities of the one are of necessity superior to those of the other. They cannot at the same moment be on the same plane. Close examination of them in any particular case when the dual claim projects itself reveals the differences between them. These are at times so great, and mark such divergence of character, as to justify the demand that the weaker be relinquished or unrecognized. It is not unnatural, however, that political considerations should influence the views of statesmen in this regard, and produce reluctance in the surrendering of claims to allegiance even under circumstances when they lack merit. Such considerations have not in fact ceased to be influential.[1] Thus the desire, if not the determination, on the part of some States to retain man-power produces unwillingness to admit that particular

[8] Instructions of Mr. Frelinghuysen, Secy. of State, to Mr. Suydam, advocate for the United States, before the Spanish Claims Commission, Feb. 25, 1882, in which it was declared: "The true rule to govern the commission is, that when an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, it can only be impeached by showing that the court which granted it was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law." Moore, Arbitrations, III, 2619, 2620. This rule was accepted by the commissioners for both the United States and Spain.

Concerning generally the question before the Spanish Claims Commission, see Moore, Arbitrations, 2590–2621, Moore, Dig., III, 506–509. Concerning the Disposition of Fraudulent Certificates, Moore, Dig., III, 516–518.

With respect to Crimes and Offenses against the Naturalization Laws of the United States, see Van Dyne, Naturalization, 189–194.

[9] Case of Medina, United States-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, III, 2583–2589; Cases before Spanish Claims Commission, Agreement of Feb. 11–12, 1871, *id.*, 2621–2647; Cases before French-American Commission, Convention of Jan. 15, 1880, *id.*, 2647–2655; Flutie Cases before American-Venezuelan Commission, 1903, Ralston's Report, 38.

See, also, Case of Rita L. Ruiz, before Spanish Treaty Claims Commission, under Act of Congress, March 3, 1901, 37, published also in Van Dyne, Naturalization, 144, in which it was held that the Commission, although established by Act of Congress, was sitting as an international tribunal, and as such was empowered to impeach for cause an American certificate of naturalization.

§ 372. [1] They are believed to have been responsible for the failure of The Hague Conference on the Codification of International Law of 1930 to produce a convention offering a solution of the major problem.

claims to allegiance or nationality have become weak and should be given up. Nevertheless, in any conflict between the political interests of particular States and the demands of international justice, the family of nations must ever side with the latter and point unerringly to the ultimate victor. Its interests permit no purely political considerations permanently to outweigh the influence of reason or to impose arbitrary tests of the soundness of national pretensions.[2] Therefore, it seems worth while to endeavor to observe or ascertain what circumstances in the contacts between a State and an individual, during the course of the various experiences of his life, serve to lay the foundations of a unique relationship between them which, so long as it lasts, clothes the State with a stronger and sounder claim to his allegiance than any other can prefer. On such superiority rests the demand for singleness of nationality and for recognition of it.

The experience of the United States, in respect to large numbers of persons born within its domain to foreign parents, and taken by them during minority to the territory of their own States for a residence there prolonged until after adult years have been attained, and, conversely, in respect to a lesser but considerable number of persons born abroad to American parents, and who have remained in the country of birth until after attaining adult years, and still again, in respect to a large foreign-born population seeking and obtaining American naturalization, has borne fruit. It has shed light on the relative value of conflicting claims. It has accentuated the need of respect for one rather than for both. It has encouraged the United States to point to situations when the claim to nationality becomes inequitable and should be relinquished. The stand of the United States in respect to dual nationality deserves examination in at least three differing sets of situations requiring separate consideration: first where the claims accrue at time of birth and continue during the minority of the individual concerned; secondly, where the individual has become an adult; and thirdly, where naturalization produces conflict between the naturalizing State and the State of origin.[3]

## b

## The Attitude of the United States

### (1)

§ 373. **Claims by Right of Birth and During Minority.** That a child may at birth become the object of a double claim of allegiance is the natural consequence of the fact that States may without impropriety rely upon either the *jus sanguinis* or the *jus soli* as the source of national character, and is the necessary

[2] Those interests must ever be antagonistic to policies that are contemptuous of reason and logic. The influence of the former, when widely and clearly received, suffices, however, in the long run to bend policies in their direction and hence to modify their character. Therefore, it is not unreasonable to anticipate that even political considerations will not remain a lasting obstacle to the solution of problems arising from dual claims to the nationality of an individual as intolerance of a distorted vision gradually pervades the international society and demands reliance upon fresh criteria as the tests of the soundness of current practices.

[3] With respect to this last problem, see, *infra*, §§ 376–380.

result whenever a State, such as the United States, bases its laws upon both principles.[1] Nevertheless, this very reliance upon both aids in the solution of the conflict by necessarily imputing to such State respect for the nature of the claim of that other within whose territory the child happens to be.[2] The latter is able to exact allegiance from him so long as he is deemed incapable of making any choice and remains within its control. The power of the territorial sovereign and the incapacity of the child combine to fortify the claim and, for the time being, to render it superior to any other. Nevertheless, the combination does not suffice, in American opinion, to destroy the foundations of the claim of the opposing State so long as the person concerned is, by reason of his youth, deemed incapable of exercising a choice worthy of respect. When, however, he reaches adult years, one reason for keeping alive for him the privilege of availing himself of the nationality of that other State outside of whose territory he has remained as a minor, disappears. As it does, fresh factors simultaneously present themselves which weigh so heavily on the one side as to accentuate the weakness of the other.[3]

In general, it is the presence of the individual, whether as a minor, or as an adult (who has not been naturalized by a foreign State) who remains or resides within its territory, which justifies the State which claims him as a national in exacting from him the performance of duties that may normally be demanded of a national.[4] As Secretary Hughes declared on November 24, 1923, in the course of a circular instruction to American Diplomatic and Consular Officers:

> It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States should respect its claim to allegiance. The important point to observe is that the doctrine of dual allegiance ceases, in American contemplation, to be fully applicable after the child has reached adult years. Thereafter two States may in fact claim him as a national. These claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relation-

§ 373. [1] Mr. Lansing, Secy. of State *ad interim*, to Senator H. C. Lodge, June 9, 1915, For. Rel. 1915, 559; Compilation of Certain Departmental Circulars Relating to Citizenship, etc., 1925, 118, 121. See, generally, Moore, Dig., III, 518–519; McNair's 4 ed. of Oppenheim, I, §§ 308–313; Westlake, 2 ed., I, 221–225.

[2] Opinion of Mr. Hoar, Atty. Gen., 13 Ops. Attys. Gen., 89, 91, Moore, Dig., III, 519; Report of Mr. Fish, Secy. of State, to the President, Aug. 25, 1873, For. Rel. 1873, II, 1186, 1191–1192, Moore, Dig., III, 519; see, also, Westlake, 2 ed., I, 223. See, also, Mr. Wilson, Acting Secy. of State, to Mr. Pierrepont, Chargé at Santiago, Aug. 3, 1910, For. Rel. 1910, 195.

Obviously a State cannot justly exact allegiance of a resident not born within its territory and the child of alien parents; for such an attempt would defy the principle that claims of allegiance, in order to be just, must be derived from recognized sources. Herein is illustrated the fact that the propriety of the action of the individual State in respect to nationality, as in all other matters, finds its ultimate test in an international rather than a domestic standard.

[3] Nevertheless, the absence of American legislation indicative of a design to divest of nationality a native American citizen who has continued to reside as an adult in the territory of a foreign State also claiming him as a national (*jure sanguinis*), has caused the Department of State to become increasingly reluctant, as a matter of Departmental policy, to apply the underlying principle in some fairly recent situations.

[4] See, Alexander Tellech Case, American-Austrian and Hungarian Commission, Agreement of Nov. 26, 1924, Final Report of Commissioner and Decisions and Opinions (1929), 71.

See, also, Mr. Carr, Assist. Secy. of State, to Ambassador Johnson, Nov. 16, 1936, Hackworth, Dig., III, 368; Instruction to the Consul at Vigo, Spain, May 18, 1938, Hackworth, Dig., III, 372.

ship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim.[5]

Again, when a person after emigration to, and residence within, the territory of a foreign State acquires by naturalization its nationality, and subsequently returns for temporary sojourn within the domain of the State of origin, it will be seen that according to American opinion, the doctrine of dual nationality is inapplicable. Naturalization is deemed to impress upon such an individual a new and single national character, entitled to general recognition as such.[6]

A child having the nationality of two States at birth, may, before attaining his majority, find himself a resident within the territory of a third State. If he is to be deemed incapable of making an election worthy of respect, it would not be unreasonable for such State to regard him as a national of that other State claiming him as a national within whose territory he last resided. It is believed that such a view is in harmony with that of the Department of State.[7]

(2)

§ 373A. **Foreign-born Persons.** Children born outside of the limits of the United States who are regarded as citizens thereof by virtue of the relevant provisions of the statutory law,[1] and who continue to reside outside of the United States, are deemed by the Department of State to be entitled to passports during minority.[2] Recognizing the impropriety of interference with duties of allegiance which such children owe to the country of birth which regards them as nationals, while residing within areas under its control, the United States formerly issued passports qualified with the statement that the rights of the holders were subject to the rights, obligations and duties which might attach to them in the State of birth and of continued residence.[3]

[5] No. 919, General Instruction, Consular; Diplomatic Serial, No. 225-A, Compilation of Certain Departmental Circulars relating to Citizenship, etc., Department of State, 1925, p. 118.

[6] Declares Professor Moore: "It is sometimes stated that a double allegiance also exists where a person born in one country afterwards emigrates to and becomes a citizen of another country. That a person in such a situation may be subject to the claims of allegiance in two countries, is in point of fact no doubt true; but it is in point of principle equally true that, when writers place such a case under the head of double allegiance, they at least impliedly hold that the doctrine of voluntary expatriation, as maintained by the United States, is not well founded. From the point of view of the doctrine of expatriation, as enunciated by the United States, the man who, voluntarily forsaking his original home and allegiance, acquires a new one, has thereafter but one allegiance — that of his adopted country." Dig., III, 518–519.

See, statement of R. W. Flournoy, a delegate of the United States, March 22, 1930, before the First Committee (Nationality) of The Hague Conference of 1930 for the Codification of International Law.

[7] See, in this connection, Proposal of the Delegation of the United States at The Hague Conference for the Codification of International Law, March 18, 1930, in the First Committee (Nationality), upon or by way of a substitute for, the Fifth Basis of Discussion.

§ 373A. [1] It should be borne in mind that Section 1993, Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, was repealed by the Nationality Act of 1940.

[2] Mr. Adee, Acting Secy. of State, to Mr. Combs, No. 71, Sept. 15, 1903, For. Rel. 1903, 595, Moore, Dig., III, 525.

[3] See excellent statement of Mr. Bayard, Secy. of State, to Mr. Vignaud, Chargé at Paris,

The requirements to be satisfied by the foreign-born child, under the Nationality Act of 1940,[4] in order to retain the citizenship conferred upon him at birth, and the necessity of residence within the domain of the United States for specified periods of time during minority, as well as the penalty for failure to reside therein, are noted elsewhere.[5] It may be observed that the international value of election of American nationality by a foreign-born person, who is given the capacity to elect by the statutory law, must depend upon actual removal to the domain of the United States.[6]

It is not unreasonable for the State of origin to assert that a child born to its own nationals within its own territory, who is naturalized abroad in his infancy in consequence of the naturalization of his parents, is not necessarily deprived of his nationality of origin if, during his minority, he returns to its domain; and that under such circumstances the obligation of that State to respect the naturalization of the parents fails to include an obligation to respect that also of the child.[7] Elsewhere are noted the provisions of the Nationality

---

July 2, 1886, For. Rel. 1886, 303, 304, referring to opinion of Mr. Hoar, Atty. Gen., 13 Ops. Attys. Gen., 89, Moore, Dig., III, 529; Mr. Frelinghuysen, Secy. of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 396, 398, Moore, Dig., III, 530; Mr. Olney, Secy. of State, to Mr. Strobel, Minister to Chile, June 4, 1896, For. Rel. 1896, 34-35, Moore, Dig., III, 526.

Obviously where such a conflict does not arise under the legislation of the foreign State, no reason other than what may be apparent from the domestic law of the United States exists for the withholding of protection in the country of birth. Mr. Adee, Acting Secy. of State, to Mr. Coombs, Minister to Japan, April 28, 1893, For. Rel. 1893, 401, Moore, Dig., III, 530.

It should be noted that qualified passports have not been issued for many years.

[4] Sec. 201, especially paragraph (g).

[5] See *supra*, § 345; also *supra*, § 347.

*Cf.* provisions of Sec. 6 of the Act of March 2, 1907, 34 Stat. 1228, 1229.

Mr. Gregory, Atty. Gen., was of opinion, April 27, 1916, that foreign-born children of American-born Chinese fathers were entitled to enter the United States as citizens thereof, despite the fact that they continued to reside for some time in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States. 30 Ops. Attys. Gen. 529.

"The statutory law of the United States affords some guidance but not all that could be desired, because it fails to announce the circumstances when the child who resides abroad within the territory of a State reasonably claiming his allegiance forfeits completely the right to perfect his inchoate right to retain American citizenship. The Department must, therefore, be reluctant to declare that particular conduct on the part of a person reaching adult years in foreign territory produces a forfeiture or something equivalent to expatriation." (Mr. Hughes, Secy. of State, in Circular Instruction of Nov. 24, 1923, to American Diplomatic and Consular Officers, No. 919, General Instruction, Consular; Diplomatic Serial No. 225-A.) Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc., Department of State, 1925, 118, 121.

[6] Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, Feb. 15, 1888, For. Rel. 1888, I, 510, 511, Moore, Dig., III, 548; Same to Mr. Vignaud, Chargé at Paris, July 2, 1886, For. Rel. 1886, 303, 304, Moore, Dig., III, 546; Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, No. 959, Nov. 4, 1899, MS. Inst. Germany, XXI, 104, Moore, Dig., III, 551.

See, in this connection, *Ex parte* Gilroy, 257 Fed. 110, 126; also Native-born Children, *infra*, § 374.

Also, R. W. Flournoy, "Dual Nationality and Election," *Yale L. J.*, XXX, 550.

[7] See Case of René Dubuc, For. Rel. 1910, 514–516.

The Department of State has maintained that the naturalization, by virtue of the statutory laws of the United States, of a child of Portuguese birth, in consequence of the naturalization of the parents in the United States, attaches to such child an American nationality which should be respected by Portugal by reason of Art. I of its naturalization convention with the United States of May 8, 1908, which provides that subjects of Portugal who become naturalized citizens of the United States and shall have there resided uninterruptedly for five years shall be held by Portugal to be American citizens and shall be treated as such. Mr. Knox, Secy. of

Act of 1940, applicable to the naturalization of children in consequence of the naturalization of a parent; [8] and also the effect of the change of parents' American nationality upon that of the American-born child.[9]

(3)

§ 374. **Native-born Children.** Children born to foreign parents in the United States, and who are American citizens within the meaning of the Fourteenth Amendment to the Constitution, if taken to the country of the parents' nationality, are deemed to be entitled to passports during minority.[1] The Department of State does not, however, endeavor to protect the child from the burdens of allegiance imposed by that State, in case its laws regard him as a national by virtue of the *jus sanguinis*.[2]

A passport has been denied when sought for the protection of a minor born in the United States, whose parents proposed to return with him "for a brief period" to the country of which they were subjects.[3] The Department of State has, at least on one occasion, however, encouraged the use of the good offices of an American diplomatic officer to protect an American-born minor from military service in the State of the parents' nationality, when it appeared that the father's domicile had been in the United States ever since the birth of the son, and that the latter was only temporarily within the domain of the State which regarded him as a national.[4]

No statutory law of the United States (except as hereinafter noted) indicates what steps should be taken by the child who after attaining adult years, and continuing to reside within the territory of the foreign State of which the parents are nationals, seeks to avail himself of his American nationality by birth; no Act of Congress declares that continuity of such residence shall produce ex-

---

State, to Mr. Bryan, Minister to Portugal, Jan. 12, 1910, telegram, in the Case of Antonio S. Nunes, where it is also stated that "similar construction has been put upon provisions in our naturalization treaties with other countries." For. Rel. 1910, 832.

[8] See Effect of Parents' Naturalization on Infants, The Naturalization of Children, *supra*, § 367.

[9] See Effect of Change of Parents' American Nationality, *infra*, § 375.

§ 374. [1] Fourteenth Amendment, Section 1.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 MS. Dom. Let. 270, Moore, Dig., III, 532; Mr. Blaine, Secy. of State, to Mr. Phelps, Minister to Germany, May 3, 1892, For. Rel. 1892, 189, Moore, Dig., III, 533; Mr. Bacon, Acting Secy. of State, to Mr. Tower, Ambassador to Germany, March 8, 1907, For. Rel. 1907, I, 516.

*Compare* the divergent rulings in Case of R. J. J. Pinto and other cases in 1899 and 1901, For. Rel. 1899, 588–589; *id.*, 760, 762; *id.*, 1901, 532.

When a child, born in the United States to parents previously naturalized therein, is taken during minority to the territory of the State of the parents' origin, a different situation arises. In such case the contention is justified that the acquisition by the parents of American nationality which gave them a new and single national character, served also to cut off the right of their former sovereign to claim allegiance of a child subsequently born outside of its domain and later permitted to enter it. The United States could not admit the validity of such a claim, or the invocation of the doctrine of dual allegiance in support of it. See the facts in the Case of Ugo Da Prato, mentioned in a communication of Mr. Lansing, Secy. of State *ad interim*, to Senator H. C. Lodge, June 9, 1915, For. Rel. 1915, 559.

[3] Mr. Gresham, Secy. of State, to Mr. Seely, March 9, 1893, 190 MS. Dom. Let. 553, Moore, Dig., III, 533.

[4] Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, concerning the Case of A. F. Gendrot, Dec. 28, 1887, For. Rel. 1888, I, 498, Moore, Dig., III, 537. See, also, other documents concerning the same case in Moore, Dig., III, 537–539.

patriation. The Department of State has, therefore, been reluctant to say that failure on the part of the individual to take any particular steps is necessarily productive of expatriation. It has rather been concerned with the effect of such continued residence abroad upon any domestic duty to accord protection to one the cessation of whose American citizenship is not established.[5] Nevertheless, the Department formerly did not hesitate to declare that the child upon attaining adult years should elect between the nationality that was his by birth, and that which was his by parentage, and that election of American nationality was effective by the manifestation of an intention in good faith to return to the territory of the United States with all convenient speed and there to assume duties of citizenship; [6] and it repeatedly intimated that the appropriate mode of giving expression to such an election was to return thereto, evidence of such choice being manifested in placing oneself in the territory of the country elected.[7]

The Department has, however, within recent years taken pains to point out that there is frail support for the contention that the theory of election is "a part of the nationality law of the United States," [8] intimating that bare expressions of volition, unless assuming the form of, or accompanied by, actual residence within American territory, are not, in an international sense, decisive of loss of nationality of the foreign State.[9]

In 1936 the Department of State, after adverting to previous practices, declared that in 1926, it had reconsidered the whole subject of election of nationality by persons having a dual nationality status and had concluded "that in the absence of legislative authority it was not warranted in declining to accord recognition as citizens of the United States to persons who were born in the United States of alien parents merely because they have resided abroad for protracted periods before and after attaining majority." It added: "Neverthe-

[5] See Loss of Privilege of National Protection, Foreign Domicile, Native Citizens, *infra*, § 388.

[6] See memorandum of the law officer of the Department of State, enclosed in a communication from Mr. Bacon, Acting Secy. of State, to the German Ambassador, Nov. 20, 1906, For. Rel. 1906, I, 656, 657.

[7] Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, Feb. 15, 1888, For. Rel. 1888, I, 510; also Mr. Adee, Acting Secy. of State, to Mr. Tripp, Minister at Vienna, July 23, 1895, For. Rel. 1895, I, 20–22, Moore, Dig., III, 549–550; Mr. Bacon, Acting Secy. of State, to Mr. Tower, Ambassador to Germany, March 8, 1907, For. Rel. 1907, I, 516.

[8] Statement of March 16, 1929, for the Preparatory Committee of The Hague Conference for the Codification of International Law. Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 156.

[9] See Case of Frank Ghiloni, For. Rel. 1915, 558; *id.*, 1916, 398–428, where the Department of State undertook to protect from military service a man who had been born in Massachusetts in 1885, his father being an Italian subject who obtained naturalization as an American citizen the following year. The son was taken to Italy when two years of age, returning to the United States in 1897, when about twelve years of age. He resided continuously in the United States until June, 1914, when he went to Italy for his health, he then being twenty-nine years of age. During that visit World War I broke out, and he was impressed into service in the Italian Army as an Italian subject. In seeking to effect his release Secretary Lansing declared, July 20, 1915, *id.*, 1915, 570: "It is considered by this Government that the principle of election of nationality should be recognized in cases of persons born with dual nationality, whether or not the municipal laws of the countries concerned prescribe definite modes of election. This Government has no desire to intervene in cases of persons who were born in the United States of Italian parents but were domiciled in Italy upon attaining majority, are still domiciled there and have evidently elected Italian nationality." The Italian Government declined to accede to the request. The man was subsequently taken prisoner by the Austro-Hungarian forces. The Department of State demanded and obtained his release.

less, with respect to the matter of protection the Department considers the period of residence abroad of a person having dual nationality before and after attaining majority. If the period of foreign residence in the country of which he is also a national has been of long duration, it has been its practice to decline to issue passports save under exceptional circumstances." [10]

Save with respect to a relatively narrow class of cases, the Nationality Act of 1940 does not purport to deal with the matter, and, therefore, is far from announcing that protracted residence abroad produces loss of the American nationality of an American-born national.[11]

(4)

§ 375. **Effect of Change of Parents' American Nationality.** The American-born child of a naturalized American citizen who upon returning to the State of his origin resumes his former nationality is regarded by the United States as reasonably subject to the allegiance of such State, provided the child is within its domain, and is claimed as a national pursuant to the local law. Such child is, nevertheless, deemed to possess the privilege, when attaining adult years, of availing himself of his American nationality by birth, by making an appropriate election thereof.[1]

[10] Communication to the Consul General at London, Nov. 30, 1936, Hackworth, Dig., III, 371, in which it was also said: "The Department over a number of years held in cases of persons who were born in the United States of alien parents and thus acquired American citizenship under Article XIV of the Amendments to the Constitution of the United States and likewise acquired the nationality of the State of which their parents were citizens or subjects under its laws that, if such persons were taken abroad during their minority and resided in the country of which their parents were nationals, they were required to demonstrate their election of the nationality of the United States after attaining majority or otherwise were not held to be entitled to recognition as citizens of the United States."

See also communication of Dept. of State to the Consul at Calgary, March 2, 1935, Hackworth, Dig., III, 357.

[11] According to Sec. 402: "A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family." Sec. 401 has reference to loss of nationality of a national of the United States, whether by birth or naturalization by "(c) entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or (d) accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible."

§ 375. [1] See, in this connection, correspondence with the German Foreign Office in 1884–1885, For. Rel. 1885, 393–411, 414–416, and summary thereof in Moore, Dig., III, 748–749. *Compare* views of Mr. Pierrepont, Atty. Gen., in Steinkauler's Case, 15 Ops. Attys. Gen., 15, Moore, Dig., III, 539, concerning Art. IV of the treaty with North Germany of 1868.

"If the father . . . did in fact renounce his American citizenship and resume his original allegiance, in a manner recognized by the laws of his native country, that fact would operate as a renunciation of the adopted citizenship for his minor children, at least while they remain within the jurisdiction which their father reacknowledged." (Mr. Frelinghuysen, Secy.

In relation to the general problem, the views of the Department of State do not appear to have been uniform. Notwithstanding the doubt expressed by Secretary Blaine in 1890, as to the power of a parent to eradicate the original nationality of his child,[2] and which was revealed also in an instruction of 1923, the Department somewhat later declared that it had for many years uniformly held (as was doubtless the case) that former citizens of the United States who had been naturalized during minority in foreign States through the naturalization of their parents "must be regarded as having lost their American nationality" under the provision of Section 2 of the Act of March 2, 1907.[3] In 1939, however, the Supreme Court of the United States found occasion to express itself as follows:

> We have quoted liberally from these rulings — and many others might be cited — in view of the contention now urged by the petitioners in resisting Miss Elg's claim to citizenship. We think that they leave no doubt of the controlling principle long recognized by this Government. That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.[4]

---

of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 396, 397, Moore, Dig., III, 540.)

See, also, Mr. Bayard, Secy. of State, to Mr. de Weckherlin, April 7, 1888, For. Rel. 1888, II, 1341, Moore, Dig., III, 542; Mr. Olney, Secy. of State, to Mr. Materne, May 29, 1896, 210 MS. Dom. Let. 406, Moore, Dig., III, 542.

[2] See communication to Mr. Phelps, Minister to Germany, Feb. 1, 1890, For. Rel. 1890, 301. See also *supra*, § 367.

[3] Hackworth, Dig., III, 235. See also opinion of the Attorney General, 36 Ops. Attys. Gen. 535.

[4] Perkins *v.* Elg, 307 U. S. 325, 333–334. Declared the court also: "The mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

"It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States, provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties." (*Id.*, 329.)

See Edwin Borchard, "Citizenship by Birth in the United States not Lost through Naturalization abroad of Minor's Father," *Am. J.*, XXXIII, 534; D. V. Sandifer, "The Elg Case: Election of Citizenship at Majority by Minors," *University of Cincinnati Law Rev.*, XIV, 423. See also discussion of the case in Hackworth, Dig., III, § 246. It was announced by the Department of State in 1931, that it would "not recognize as resulting in loss of American citizenship the acquisition of a foreign nationality on the part of such a child if he resided in the United States at the time of such acquisition and continued to reside here until after attaining the age of twenty-one years." (Circular instruction of Oct. 7, 1935, Hackworth, Dig., III, 236.) Again, "The Department has concluded that in the case of an Ameri-

The precise question in the instant case was whether the plaintiff, who had been born in the United States of Swedish parents then naturalized American citizens, had lost her citizenship and was subject to deportation because of her removal during minority to Sweden, it appearing that her parents had resumed their citizenship in that country but that she had returned to the United States on attaining majority with intention to remain and to maintain her citizenship in the United States.[5] The Supreme Court of the United States concluded that she had not lost her American citizenship. In so doing it noted the occurrence of a change in the attitude of the Department of State in contrast to the position taken in its circular instruction of November 24, 1923.[6] It also commented upon the views of the Attorney General in his opinion of June 16, 1932, in the case of Ingrid Therese Tobiassen,[7] with which it disagreed.[8]

The statutory law of the United States, as revealed in the Nationality Act of 1940, does not appear to be at variance with the theory enunciated by the Supreme Court. The provisions applicable to the effect of the change of the parents' American acquired nationality, give to the American-born child an opportunity to avail himself of his American nationality at birth if he resumes his permanent residence in the United States prior to his attaining the age of twenty-three years.[9]

(5)

§ 375A. **Adult Persons. An American Proposal.** It has been observed that in American opinion the difference in value between the opposing claims of two States to the nationality of the same individual at the same time becomes so marked after he has attained adult years, that the lesser of them should be

---

can-born minor child who acquires a foreign nationality through the change of his alien father's nationality by the transfer by treaty of the territory of his original nationality to another foreign State, Congress did not intend that in such case the American-born child should be deprived of his American nationality. In such case there is no voluntary act on the part of the father in changing his nationality from one foreign State to another foreign State." (Hackworth, Dig., III, 238.)

[5] The statement of the question is substantially that of the Chief Justice as set forth in the beginning of his opinion.

[6] Declared the Court in this connection: "It thus appears that as late as 1925, when the Department issued its 'Compilation' including the circular instruction of November 24, 1923, it was the view of the Department of State that the Act of March 2, 1907, had not taken away the right of a native citizen on attaining majority to retain his American citizenship, where he was born in the United States of foreign parents. We do not think that it would be a proper construction of the Act to hold that while it leaves untouched the right of election on the part of a child born in the United States, in case his parents were foreign nationals at the time of his birth and have never lost their foreign nationality, still the statute should be treated as destroying that right of election if his parents became foreign nationals through naturalization. That would not seem to be a sensible distinction. Having regard to the plain purpose of § 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the right of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority. And, on the facts of the instant case, this view apparently obtained when in July, 1929, on the instructions of the Secretary of State, the Department issued the passport to respondent as a citizen of the United States." (*Id.*, 346–347.)

[7] 36 Ops. Attys. Gen., 535.

[8] 307 U. S. 347–349.

[9] Secs. 401 (a) and 407.

relinquished.[1] If he then retains or makes his permanent home within the territory of one of those States, he accentuates the superiority of its equities in respect to himself.[2] He fortifies its claim by right of birth (either *jure soli* or *jure sanguinis*) by a choice made when he is capable of making an intelligent one, and manifested not by a formal declaration, but rather by an actual and intimate association with the soil of a State which has always regarded him as a national and which is in no sense foreign to himself.[3] His conduct is believed thus to establish an impregnable foundation for a single nationality worthy of recognition as such.

A proposal along such lines found expression in the Harvard Draft convention on Nationality of 1929,[4] and, in somewhat different form constituted a unique contribution from the United States to The Hague Conference of 1930, for the Codification of International Law, where it was expressed in the following language:

> Without prejudice to the liberty of a State to accord wider rights to renounce its nationality, a person of double nationality may, with the authorization of the Government concerned, renounce one of his two nationalities. The authorization may not be refused if the person has his habitual residence abroad. If such a person, upon reaching the age of twenty-three years, shall have failed to renounce either nationality, he shall, if he then has his habitual residence in either of the States of which he is a national, be conclusively presumed to have elected the nationality thereof and to have renounced the nationality of the other State of which he was a national; provided, however, that a person reaching the age of twenty-three years within the period of three years immediately following the adoption of this Convention by a State shall not be presumed to have renounced the nationality thereof unless, having his habitual residence in the other State of which he is a national when he reaches the said age, he continues to reside therein during the remainder of the said period.[5]

§ 375A. [1] See *supra*, § 373.

[2] "It is a generally recognized rule, which may be regarded as a rule of international law, that when a person who was born with dual nationality is residing in either of the countries of which he is a national, that country has a right to assert its claim to him without any interference by the other, unless perhaps such person, having reached the age of majority, has clearly elected the nationality of the other country and is only temporarily residing in the country asserting the claim. Even in the latter case, it cannot be asserted with any degree of confidence that the country in which the person is found has no right to assert its claim to his nationality and allegiance, since it may not recognize the principle of election." (Mr. Olds, Assist. Secy. of State, to Minister MacMurray, April 19, 1926, Hackworth, Dig., III, 354.)

[3] See R. W. Flournoy, "Dual Nationality and Election," *Yale L. J.*, XXX, 545–564, and 693–709; also communication of Dept. of State, of March 16, 1929, for the Preparatory Committee of The Hague Conference for the Codification of International Law of 1930, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 148–149, 156.

[4] According to Art. 12 thereof: "A person who has at birth the nationality of two or more States shall, upon attaining the age of twenty-three years, retain the nationality only of that one of those States in the territory of which he then has his habitual residence; if at that time his habitual residence is in the territory of a State of which he is not a national, such person shall retain the nationality only of that one of those States of which he is a national within the territory of which he last had his habitual residence." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 14; also Comment by R. W. Flournoy, *id.*, 41–44.)

[5] This proposal offered on March 18, 1930, in the First Committee (Nationality),

The proposal emphasized the duty of a State not only to permit its national when habitually resident abroad to renounce its nationality, but also to regard his residing habitually, when of a certain adult age, within the territory of the other State also claiming him as a national, as a decisive token of permitted renunciation. It is the legal consequence of the fact of such residence which is the distinctive feature of the proposal.[6] It lays down a sound test of the relative merits of opposing claims and demands relinquishment of the weaker. The Hague Conference of 1930, for the Codification of International Law was not prepared to make such a concession, or to do more than acknowledge the duty of a State to acquiesce upon conditions to be noted, in the decision of its national habitually resident abroad to renounce its nationality when the dual claim projects itself. Thus, Article 6 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws provided that

> Without prejudice to the liberty of a State to accord wider rights to renounce its nationality, a person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorisation of the State whose nationality he desires to surrender.
>
> This authorisation may not be refused in the case of a person who has his habitual and principal residence abroad, if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied.[7]

The distinctive features of this article are first, its obvious inapplicability to a case where the dual claim arises out of, or persists in spite of, naturalization of the individual concerned, and secondly, the stress laid upon the conditions to be satisfied which the State called upon to yield the desired authorization may see fit to impose. There appears to be no imposition of a duty upon a State to authorize a surrender of nationality by the individual concerned, still less to relinquish it, in case he does not in fact renounce it; nor is it intimated that his renunciation is to be implied from his habitual residence within the territory of the foreign State claiming him as a national.[8] The Article reveals the failure

---

was submitted as a substitute for Basis of Discussion No. 15. See also views of Mr. Flournoy, a delegate of the United States expressed before the same Committee on March 26, 1930.

[6] In respect to form, the American proposal left something to be desired. It is the consequence of the fact of habitual residence within the territory of the State claiming the individual as a national, within a certain period after he has attained his majority, rather than his avowal of preference for the nationality of that State, which, in American opinion, is understood to be the consideration decisive of the duty of the other State to relinquish its claim. Moreover, in view of existing divergent practices, it is the relinquishment of that claim, quite as much as renunciation of allegiance by the individual concerned, that might well be accentuated. Therefore, it is suggested that the end desired might be more happily reflected in a provision omitting reference to the matter of election and declaring in the simplest fashion that possession of habitual residence in the territory of one of the claimant States should produce retention of its sole nationality and the dissolution or relinquishment of any other.

[7] *Am. J.*, XXIV, *Documents*, 193. On the recommendation of the First Committee, the Conference recommended "that States should adopt legislation designed to facilitate, in the case of persons possessing two or more nationalities at birth, the renunciation of the nationality of the countries in which they are not resident, without subjecting such renunciation to unnecessary conditions." (Final Act of Conference, *Am. J.*, XXIV, *Documents*, 169, 182.) For the text of the convention, see Publications, League of Nations, V, Legal Questions. 1930.V.3, *Am. J.*, XXIV, *Documents*, 192.

[8] According to Art. 5 of The Hague Convention: "Within a third State, a person having

of the Conference to offer to the international society a solution of the problem arising from conflicting claims to the nationality of adult persons.[9]

## 6

## EXPATRIATION THROUGH NATURALIZATION

### a

§ 376. **In General.** Expatriation refers to conduct on the part of an individual which produces a loss of nationality.[1] A State may well determine what acts, if any, on the part of a national when within its control shall be deemed to produce such an effect; [2] and it may in fact forbid its nationals, in certain seasons, as in time of war, to become expatriates, regardless of where they undertake to do so.[3] Again, it may feel itself under no obligation to recognize as effective as against itself, acts on the part of a minor which, if committed by an adult it might regard as productive of loss of its nationality.[4]

It would be difficult to maintain that international law imposes an obligation upon a State towards any other or to the family of nations to permit its nationals who are within its control through residence within its domain to depart from its physical grasp as a means of committing when outside thereof acts of a character such as might be productive of, or facilitate, loss of nationality.

---

more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and any conventions in force, a third State shall, of the nationalities which such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident or the nationality of the country with which in the circumstances he appears in fact to be most completely connected." (*Am. J.*, XXIV, *Documents*, 193.)

[9] See Report of M. Guerrero, *Rapporteur*, submitted to the Conference, April 9, 1930, on behalf of the First Committee (Nationality), *Am. J.*, XXIV, *Documents*, 215.

"Instead of looking toward the abolition of multiple nationality, this chapter rather consecrates its existence; and this effect is little relieved by a *vœu* that States should adopt legislation designed to facilitate renunciation." (Manley O. Hudson, "The First Conference for the Codification of International Law," *Am. J.*, XXIV, 447, 451.)

§ 376. [1] "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." (Hughes, C. J., in Perkins *v.* Elg, 307 U. S. 325, 334.) See also Van Dyne, Naturalization, 333.

"At present it cannot be said that there is any general agreement upon the 'right of expatriation,' that is, the right of an individual to cast off allegiance to the State of which he is a national, without obtaining its express consent, when he seeks the nationality of another country." (R. W. Flournoy, Reporter, in Comment upon Art. XIII of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 46.)

[2] See, § 2, Act of March 2, 1907, 34 Stat. 1228.

[3] According to § 2 of the Act of March 2, 1907 (34 Stat. 1228), which is no longer in force: "No American citizen shall be allowed to expatriate himself when this country is at war."

[4] Declared Secretary Hughes in the course of an instruction to American diplomatic and consular officers of Nov. 24, 1923: "It is considered that an American national who took an oath of allegiance to a foreign country during minority — that is, under the age of twenty-one years — and when the United States was at peace committed conduct of a voidable character — that is, conduct not deemed by itself as serving definitely to expatriate him as an American — in case, within a reasonable period after release from service into which he may have been inducted, and after his becoming of age, he took the appropriate steps to assert his claim to American nationality." (No. 919, General Instruction, Consular; Diplomatic Serial No. 225-A, Compilation of Certain Departmental Circulars Relating to Citizenship, etc., 1925, 118.) See, in this connection, United States *ex rel.* Baglivo *v.* Day, 28 F. (2) 44; also discussion in Hackworth, Dig., III, § 249.

As expatriation is usually sought to be effected by the individual who, with or without the consent of his sovereign, has in fact left its territory, the problem confronting the international society does not concern the propriety of efforts on the part of that sovereign to prevent his escape from its control, but rather the significance to be attached to events accruing after he has got beyond it.

Again, it will be seen that endeavors by the individual to throw off the burden of allegiance to his State and to free himself from its nationality commonly constitute a part of the series of acts through which he becomes eligible for naturalization abroad, and so mark the fulfillment of requirements imposed by a foreign State incidental to its clothing him with its own nationality. Rarely does the individual make such endeavors when the acquisition of a new nationality is unsought or unattainable, or when the interest of a foreign State is unaroused, as by the added effect of its own conduct. When, however, the efforts of the individual to produce a loss of his nationality are unrelated to attempts to bring about naturalization, and the interest of no foreign State is aroused, he finds himself without means of redress if his acts are in disobedience to the command of his sovereign, which, upon his return to its domain, proceeds to penalize him therefor. Accordingly, it is difficult to maintain that the law of nations as yet regards the affair other than as a domestic one between a State and its national.

If the matter of expatriation has given rise to burning questions between States, it is because it has concerned not merely the conduct of the individual in the light of the possible commands of his own State, but also the conduct of a foreign State in clothing him when within its control with a new nationality. The precise question confronting the international society has not been an academic one. In so far as the United States has been concerned with the solution of it, in controversies with States of origin, it has pertained chiefly to the consequences of conferring by naturalization American nationality upon one who by some process has reached American territory and while therein has duly sought in pursuance of the laws of the United States to acquire its nationality.[5]

b

§ 377. **Relation to Emigration.** A circumstance that may have retarded acceptance in the United States of the theory that an individual may at will free himself from the duty of allegiance towards his sovereign was a consciousness of the fact that his privilege of departure from its territory depended in a domestic sense upon the will of the State which the law of nations did not purport in that regard to restrict; and that, accordingly, if the State forbade him to emigrate, it violated no obligation to other members of the international society.[1] If, therefore, any privilege or right of expatriation necessarily embraced

[5] It may be observed, in this connection, that foreign States have seldom, if ever, denied the right of the United States to confer its nationality, through naturalization, upon their nationals. Such States have frequently, however, asserted that American naturalization should not produce a loss of the original nationality.

See R. W. Flournoy, "Naturalization and Expatriation," *Yale L.J.*, XXXI, 702, 848.

§ 377. [1] See, for example, Mr. Everett, Secy. of State, to Mr. Barnard, Minister to Prus-

or involved the exercise of a privilege or right to emigrate as well as to terminate an existing duty of allegiance, it rested in part upon a fiction; for it necessarily denied the supremacy of the territorial sovereign of origin and, in particular, its freedom of control over its own national while within its own domain.[2]

As a matter of fact, the United States has not concerned itself with inquiries respecting the lawfulness of the emigration of the applicant for its citizenship. That citizenship has been within the reach of him who, regardless of the propriety of his previous conduct in respect to emigration, has, within the territory of the United States, complied with its naturalizaton laws.[3] Stripped, therefore, of impedimenta relating to emigration, and confined to the legal aspect of the attempt to dissolve the tie of allegiance to one sovereign incidental to the acquisition of the nationality of another by naturalization within its territory, the "right of expatriation," whatever it may be, is freed from an unstable prop, and entitled to intelligent support. While officers of the United States have at times intimated that the individual seeking expatriation abroad, as by naturalization, is possessed of the privilege of emigrating from the shores of his country,[4] the United States has, in its convention with Portugal of May 7, 1908, acknowledged the right of the State of origin to make legal provisions for the regulation of emigration, and to punish those who transgressed the same upon their return to its territory.[5] It has been observed elsewhere that while the naturalization

---

sia, Jan. 14, 1853, S. Ex. Doc. 38, 36 Cong., 1 Sess., 53, 54, Moore, Dig., III, 567; also Opinion of Mr. Cushing, Atty. Gen., Oct. 31, 1856, in which it was declared: "The assumption of a natural right of emigration, without possible restriction in law, can be defended only by maintaining that each individual has all possible rights against the society, and the society none with respect to the individual; that there is no social organization, but a mere anarchy of elements, each wholly independent of the other, and not otherwise consociated save than by their casual co-existence in the same territory. (Ahrens, *Droit Naturel,* p. 324.)" 8 Ops. Attys. Gen. 139, 163, Moore, Dig., III, 570, 571.

[2] It may be doubted, therefore, whether the assertion of Attorney General Black in his opinion respecting the Case of Christian Ernst, in 1859, that the right of expatriation possessed this twofold aspect, added weight to the argument which he ably sought to advance. It was there declared to be the "natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose." 9 Ops. Attys. Gen., 356, 357, Moore, Dig., III, 573. See also Mr. Seward, Secy. of State, to Mr. Marsh, Minister to Italy, July 15, 1868, MS. Inst. Italy, I, 269, Moore, Dig., III, 608.

[3] The naturalization laws of the United States make no reference to the matter.

[4] Opinion of Mr. Black, Atty. Gen., 9 Ops. Attys. Gen., 356, Moore, Dig., III, 573; Mr. Cass, Secy. of State, to Mr. Wright, Minister to Prussia, May 12, 1859, MS. Inst. Prussia, XIV, 274, Moore, Dig., III, 572; Mr. Seward, Secy. of State, to Mr. Johnson, Minister to Great Britain, July 20, 1868, Dip. Cor. 1868, I, 328, 329, Moore, Dig., III, 581.

[5] After declaring in Art. II that the recognized citizen of the one party on returning to the territory of the country of origin shall not be punishable for the act of emigration itself, it is provided that "the infraction of the legal provisions which in the country of origin regulate emigration shall not be held, for the purposes of this Article, as pertaining to the emigration itself and, therefore, the transgressors of those provisions who return to the country of their origin are there liable to trial on account of any and whatever responsibility they may have incurred through such infraction." Malloy's Treaties, II, 1468.

Declared Mr. Bayard, Secy. of State, in a communication to Mr. Lothrop, Minister to Russia, Feb. 18, 1887: "The Department is far from questioning the right of His Imperial Majesty to refuse to permit his subjects to emigrate. This is an incident of territorial sovereignty recognized by the law of nations, but can only be exercised within the territory of Russia. . . . His Imperial Majesty may 'prevent' Russians from coming to the United States; but when they have come, and have acquired American citizenship, they are entitled to the privileges conferred by the Article [10 of the treaty of commerce of Dec. 18, 1832]." For.

treaty with Bulgaria, of November 23, 1923, provided that a naturalized person was not to be punishable for the original act of emigration,[6] the treaty with Czechoslovakia, signed July 16, 1928, provided that a naturalized person was not to be prosecuted or punished "for expatriation."[7]

c

§ 378. **Development of the Doctrine in the United States.** That the alien who came to the United States, and there made his abode, could by any process dissolve the existing tie of allegiance binding him to the country of his origin was not the accepted view in the early days of the Republic. The common-law doctrine which denied the individual such a privilege found support in the views of publicists and judges.[1] Doubt was, moreover, expressed as to the effect of naturalization.

It was frequently suggested by the political department of the Government that the naturalized American citizen acquired a character not necessarily entitled to recognition by the country of origin, and which did not, upon his return to its domain, justify the United Sates in making the endeavor to protect him as its national.[2] The doctrine of dual allegiance thus became as readily applicable to the adult naturalized American citizen as to a minor child born within the United States, but subjected by virtue of the *jus sanguinis* to duties of allegiance towards the State of the father's nationality in the territory of which the child

---

Rel. 1887, 948, Moore, Dig., III, 633. The foregoing language was used in connection with the case of one Adolph Lipszyc, a naturalized American citizen of Russian origin, subjected to punishment upon his return to Russia. "His sole offense" was "his naturalization in the United States without the consent of Russia." Mr. Bayard contended that under the treaty of commerce of 1832, American citizenship had been acquired with the assent of Russia, and that Lipszyc could "not be tried for an emigration which, when followed by naturalization in the United States, Russia herself recognizes as conferring citizenship of the United States." The withdrawal of the penal action "based exclusively on that emigration" was urgently sought. See, also, concerning this case, For. Rel. 1887, 959–960, *id.*, 961, Moore, Dig., III, 637–643.

[6] U. S. Treaty Vol. IV, 3972. Such a provision merely signifies that a State, willing to agree that its nationals who go to the territory of the United States may there at will acquire American citizenship through naturalization, consistently agrees also not to penalize the former national on account of his original act by means of which it became possible for him to become subsequently an applicant for that citizenship. It should be constantly borne in mind, however, that refusal on the part of a foreign State so to agree would not necessarily imply a refusal also to accept the American doctrine in respect to expatriation through naturalization. The winning of that respect from States which have been, and still remain, reluctant to yield it might possibly be made easier were the United States less eager to incorporate in its naturalization treaties any reference to the matter of emigration.

[7] U. S. Treaty Vol. IV, 4063. See Treaties Concluded since World War I, *supra*, § 363B.

§ 378. [1] J. B. Moore, Principles of American Diplomacy, 1918, Chap. VII; also documents cited in Moore, Dig., III, 552, among which are 2 Kent's Comm. 49; 3 Story's Constitution, 3, note 2; Inglis *v.* Trustees of Sailor's Snug Harbour, 3 Pet. 99; Shanks *v.* Dupont, 3 Pet. 242, 246; The Santissima Trinidad, 7 Wheat. 283; and *contra*, Alsberry *v.* Hawkins, 9 Dana (Ky.), 178. See, also, Moore, Dig., III, 554–562, and cases there cited and quoted.

With respect to the relation of Expatriation to the question of Impressment see Moore, Dig., III, 563, *citing* Am. State Pap., For. Rel., III, 630, Adams' Hist. of the United States, II, 332–339.

[2] Mr. Marshall, Secy. of State, to Mr. Humphreys, Sept. 23, 1800, Moore, Arbitrations, II, 1001, Moore, Dig., III, 562; Mr. Webster, Secy. of State, to Mr. Bryan, March 21, 1843, 33 MS. Dom. Let. 117, Moore, Dig., III, 565; also Mr. Wheaton, Minister to Prussia, to Mr. Knoche, July 24, 1840, enclosed with Mr. Wheaton's No. 157, to Mr. Forsyth, Secy. of State, July 29, 1840, S. Ex. Doc. 38, 36 Cong., 1 Sess., 6, 7, Moore, Dig., III, 564.

happened to be; for the right to treat the adult as a national was regarded as dependent upon the power to exact allegiance from him, rather than upon a new political status conferred upon him by the State of adoption.

It was Mr. James Buchanan who, in 1845, was the first Secretary of State to announce the principle that naturalization put an end to any tie of former allegiance, and that the naturalized American citizen was, therefore, entitled to complete recognition as such by the country of his origin.[3] It was not, however, until after Mr. Buchanan became President that this view was the accepted position of the Department of State,[4] and not until 1868 that it was embodied in the statutory law of the United States.[5] That law did not define "the right of expatriation." Its purpose was to make clear the doctrine, first, that the freedom of an alien to change his nationality through naturalization, in so far as he had any part in the matter, was not dependent upon the consent of his sovereign beyond whose control he had placed himself; secondly, that naturalization within

[3] Communication to Mr. Rosset, Nov. 25, 1845, 35 MS. Dom. Let. 330, Moore, Dig., III, 566; Mr. Buchanan, Secy. of State, to Mr. Bancroft, Minister to Great Britain, Oct. 28, 1848, Brit. and For. State Pap., XLVII, 1236, 1237, Moore, Dig., III, 566; Same to Same, Dec. 18, 1848, Brit. and For. State Pap., XLVII, 1241, Moore, Dig., III, 566.

"A comprehensive examination of our unpublished diplomatic records enables me to say that the first Secretary of State to announce the doctrine of expatriation in its fullest extent — the doctrine that naturalization in the United States not only clothes the individual with new allegiance but also absolves him from the obligations of the old — was James Buchanan." J. B. Moore, Principles of American Diplomacy, 1918, 276.

[4] See Mr. Everett, Secy. of State, to Mr. Barnard, Minister to Prussia, Jan. 14, 1853, S. Ex. Doc. 38, 36 Cong., 1 Sess., 53–54, Moore, Dig., III, 567; Mr. Marcy, Secy. of State, to Mr. Daniel, Minister to Sardinia, Nov. 10, 1855, MS. Inst. Italy, I, 88, Moore, Dig., III, 569; Mr. Cushing, Atty. Gen., 8 Ops. Attys. Gen., 139, Moore, Dig., III, 570. President Buchanan's views found expression in the Case of Christian Ernst, and were communicated by Mr. Cass, Secy. of State, to Mr. Wright, Minister to Prussia, July 8, 1859, S. Ex. Doc. 38, 36 Cong., 1 Sess., 132, Moore, Dig., III, 574.

Concerning the course of the United States during the Civil War, see documents in Moore, Dig., III, 577–579.

[5] The Act of July 27, 1868, 15 Stat. 223, as embodied in Rev. Stats. §§ 1999, 2000, 2001, is as follows: "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

"Any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of the Republic.

"All naturalized citizens of the United States, while in foreign countries, are entitled to, and shall receive from this Government, the same protection of persons and property which is accorded to native-born citizens.

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release; and all the facts and proceedings relative thereto shall as soon as practical be communicated by the President to Congress."

Also, communication of the Department of State of March 16, 1929, for the Preparatory Committee for The Hague Conference for the Codification of International Law, of 1930, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 149–151.

the United States served to dissolve the tie of allegiance with respect to that sovereign; and thirdly, that by such process the individual acquired a new national character entitled to recognition upon his return to the country of origin.[6]

d

§ 379. **Significance of the Existing Law.** It is not believed to be inconsistent with the doctrine enunciated by the United States for the State of origin to punish the naturalized American citizen, upon his return to its territory, for emigrating in disobedience to its command and contrary to its laws; for, in so doing, that State does not necessarily deny the validity of naturalization, but merely inflicts a penalty upon one who transgressed the local law when within its territory and while also a national.

In calling upon the State of origin, in spite of its domestic laws forbidding renunciation of allegiance without governmental consent, to accord complete recognition to the American naturalization of a former national who has disobeyed its commands, the United States is not believed to take an unreasonable position. Such an individual has voluntarily and unequivocally renounced allegiance to his former sovereign, he has made his residence for a period of years on American soil and he has sworn allegiance to the State of his adoption. The United States has clothed him, therefore, with its nationality under circumstances when it has become reasonable for it as a sovereign to establish a bond between itself and the individual, not only more intimate than can exist between himself and any other, but also one which is inconsistent with the continuance of a similar relationship between himself and any other. Through the process of naturalization the United States, therefore, reasonably asserts that it both dissolves the political relationship of the individual to his former sovereign, and simultaneously impresses upon him a new national character entitled to general recognition.[1] This principle is necessarily at variance with the theory of dual

[6] Respecting the circumstances leading to the enactment of the Act of July 27, 1868, see Moore, Dig., III, 579–581, and documents there cited. Respecting the cases of Warren and Costello, naturalized American citizens of British origin, arrested in Dublin in 1867, see Dip. Cor. 1866, I.

In its communication of March 16, 1929, for the Preparatory Committee of The Hague Conference for the Codification of International Law of 1930, the Department of State declared in reference to the Act of July 27, 1868, and to § 2 of the Act of March 2, 1907 (34 Stat. 1228): "It is clear from the statutory provisions quoted above that the Government of the United States holds that loss of original nationality results directly from naturalization in a foreign country, and that such loss is not conditioned upon the authorization of the Government of the State of former nationality to renounce such nationality. In other words, it is held that there is 'an exact correspondence between the loss of the former nationality and the acquisition of the new nationality by naturalization, especially as regards date.'" (Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 145, 150.)

"As our legislation does not contemplate perpetual national allegiance a former Roumanian subject now citizen of another country is no longer liable to military service in Roumania." (The Roumanian Minister in Washington, to the Assist. Secy. of State, Jan. 25, 1919, Hackworth, Dig., III, 190.)

§ 379. [1] From the principles of Conflict of Laws as applied in the United States and England an analogy suggests itself. The civil status or artificial condition attached to a man may be dissolved by a State other than that which conferred or imposed it. Thus if he be a slave, the State to whose domain he goes, and in which he makes a new legal home, may not only decline to recognize his status, but also proceed formally to destroy it. In a word, the State

allegiance; for it cannot be admitted that the political status conferred by naturalization is consistent with the existence of any other, or that until it is dissolved by some reasonable process it may be disregarded at will by the State of origin.[2]

Although the United States may find itself unable to prevent a foreign State from withholding recognition of American naturalization when obtained in defiance of its laws forbidding the attempt to transfer allegiance, it is always possible to emphasize the fact that the foreign law which embodies the command and penalizes disobedience is heedless of a marked trend of opinion prevailing within the international society.[3]

e

§ 379A. **Action of The Hague Conference of 1930.** At The Hague Conference of 1930 for the Codification of International Law the principle of expatriation through naturalization regardless of the will of the former sovereign fell among thorns. The political cares of this world effectively choked any general disposition to agree to respect it.[1] While the Final Act of the Conference registered the recommendation that "it is desirable that States should apply the principle that the acquisition of a foreign nationality through naturalisation involves the

---

which becomes the new domicile habitually dissolves for cause the status previously attached to the individual by the law of his former home and furnishes the proper law for him to invoke in order to accomplish such an end. The reasonableness of this assertion of sovereign power is, moreover, recognized, when the individual resumes his home in the State to which he formerly belonged. His former status is deemed to have been destroyed, and the imposition or conferring of a new and similar one is believed to require affirmative action.

[2] "The doctrine embodied in the Act of 1868 is that naturalization invests the individual with a new and single allegiance, and by consequence absolves him from the obligations of the old. The position of governments and of publicists who deny the American contention is that naturalization merely adds a new allegiance to the old, so that the individual becomes subject to a dual allegiance, and may be held to all the obligations of his original citizenship if he returns to his native country. The doctrine of dual allegiance is, in a word, the precise test, the acceptance of which distinguishes those who reject the doctrine of voluntary expatriation from those who support it." (J. B. Moore, Principles of American Diplomacy, 1918, p. 294.) In the light of this statement see President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxxi, Moore, Dig., III, 586; also Mr. Hay, Secy. of State, to Mr. Garabedyan, Feb. 19, 1900, For. Rel. 1900, 938, Moore, Dig., III, 689, same to Mr. Combs, Minister to Guatemala, No. 30, April 18, 1903, For. Rel. 1903, 584, Moore, Dig., III, 608.

"The cases of persons born in the United States of alien parents should not be confused with the cases of persons born abroad who have obtained naturalization as citizens of this country. In the former cases the Department recognizes now, as it always has heretofore, that the persons concerned are born with a dual nationality. In the latter cases the Department does not recognize the existence of dual nationality in view of the fact that persons who obtain naturalization as citizens of this country are required to renounce their original allegiance." (Mr. Lansing, Secy. of State *ad interim*, to Senator H. C. Lodge, concerning the Case of Ugo Da Prato, June 9, 1915, For. Rel. 1915, 559, 563.)

[3] See R. W. Flournoy, Reporter, in Comment on Art. XIII of Harvard Draft convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 45–48, in which attention is called to the Analysis of Laws concerning Naturalization and Expatriation, embraced in Appendix No. I, *id.*, 83, 100–106.

According to Art. XIII of the Harvard Draft Convention on Nationality: "Except as otherwise provided in this Convention, a State may naturalize a person who is a national of another State; and such person shall thereupon lose his prior nationality." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 14.)

§ 379A. [1] See Report of the First Committee (Nationality), Dr. J. Gustavo Guerrero, *Rapporteur*, Publications of League of Nations, V. Legal Questions, 1930. V. 8; *Am. J.*, XXIV, *Official Documents*, 215, 221–222; R. W. Flournoy, "Nationality Convention, Protocols

loss of the previous nationality," it was declared to be "also desirable that, pending the complete realisation of the above principle, States before conferring their nationality by naturalisation should endeavour to ascertain that the person concerned has fulfilled, or is in a position to fulfil, the conditions required by the law of his country for the loss of its nationality." [2] There was thus seemingly encouraged recourse to a procedure itself calculated to defer the practical realization of the principle of which the application was acknowledged to be desirable.[3]

Article VII of the Convention produced by the Conference, "On Certain questions Relating to the Conflict of Nationality Laws," made provision for the use of so-called expatriation permits. Although the article does not require, as the Delegate of the United States (on the First Committee — Nationality) has since pointed out, the production of such a permit as a prerequisite to naturalization, it "recognizes that such permits are being issued by some States and makes certain provisions concerning their use and effect" and "concludes with the requirement that the State whose nationality is acquired by a person to whom an expatriation permit has been issued, shall notify such acquisition to the State which has issued the permit." [4] The Delegate of the United States accordingly opposed this article "upon the ground that it seemed to imply an admission that it is a reasonable and proper thing for a State to require its express permission before one of its nationals can change his nationality through naturalization in another State." This he deemed to be "clearly at variance with the position maintained by the United States for many years concerning expatriation." [5]

If the principle of expatriation through naturalization is to win the approval of States fairly concerned with the conservation of man-power, and roughly described as States of emigration, they must be convinced — as they do not as yet appear to be convinced — that acquiescence will not necessarily serve to drain off elements of a national population which there is the strongest desire to retain. Thus if proponents of the principle are prepared to bring home to such States the fact that control of emigration however rigid is not sought to be interfered with, and is not inconsistent with approval of the principle, it may hasten the day of general acquiescence. In a word, acknowledgment on the part of States least disposed to yield it, that naturalization produces loss of former na-

---

and Recommendations Adopted by the First Conference on the Codification of International Law," *id.*, XXIV, 467, 473–476.

[2] *Am. J.*, XXIV, *Official Documents*, 183.

[3] Declares R. W. Flournoy, Delegate of the United States on the First Committee (Nationality): "While the paragraph just quoted [that also quoted in the text] does not state definitely that naturalization shall not be granted, until the applicant shows that he 'has fulfilled, or is in a position to fulfil, the conditions required by the law of his country for the loss of its nationality,' the implication is that such rule should be followed. Therefore, the Delegation of the United States was unable to agree to the recommendation in its final form." (*Am. J.*, XXIV, 475–476.) The same Delegate set forth at length before the First Committee on March 22, 1930, the position of the United States with respect to expatriation through naturalization, as did also Mr. David Hunter Miller, Chairman of the United States Delegation, on March 24, 1930. The statement of the former is published in part in *Am. J.*, XXIV, 473–474. The views of Messrs. Flournoy and Miller are set forth in Hackworth, Dig., III, 162–163.

[4] For the text of the Convention, see Publications, League of Nations, V. Legal Questions, 1930, V. 3; *Am. J.*, XXIV, *Documents*, 192.

[5] R. W. Flournoy, in *Am. J.*, XXIV, 467, 473.

tionality without the consent of the former sovereign, must be expected to depend upon the clearest understanding that the concession in no wise impairs their freedom to prevent their nationals from departing from their territorial limits and from getting beyond their physical control.

## f

## Contrasting Views of Certain Foreign States

### (1)

§ 380. **Respecting Effect of Naturalization.** The naturalization of an individual is a fact. Expatriation through naturalization is a result which the State of origin is not always prepared to admit to be the necessary legal consequence of that fact. Reluctance to yield such an admission is attributable to the theory that the law of nations as reflected by the practice of interested States imposes no obligation upon the State of origin to make it, and that, accordingly, that State remains free to prescribe the conditions when its own nationality is to be deemed to be terminated by naturalization or by other events in the life of a national. It is believed to be worth while to observe closely the extent to which this sense of freedom finds expression in the statutory law of certain States and to note in particular the nature of various conditions with which they demand compliance before acknowledging a loss of their own nationality to have occurred even when the naturalization of a national has taken place. Some of these are slight and founded on reason; others are considerable, and, from an American point of view, appear to pay scant heed to the economic factor after emigration has taken place, and the national has become a part of the life of the State within whose territory he resides and whose nationality he acquires.

At the outset it should be noted that the State which denies that expatriation is to be acknowledged when no foreign nationality is acquired through naturalization is not opposing the doctrine of expatriation through naturalization, but rather the doctrine of expatriation without naturalization.[1]

Some States of origin appear to condition their willingness to recognize the foreign naturalization of a national as productive of expatriation,[2] or as a means

§ 380. [1] See, for example, the theory of Art. 18, of the Law of the Free City of Danzig of May 30, 1922, concerning the Acquisition and Loss of Danzig Nationality, Flournoy and Hudson, Nationality Laws, 1929, 209, 211.

[2] See Articles 17 and 21 of the Bulgarian Law concerning Nationality of Dec. 31, 1903, as amended Jan. 12, 1908, Dec. 8, 1911, and July 24, 1924, Flournoy and Hudson, Nationality Laws, 1929, 162, 166, "text from enclosure with Despatch No. 551, Dec. 19, 1924, from the American Minister to Bulgaria to the Secretary of State."

"The naturalisation of a German national in a foreign State automatically involves the loss of German nationality if the said person possesses neither domicile nor permanent residence in Germany and naturalisation ensues on his application." (Communication from the German Foreign Office for the Preparatory Committee of The Hague Conference for the Codification of International Law, Oct. 31, 1928, Bases of Discussion, Vol. I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, p. 36.) Also Section 25, German Law of Nationality of July 22, 1913, Flournoy and Hudson, Nationality Laws, 1929, 306, 310.

According to Art. I of the Finnish Law of June 17, 1927, regarding the Loss of Finnish Citizenship: "A Finnish citizen who becomes a citizen of another country loses his Finnish citizenship if his domicile is outside of Finland or if he resides abroad." (Flournoy and Hudson, Nationality Laws, 1929, 249.) In 1929 the Finnish Government informed that of the United States that according to Section 1 of the Finnish law of 1927, "no Finnish man between 17–28 years of age, can lose his Finnish citizenship by becoming citizen of another

of enabling him to obtain release from his former nationality,[3] upon his residing abroad or upon his leaving the country. It is believed that on principle such a requirement merits the approval of the international society.

States that endeavor to maintain unbroken the bond of nationality until particular services such as those of a military character have been rendered, or until the national has ceased to be of potential military value, seek to accomplish the end desired by differing processes. Some States such as Belgium, while acknowledging loss of nationality through naturalization, decline to make such a concession while military service is due or unfulfilled, unless the national is released therefrom.[4] According to the French law, recognition that naturalization produces a loss of French nationality is conditioned, in the case of a national enlisted in the active army or entered on the military liability list, upon the expiration of a specified lapse of time, except with the special authorization of the French Government.[5] Greece[6] and Turkey[7] acknowledge no loss of na-

---

country, unless the President of the Republic, upon petition thereof, releases him from the same." (Hackworth, Dig., III, 168.)

[3] See Art. 18, Law of May 30, 1922, of Free City of Danzig, concerning the Acquisition and Loss of Nationality, Flournoy and Hudson, Nationality Laws, 1929, 209, 211, "text from *Br. Parl. Papers,* Misc. No. 2 (1927), Cmd. 2852, p. 13."

Also Section V, Danish Law of April 18, 1925, concerning the Acquisition and Loss of Danish Nationality, Flournoy and Hudson, 1929, Nationality Laws, 214, 215; "*Br. Parl. Papers,* Misc. No. 2 [1927], Cmd. 2852, p. 17."

See documents in Hackworth, Dig., III, 180–182, concerning discussion between the United States and Guatemala pertaining to the laws of the latter country, relating to the naturalization of Guatemalan nationals.

[4] According to Art. 16 of the Belgian Law of Aug. 4, 1926, relative to the Acquisition, Recovery and Loss of Nationality: "If the person concerned is still subject to obligations of military service for the active army and its reserve, the acquisition of a foreign nationality will only cause him to lose Belgian nationality subject to the authorization of the King." Flournoy and Hudson, Nationality Laws, 1929, 38, 41 "text from *Br. Parl. Papers,* Misc. No. 2 [1927], Cmd. 2852, p. 9."

*Cf.* Finnish law of June 17, 1927, regarding the Loss of Finnish Citizenship, Art. I, Flournoy and Hudson, Nationality Laws, 1929, 239 "text from enclosure with Despatch No. 476, July 20, 1927, from the American Minister to Finland to the Secretary of State."

[5] According to the communication of Nov. 16, 1928, from the French Foreign Office for the Preparatory Committee of The Hague Conference for the Codification of International Law of 1930: "Authorisation to renounce nationality, in the strict sense, is unknown in French law. It is naturalisation abroad which leads to the loss of French nationality; nevertheless, before this effect can be produced in the case of a Frenchman incorporated in France in the active army, or of a Frenchman exempted from active service who has been entered in the military census lists for less than ten years, the acquisition of the foreign nationality must have been authorised by the French Government (Article 9, paragraph 1, sub-paragraph 2). This is not a case of authorisation to renounce nationality entailing the loss of French nationality, but a condition concerning the effect of naturalisation abroad." (Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.V.1929, 39.) See French Law of Aug. 10, 1927, Art. 9 (1), Flournoy and Hudson, Nationality Laws, 1929, 245, 249, *citing Journal Officiel,* Aug. 14, 1927.

See, also, in this connection, documents in For. Rel. 1914, 291–301.

[6] "He loses his quality as a Greek who becomes naturalized in a foreign country. For this, permission of the Greek Government, given through the Ministry for Foreign Affairs after consideration of the concrete circumstances submitted, is required beforehand; but this permission is never given if the petitioner is liable to military service or if he be a military delinquent or subject to penal prosecution for a misdemeanor or a crime." Art 23 (a) of the Greek Law No. 391, of Oct. 29, 1856, as amended by the decree law of Sept. 13, 1926, which was confirmed by the decree of Aug. 12, 1927, Flournoy and Hudson, Nationality Laws, 1929, 315, 317 ("text from D. K. Nikolopoulou, *Greek Nationality,* Athens, 1927").

See statement in Hackworth, Dig., III, 177; also *id.,* 179, *citing* documents in For. Rel. 1921, Vol. 2, 166–168.

[7] According to Art. 7 of the Turkish Law of May 28, 1928: "The surrender of Turkish

tionality through naturalization abroad except when there is a previous granting of permission which, according to the statutory law, is never given if the petitioner therefor is liable to military service. Still, other States, such as Egypt,[8] Persia (Iran),[9] and Russia[10] announce that loss of nationality is allowed with, and is dependent upon, the granting of permission, without indicating on what terms it may be obtainable. "Generally speaking," declares Mr. Hackworth, "the Soviet Government has not recognized naturalization in a foreign country obtained without the prior consent of the appropriate Soviet authorities as resulting in the loss of Soviet citizenship."[11] In general, however, States, which have recourse to the release system appear to acknowledge that the national who endeavors to obtain abroad a foreign nationality through naturalization has it within his power, upon compliance with conditions which obviously greatly vary in kind and extent, to cause the termination of his nationality of origin. In the case of Switzerland, while the voluntary acquisition of a foreign nationality is not deemed to affect Swiss citizenship, the person concerned is permitted expressly to renounce it, if he complies with the requirements of the Federal Law which do not embrace compliance with military obligations.[12] In the case

---

citizenship is dependent upon the obtaining of a special authorization. Such authorization may be granted by the Council of Ministers upon an application to the Ministry of the Interior of the person desirous of abandoning Turkish citizenship. Authorization shall not be granted to those who have not performed their military service." Flournoy and Hudson, Nationality Laws, 1929, 570, "text from enclosure with Despatch No. 333, June 6, 1928, from the American Ambassador to Turkey to the Secretary of State."

See also statement from the American Consulate General at Constantinople, Jan. 17, 1929, Hackworth, Dig., III, 198.

[8] See Art. 12, Egyptian Decree Law No. 19, of Feb. 27, 1929, Flournoy and Hudson, Nationality Laws, 1929, 225, "text from *Journal Officiel* of March 1929, (Special Number)."

See award in George J. Salem Case, American-Egyptian Arbitral Tribunal, under protocol of Jan. 20, 1931, Dept. of State Arbitration Series 4 (6), 1933, 38–40; also dissenting opinion of Mr. Nielsen, American Arbitrator, *id.*, 71, 72–84.

[9] See Articles XIII and XIV of Persian Law of Sept. 7, 1929, Flournoy and Hudson, Nationality Laws, 1929, 473, 475, "text from enclosure with Despatch No. 952, Oct. 14, 1929, from the American Chargé d'Affaires at Teheran to the Secretary of State."

[10] See Articles 12 and 13 of Decree No. 202, of Oct. 29, 1924, of Union of Soviet Socialist Republics, Flournoy and Hudson, Nationality Laws, 1929, 511, 514, "text from *Br. Parl. Papers*, Misc. No. 2 (1927), Cmd. 2852."

With respect to the position of Russia when under the Romanoffs, see report of Mr. Olney, Secy. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxix, Moore, Dig., III, 652. Also Mr. Hay, Secy. of State, to Mr. Belmont, Jan. 25, 1900, 242 MS. Dom. Let. 391, Moore, Dig., III, 655; other documents, *id.*, III, 622–656; Dept. of State, Circular of Jan. 9, 1914, Circulars Relating to Citizenship, 1916, p. 72.

[11] Hackworth, Dig., III, 200, *citing* provisions of a decree of April 22, 1931, and superseding provisions of Art. 4 of the Act on Citizenship of the Union of Soviet Socialist Republics of Aug. 19, 1938, to the effect that "citizenship of the U.S.S.R. may be renounced with the permission of the Presidium of the Supreme Soviet of the U.S.S.R."

[12] Acting on the principle that every Swiss conserves his citizenship as long as he does not renounce it himself, and as long as he can prove his descent, Switzerland has not regarded the naturalization of a national as necessarily productive of expatriation, and has made its recognition of the loss of Swiss nationality dependent upon a formal and express renunciation of allegiance in the manner prescribed by its law.

It may be observed that a Swiss is a national of Switzerland because he is a citizen of one of the cantons of which the Swiss Republic is composed. Renunciation of Swiss nationality is renunciation to the particular canton to which the individual belongs.

See Articles 7–9, of Swiss Federal Decree of June 25, 1903, concerning the Acquisition of Citizenship and Relinquishment of Same, Flournoy and Hudson, Nationality Laws, 1929, 557, 558, "text from enclosure with Despatch of May 10, 1924, from the American Consul

of Germany, while naturalization of a national domiciled or residing abroad is regarded as productive of a loss of German nationality, such a result does not ensue if, before naturalization in the foreign State, the national applies for and obtains from German authority written authorization to retain his German nationality.[13]

The various legislative policies reflected in the foregoing statutes reveal the methods by which some States have sought to check the tendency favorable to the principle of expatriation through naturalization. Such legislation, however recent, is, nevertheless, not believed to manifest a trend of opinion increasingly hostile to that principle, but rather to indicate a brave showing of retreating forces conscious of the steady growth of the influence of the principle and desirous of postponing the day when it is to be deemed a part of the law of nations.[14] What weakens the influence of their opposition is the acknowledgment of the numerous contingencies when loss of nationality through naturalization deserves recognition, as well as the circumstance that recourse to other methods may serve to enable the State of origin to safeguard itself, for most practical purposes, against a dreaded loss of man-power.

The return of the naturalized American citizen to the territory of the State of his origin, itself not prepared to accept the doctrine of expatriation through naturalization, and not obliged by convention to do so, has oftentimes given rise to controversy.[15] While the Department of State cannot well deny that such a State possesses the privilege of keeping out of, or expelling from, its domain such an individual whose conduct in the acquisition of American nationality has been defiant of its policy and laws, serious objection is made when the individual concerned is subjected to other penalties on account of his American naturalization. As a means of avoiding possible conflicts, the Government of the United States has been inclined to make known through appropriate notices the laws obtaining in certain States of origin in order that American naturalized citizens

---

at Lucerne to the Secretary of State." Also Communication of Dec. 17, 1928, from the Swiss Foreign Office for the Preparatory Committee of The Hague Conference for the Codification of International Law of 1930, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 42.

See also documents in Hackworth, Dig., III, 192–194.

In relation to the laws of Jugoslavia, see documents in Hackworth, Dig., III, 202–207.

[13] See Section 25 of German Law of Nationality of July 22, 1913, Flournoy and Hudson, Nationality Laws, 1929, 306, 310, "text from enclosure with Despatch No. 846, Sept. 3, 1913, from the American Consul General at Berlin to the Secretary of State." Also Communication from the German Foreign Office, of Oct. 31, 1928, for the Preparatory Committee of The Hague Conference for the Codification of International Law of 1930, Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 36.

[14] "Notwithstanding the fact the 'right of expatriation' has not been recognized in a number of recent nationality laws, including the laws of some of the countries whose independence resulted from the World War, the modern tendency is undoubtedly in the direction of its general recognition." (R. W. Flournoy, Reporter in Comment on Art. XIII of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 48.)

[15] Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, No. 147, Jan. 14, 1891, MS. Inst. Turkey, V, 196, Moore, Dig., III, 696; President Cleveland, Annual Message, Dec. 3, 1894, For. Rel. 1894, xv, Moore, Dig., III, 701; Mr. Gresham, Secy. of State to Mr. Terrell, Minister to Turkey, March 29, 1894, For. Rel. 1894, 754, 755–756, Moore, Dig., III, 701; other documents, *id.*, III, 696–707.

may be duly apprised of difficulties which their return to the territories thereof may be expected to produce.[16]

It should be observed that some States of origin, which adhere to the release system, demand, as a condition of permitted expatriation through naturalization, that the individual concerned liquidate or transfer to a national property of various kinds within, or pertaining to, their territories.[17] The penalty for acquiring foreign naturalization without their consent may, moreover, assume the form of a governmental liquidation,[18] or of a deprivation of nationality.[19] Recourse to the latter procedure, if unaccompanied by other penalties, is not necessarily disadvantageous to the person seeking by naturalization abroad to dissolve the tie of former allegiance. Confiscation of property and banishment of parents of the actors may be threatened because of failure to return for military service.[20]

(2)

§ 381. **Difficulties Respecting Military Service.** Some States, recognizing the loss of nationality produced by naturalization, have sought to exact military service from former nationals who have become naturalized American citizens, or have endeavored otherwise to inflict punishment upon them on account of evasion of such service before naturalization was consummated.[1] The Italian Civil Code of 1866 announced that loss of citizenship did not carry with it ex-

[16] See Department of State, Notice to Bearers of Passports, revised to Feb. 1, 1941, Publication No. 1565, Part IV.

[17] See, for example, Art. 8 of Turkish Law of May 28, 1928, Flournoy and Hudson, Nationality Laws, 1929, 570, 571.

Also Art. XIII of Persian Law of Sept. 7, 1929, *id.*, 473, 475.

[18] According to Art. XV of the Persian Law of Sept. 7, 1929: "If any Persian subject in violation of the above-mentioned provisions should acquire foreign nationality, this nationality will be considered as null and void and the party concerned will be treated as a Persian national. Meanwhile, however, all his immovable property will be sold under the supervision of the local Public Prosecutor, and the proceeds of the sale after deduction of costs will be delivered to him." (*Id.*, 475–476.)

See also Articles 988 and 989 of the Civil Code (book II), "voted by the Iranian Majliss" on Feb. 16, 1935, Hackworth, Dig., III, 182–183.

[19] See, for example, Art. 9 of Turkish Law of May 28, 1928, Flournoy and Hudson, Nationality Laws, 1929, 571.

[20] See instruction to the American Legation at Athens, of July 11, 1923, Hackworth, Dig., III, 179.

§ 381. [1] See law of Roumania, indicated in Circular Notice, Department of State, Feb. 20, 1901, For. Rel. 1901, 441, Moore, Dig., III, 621. It was there stated that "One who did not complete his military service in Roumania, and cannot prove that he performed military service in the United States, is subject to arrest, or fine, or both, for evasion of military duty." In later years, however, the Department of State was informed that upon the return to Roumania of a person of Roumanian origin who had been naturalized abroad, military service would not be exacted. See documents in Hackworth, Dig., III, 190.

Declared the Spanish Ministry of State to the American Embassy at Madrid, April 20, 1926: "Though the quality of being a Spaniard according to existing legislation is lost by naturalization in another country, distinction must be made as to whether the said naturalization took place prior or subsequent to the attainment of the age fixed for conscription in the Spanish Army; and in the first instance, the interested persons are exempted from performing their military service in Spain, but if the said naturalization is secured within the period in which he is liable for military service, the interested person will always remain obligated to perform his military service in Spain, and in case of failure to do so will incur penal responsibility under the same conditions as any other Spaniard who has not lost his nationality." (Hackworth, Dig., III, 191.)

emption from the obligation of military service.[2] The same idea was reflected in the Italian Law of June 13, 1912.[3] The application of this law to numerous naturalized American citizens of Italian origin who returned to Italy for temporary sojourn after the outbreak of the World War in 1914, was a source of constant complaint by the Government of the United States.[4] "During the progress of the war the Italian Government adopted the practice of detaining in Italy the wives and children of naturalized American citizens of Italian origin for the purpose of compelling the husbands and fathers to return to Italy for military service. It at first refused to heed protests made by the American Ambassador but, upon being advised that no other country except Italy pursued such a practice, agreed to permit the unrestricted departure of the wives and children of such persons." [5]

For the infringement of a law prior to emigration, and assuming the form of evasion of military service already due, the former sovereign violates no rule of international law in imposing a penalty upon the former national when he is within its control. It is not understood that the United States would question the propriety of such action.[6] For the failure to respond to a call to arms after emigration but prior to naturalization, it is believed that the State of origin may without violating any requirement of international law penalize its disobedient non-resident national in an effective way.[7] Nevertheless, the United States has been disposed to secure by treaty some protection for the naturalized American citizen as against action of such a kind, and to secure an undertaking that upon his return to the country of former nationality he shall not be punishable for failure, prior to naturalization, to respond to calls for military service not accruing until after bona fide residence was acquired in American territory,[8] or to answer a summons to military service which was served within a period of five years preceding naturalization.[9] Even in the absence of treaty, the United States has, at times, felt itself justified in protesting against the harsh operation of action on the part of the State of origin that would involve the punishment of

[2] For. Rel. 1878, 458, *id.*, 1879, 600, Moore, Dig., III, 610.

In Art. 12 of that Code it is declared that "Loss of citizenship in the cases stated in the preceding Article does not exempt from the obligations of military service, nor from penalty inflicted on any one who bears arms against his native country." Moore, Dig., III, 610.

Circular of Aug. 2, 1915, Dept. of State, Circulars Relating to Citizenship, 1916, p. 69; also note of Mr. Lansing, Secy. of State, to Senator Lodge, June 9, 1915, *id.*, p. 75.

For earlier cases in relation to Italy, see documents in Moore, Dig., III, 608–616, especially notice to citizens formerly subjects of Italy who contemplate returning to that country, March 18, 1901, For. Rel. 1901, 282.

[3] Art. 8, Flournoy and Hudson, Nationality Laws, 1929, 363, 364, "text from enclosure with Despatch No. 272, Dec. 20, 1924, from the American Ambassador to Italy to the Secretary of State." See documents in For. Rel. 1914, 405–423.

[4] See generally, documents in Hackworth, Dig., III, 185–188.

[5] Hackworth, Dig., III, 187, citing For. Rel. 1916, 402–404, 414, 417.

[6] Mr. Frelinghuysen, Secy. of State, to Mr. Hunt, Minister to Russia, Dec. 22, 1883, H. Ex. Doc. 88, 48 Cong., 1 Sess., 7–8, Moore, Dig., III, 627.

See R. W. Flournoy, Reporter, in Comment on Art. XIII of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April 1929, 50.

[7] See Mr. Bayard, Secy. of State, to Mr. Authes, Aug. 7, 1885, 156 MS. Dom. Let. 482, Moore, Dig., III, 432.

[8] Art. II, treaty with Bulgaria of Nov. 23, 1923, U. S. Treaty Vol. IV, 3972; Art. II, treaty with Albania of April 5, 1932, U. S. Treaty Vol. IV, 3922.

[9] Art. II, treaty with Czechoslovakia of July 16, 1928, U. S. Treaty Vol. IV, 4063.

an American naturalized citizen for evasion of military service in a case where the individual emigrated from the territory of such State when a child of tender years and long before such service was due.[10] Again, a naturalizing State may not unreasonably protest against the treatment as an offender of one who failed to perform military service not accruing until after naturalization was effected.[11]

It is still believed to be important as a means of encouraging wider recognition abroad of the reasonableness of the American claim as to the general effect of naturalization, that, in the United States and elsewhere, fresh consideration be given the principle by virtue of which a State essays to punish an individual because of his disobedience to its commands while he was its national.[12] Moreover, there needs to be swept away the confusion of thought that has served to render obscure the solid distinction between the effect of naturalization upon the right of a sovereign to exact duties of allegiance from a former national, and the effect of it upon the right of that sovereign to penalize a former national on account of the commission, while he was a national, of forbidden acts themselves unrelated to, and unproductive of, his naturalization.

(3)

§ 381A. **Conventions Restricting Exactions of Military Service.** It is desirable that, in general, a person who is regarded by two or more States as a national should not be subjected to military or other kindred obligations when within the territory of any one of them in which he does not make his habitual residence. Even though international law may not, in respect to some situations,

[10] Case of Vittorio Gardella, For. Rel. 1896, 423–426, Moore, Dig., III, 614–615; also Mr. Frelinghuysen, Secy. of State, to Mr. Hunt, Minister to Russia, Dec. 22, 1883, H. Ex. Doc. 88, 48 Cong., 1 Sess., 7–8, Moore, Dig., III, 627.

See also Mr. Bryan, Secy. of State, to the American Ambassador to France, Jan. 21, 1915, For. Rel. 1915, 385.

In a circular notice respecting "Liability for Military Service in Foreign Countries of Persons Residing in the United States," Aug. 14, 1914, it was declared that: "The United States holds that no naturalized citizen of this country can rightfully be held to account for military liability to his native land accruing subsequent to emigration therefrom, but this principle may be contested by countries with which the United States has not entered into treaties of naturalization. The latter countries may hold that naturalization of their citizens or subjects as citizens of other countries has no effect upon their original military obligation, or may deny the right of their citizens or subjects to become naturalized as citizens of other countries, in the absence of express consent or without the fulfillment of military obligations." (For. Rel. 1914, 17.) It is believed that the claim here announced in behalf of the United States is too broad in its scope if it is designed to be applicable to all cases where the demand for military service has accrued subsequent to emigration.

See correspondence with France, 1913–1914, set forth in For. Rel. 1914, 291–301. *Cf.* concessions in French decree law of Oct. 30, 1935, referred to in Dept. of State, Notice to Bearers of Passports, revision of Jan. 16, 1939, 50, 52–53, Hackworth, Dig., III, 176, footnote.

[11] According to Art. 13 of the Harvard Draft Convention on Nationality: "The naturalization of a person does not terminate liability for an offense committed by him against his former State while a national thereof; provided that a person who is naturalized shall not thereafter be subject to punishment by the State of his former nationality for failure to perform military service the liability for which arose after his acquisition of an habitual residence in the territory of the naturalizing State." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 15.)

See Neutral Persons within Belligerent Territory, Exaction of Military Service, *infra*, §§ 625–627; also, Conventions Restricting Exactions of Military Service, *infra*, § 381A.

[12] See in this connection Blackmer *v.* United States, 284 U. S. 421, 437.

be deemed to forbid a State to exact allegiance from a national who simultaneously is regarded as a national by another State within whose territory he resides, and who enters the domain of the former as a transient sojourner, its effort or disposition to do so is increasingly looked upon with disapprobation. The denial of such a privilege was reflected in a Joint Resolution of the Congress, approved by the President, May 28, 1928,[1] in the Harvard Draft Convention on Nationality of 1929,[2] as well as in the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, produced by The Hague Conference of 1930, for the Codification of International Law.[3] Certain bipartite treaties to which the United States is a party exemplify, in varying form, a design to observe a like restriction. According to the convention concluded with Sweden, January 31, 1933, for the exemption from military service of persons having dual nationality, "a person possessing the nationality of both the High Contracting Parties who habitually resides in the territory of one of them and who is in fact most closely connected with that Party shall be exempt from all military obligations in the territory of the other Party."[4] This language found expression also in a convention between the United States and Finland, of January 27, 1939.[5] The same principle was applied in treaties concluded with Norway, on November 1, 1930,[6] with Lithuania, on October 18, 1937,[7] and with

§ 381A. [1] It was there provided "That the President be, and he is hereby, respectfully requested to endeavor as soon as possible to negotiate treaties with the remaining nations with which we have no such agreement, providing that persons born in the United States of foreign parentage, and naturalized American citizens, shall not be held liable for military service or any other act of allegiance during a stay in the territory subject to the jurisdiction of any such nation while citizens of the United States of America under the laws thereof." (45 Stat. 789.)

[2] According to Article XI· "A person who has the nationality of two or more States shall not be subject to the obligation of military or other national service in one of these States while he has his habitual residence in the territory of another of these States." (*Am. J.*, XXIII, *Special Supplement*, April 1929, 14.)

[3] U. S. Treaty Vol. IV, 5261. The first three articles were as follows: "1. A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries.

"This exemption may involve the loss of the nationality of the other country or countries.

"2. Without prejudice to the provisions of Article 1 of the present Protocol, if a person possesses the nationality of two or more States and, under the law of any one of such States, has the right, on attaining his majority, to renounce or decline the nationality of that State, he shall be exempt from military service in such State during his minority.

"3. A person who has lost the nationality of a State under the law of that State and has acquired another nationality, shall be exempt from military obligations in the State of which he has lost the nationality."

See comments thereon by R. W. Flournoy and Manley O. Hudson, in *Am. J.*, XXIV, 479–481, and 452–453, respectively. See also documents in Hackworth, Dig., III, 415–416.

The ratification of the United States was deposited with the Secretary General of the League of Nations, Aug. 3, 1932. The Protocol was proclaimed by the President, April 26, 1937.

[4] U. S. Treaty Vol. IV, 4656.

[5] U. S. Treaty Series, No. 953.

*Cf.* theory of Convention Providing for Reciprocal Military Service, concluded by the United States and France, Sept. 3, 1918 (in the course of the World War), U. S. Treaty Vol. III, 2592. See in this connection, Mr. Polk, Acting Secy. of State, to the French Ambassador at Washington, Aug. 3, 1918, For. Rel. 1918, Supp. 2, 718; also documents in For. Rel. 1921, Vol. I, 937–940, and in Hackworth, Dig., III, 172–174. See also Convention with Italy of Aug. 24, 1918, U. S. Treaty Vol. III, 2708.

[6] U. S. Treaty Vol. IV, 4542.

[7] U. S. Treaty Series, No. 936.

Switzerland, on November 11, 1937.[8] It was also reflected in Article IV of the Treaty of Naturalization concluded with Albania on April 5, 1932.[9]

In an instruction of June 13, 1938, to the American Consul General at Naples, it was declared that the long-standing policy of the Department of State with regard to military obligations in cases of persons having dual nationality was similar to that embodied in the first paragraph of Article I of the Protocol signed at The Hague on April 12, 1930, and that while Italy was not a party to that Protocol and had not acceded to it, the Department felt, nevertheless, that "as to persons having both American and Italian nationalities it should adhere to the principle involved, that is, that a person possessing both American and Italian nationalities who habitually resides in Italy and who is, in fact, most closely connected with that country shall not be entitled to receive the intercession of American diplomatic and consular officers in his behalf to enable him to avoid military or other obligations required by Italy of its citizens."[10]

## g

## Modes of Expatriation of American Nationals

### (1)

§ 382. **Naturalization in a Foreign State.** According to the Nationality Act of 1940, a person who is a national of the United States, whether by birth or naturalization, loses his nationality by:

> Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Provided further,* That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this Act to return to the United States and take up permanent residence therein,

[8] U. S. Treaty Series, No. 943. Concerning these several arrangements see documents in Hackworth, Dig., III, 408–413.

[9] U. S. Treaty Vol. IV, 3923.

[10] Hackworth, Dig., III, 363–364. It was added: "The Department, of course, makes a distinction between persons who emigrated to the United States under a prospective liability to military or other obligations which had not yet matured and those who emigrated to avoid military and other obligations which had been definitely fixed upon them. Consequently, in all cases where naturalized American citizens of Italian origin emigrated to the United States prior to the date when they were actually required by the laws of Italy to serve in the army of that country and who upon returning to Italy for a temporary visit of less than two years, or who after such period are in a position to overcome the presumption of having ceased to be American citizens are called upon to serve in the Italian Army, the Department desires as a matter of principle that a protest be entered with the Italian authorities against such service."

See also documents *id.*, 357–367, touching military problems growing out of dual claims of nationality.

and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship.[1]

The provision quoted makes no mention of the voluntary aspect of the change of allegiance; nor is any limitation laid down as to the procedure or the processes whereby a foreign State may endeavor to impress its national character upon an American citizen.

It is obviously unnecessary for the Department of State to issue a certificate renouncing any claim of allegiance in behalf of the United States with respect to an American citizen who seeks to expatriate himself.[2]

(2)

§ 383. **Oath of Allegiance to a Foreign State. The Matter of Minority.** According to the Nationality Act of 1940, "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state," produces loss of his American nationality by a person who is a national of the United States, whether by birth or naturalization.[1] Like the Act of March 2, 1907,[2] the new law is silent as to the place where such oath needs to be taken in order to produce such an effect. Doubtless the efficacy of such conduct for purposes of expatriation is not dependent upon its connection with, or relation to, naturalization.[3] "For loss of nationality to result from taking an oath of allegiance to a

§ 382. [1] Sec. 401 (*a*).

*Cf.* § 2 of the Act of March 2, 1907, 34 Stat. 1228. See documents interpretative of § 2 in Hackworth, Dig., III, § 243.

[2] *Ex parte* Griffin, 237 Fed. 445. Even before the enactment of the present law it was not the custom of the Department to issue such certificates. Mr. Blaine, Secy. of State, to Count Sponneck, June 5, 1890, MS. Notes to Denmark, VII, 219, Moore, Dig., III, 714; Mr. Gresham, Secy. of State, to Mr. White, Minister to Russia, Oct. 2, 1894, For. Rel. 1894, 557, Moore, Dig., III, 714; Mr. Loomis, Acting Secy. of State, to Mr. Hengelmüller, Austro-Hungarian Ambassador, No. 49, Dec. 23, 1903, For. Rel. 1903, 20, Moore, Dig., III, 586.

§ 383. [1] Sec. 401 (*b*).

[2] § 2, 34 Stat. 1228. See *In re* Wildberger, 214 Fed. 508.

[3] *Ex parte* Griffin, 237 Fed. 445. For discussions, prior to the enactment of the law, respecting the significance of taking an oath of allegiance to a foreign power, see Moore, Dig., III, 718–730; especially, Mr. Gresham, Secy. of State, to Mr. Willis, Minister to Hawaii, April 5, 1895, For. Rel. 1895, II, 853; Mr. Olney, Secy. of State, to Same, Nov. 13, 1895, *id.*, II, 867; Mr. Hay, Secy. of State, to Mr. Smith, Minister to Liberia, No. 20, Nov. 6, 1898, MS. Inst. Liberia, II, 346.

In discussions respecting the Bancroft Treaties the Department of State held that renunciation of American naturalization was not dependent upon the resumption of the nationality of origin. Mr. Olney, Secy. of State, to Mr. Uhl, Ambassador to Germany, Dec. 21, 1896, For. Rel. 1896, 221, Moore, Dig., III, 754. *Compare* Mr. Hay, Secy. of State, to Mr. Jackson, Chargé at Berlin, No. 912, July 25, 1899, MS. Inst. Germany, XXI, 64, Moore, Dig., III, 754.

In relation to the Case of Antonio S. Nunes, Mr. Knox, Secy. of State, declared Jan. 12, 1910, in a telegram to Mr. Bryan, Minister to Portugal: "If he was forced by officials in Azores to swear allegiance to Portugal, it cannot be considered that he has expatriated himself under the provisions of the first paragraph of Section 2 of the expatriation act of March 2, 1907." For. Rel. 1910, 832.

Not infrequently during World War I, before the United States itself became a belligerent, American citizens took oaths of allegiance to foreign States under circumstances which, according to the subsequent contentions of the individuals concerned, savored of duress. Such

foreign State," the Department of State appears to hold that the oath must be one "which is prescribed by law or by regulations having the force of law."[4]

It should be observed that the Department of State long construed the statutory law (Section 2 of the Act of March 2, 1907) as requiring that the oath of allegiance to a foreign State be taken outside of the domain of the United States, if such action were to produce expatriation,[5] save in the situation where a person took the oath while residing within the territory of the United States and shortly thereafter took up a permanent residence outside thereof.[6] It has recently been declared that the Department of State, even prior to the Nationality Act of 1940, held that a person naturalized in accordance with the laws of a foreign State, while residing in the United States, lost his American nationality upon taking up a residence in the foreign State in which naturalization was obtained; and that it also held that "a person taking an oath of allegiance in the United States to a foreign State lost his American nationality if thereafter he left the United States and took up a permanent residence abroad."[7]

In the course of a general instruction of November 24, 1923, Secretary Hughes declared that it was considered that an American national who took an oath of allegiance to a foreign country during minority — that is, under the age of twenty-one years — and when the United States was at peace committed conduct of a voidable character — that is, conduct not to be deemed by itself as serving definitely to expatriate him as an American — in case, within a reasonable period after release from service into which he might have been inducted, and after his becoming of age, he took the appropriate steps to assert his claim to American nationality. Appropriate action, the Secretary said, would

---

persons usually experienced difficulty, however, in convincing the Department of State that their action had been in fact involuntary.

"Where it is alleged that a foreign oath of allegiance was taken under duress, the burden of proof should be placed upon the person asserting duress to establish that fact to the satisfaction of the Department. The mere statement of the person concerned will not be accepted as proof of the allegation that the oath was taken under duress. The best evidence of the existence of duress would ordinarily be some statement made contemporaneously with or immediately preceding the taking of the oath, showing that the person had asserted his American citizenship and had protested against being required to enter the service of, or swearing allegiance to, the foreign country. Such statement may consist of records of the military or other authorities of the foreign governments or statements communicated by the person in question to an American consulate or diplomatic mission requesting assistance in avoiding service in a foreign army on the ground that he is an American citizen." (Consular Regulations of the United States, Section 144, Note 2, as of August, 1930.)

[4] Statement in Hackworth, Dig., III, 218, where it was added: "Thus it was held in the case of Helen Moore Martin that an oath of allegiance taken by her before a notary public in England to divest herself of her nationality did not result in the loss of her American nationality. A similar ruling was made in the case of Luis Robles Fernandez with reference to an oath taken before a notary public in Mexico," citing Dept. of State to the Consul at Guadalajara, May 27, 1937; same to the consular officer in charge at Birmingham, May 10, 1938; same to the consular officer in charge at Nogales, Aug. 2, 1938.

Concerning what constitutes an oath, see Mr. Hughes, Secy. of State, to Hon. Frank L. Polk, March 17, 1924, Hackworth, Dig., III, 219 and 224; Opinion of the Legal Adviser, Dept. of State, Oct. 18, 1938, Hackworth, Dig., III, 226. See also documents in Hackworth, Dig., III, footnotes, 221–225.

[5] See communication of February 3, 1933, from the Dept. of State to the American Consul General at Rome, Hackworth, Dig., III, 228.

[6] *Id.*

[7] Statement in Hackworth, Dig., III, 231–232. See also documents in footnotes, *id.*, 232–235.

be seen in applying for a passport to return to the United States. He added, however, that in case the individual, after becoming of age and after discharge from the service, should fail for a prolonged period of years to avail himself of his nationality of birth, it was believed that he should be deemed to have forfeited all privileges of American protection.[8]

According to a decision of the United States District Court at New York, July 10, 1928, "A native-born citizen who has not attained the age of twenty-one years, cannot renounce allegiance to the United States." Adverting to the views of Secretary Hughes, in the general instruction of November 24, 1923, the Court did not, however, discuss the effect of the continued residence of the individual concerned for some eighteen months after he had attained his majority within the territory of Italy to the Government of which he had taken the oath of allegiance when a minor and seemingly regarded the matter as unimportant.[9]

In the course of the same general instruction Secretary Hughes declared that while oaths of allegiance taken before the United States entered World War I (April 6, 1917), by persons who had passed their twenty-first birthday worked expatriation, foreign oaths taken by persons who had attained their majority after the United States had entered the World War and prior to the date of the declaration of peace between the United States and Germany and Austria-Hungary (July 2, 1921), did not work expatriation either at the time such oaths were taken or afterwards, except in so far as the particular oath was one of a series of acts constituting naturalization according to the law of the country where it was taken. In the latter case the United States would, he said, as a rule, regard the foreign naturalization as entitled to recognition after the war.[10] It should be observed, however, that in November, 1928, the Department of State, following an opinion of the Solicitor, adopted the rule that a minor does not

[8] No. 919. General Instruction. Consular. Diplomatic Serial, No. 225-A, Compilation of Certain Departmental Circulars relating to Citizenship, etc., Dept. of State, 1925, 118. In such a case, Secretary Hughes said that at least a passport might be withheld from the individual simply on the ground that he had failed reasonably to avoid the consequences of his action as a minor and was subject in each instance to the final decision of the Department of State.

[9] U. S. *ex rel.* Baglivo *v.* Day, 28 F. (2) 44.

According to Note 2 to Section 144 of the Consular Regulations of the United States as of August, 1930: "While Section 2 of the Act of March 2, 1907, does not make a distinction between the cases of minors and adults who take an oath of allegiance to a foreign State, in view of the fact that in several recent cases Federal courts have held that a minor does not expatriate himself by taking an oath of allegiance to a foreign country in connection with his service in the army of such country, this Department is of opinion that it should follow these decisions."

[10] Attention was called to General Instruction No. 568, Consular, of Dec. 28, 1917.

See, however, the somewhat different view contained in an opinion by the Solicitor for the Dept. of State, Sept. 27, 1928, Hackworth, Dig., III, 272, 273, to the effect that "the Department should hold that, in the absence of a clear showing of duress any person, whether minor or adult, who takes an oath of allegiance to a foreign State thereby becomes expatriated." *Cf.* ruling of the Solicitor of Nov. 24, 1928, *id.*, 274. Somewhat later, the Department of State concluded that a minor might, upon attaining majority, "confirm an oath taken during minority, and thereupon lose nationality of the United States in accordance with the provisions of section 2 of the act of March 2, 1907." (*Id.*, III, 274.) "It has been held that under certain circumstances a minor may lose nationality of the United States through his independent naturalization in a foreign State in accordance with its laws." (*Id.*, 275, and documents cited at 276.)

expatriate himself by taking a foreign oath of allegiance.[11] Subject to a modification concerning the confirmation of the oath on attaining majority, which was adopted in 1934,[12] this rule was followed until the Act of 1940 became effective.

Mr. Hackworth has observed that "the Nationality Act of 1940 makes it clear that 'No national under eighteen years of age can expatriate himself' by taking an oath of allegiance to a foreign State, by entering its armed forces (if he has or acquires the nationality of such foreign State), by accepting employment under a foreign State, by voting in its political elections, by making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign State, or by deserting the military or naval service of the United States in time of war." [13]

(3)

§ 384. **Residence of a Naturalized National in a Foreign Country. Renunciation of Naturalization.** According to the Nationality Act of 1940, a person who has become an American national by naturalization loses his nationality by:

(*a*) Residing for at least two years in the territory of a foreign State of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign State by operation of the law thereof; or

(*b*) Residing continuously for three years in the territory of a foreign State of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof.

(*c*) Residing continuously for five years in any other foreign State, except as provided in section 406 hereof.[1]

The foregoing provisions have no application, however, to a person: (*a*) who resides abroad in the employment and under the orders of the Government of the United States; or (*b*) who is receiving compensation from the Government

[11] Hackworth, Dig., III, 274. *Cf.* an opinion by the Solicitor of Sept. 27, 1928, *id.*, III, 272, 273.

[12] *Id.*, III, 274. "It has been held that under certain circumstances a minor may lose nationality of the United States through his independent naturalization in a foreign State in accordance with its laws." (*Id.*, 275, and documents cited at 276.)

See *infra*, § 384A.

[13] Hackworth, Dig., III, 270–271, citing sections 401 (*b*) to (*g*) and 403 (*b*).

§ 384. [1] Sec. 404.

According to § 2 of the Act of March 2, 1907: "When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war." (34 Stat. 1228.)

Concerning the meaning of "foreign State" as used in the statute, see documents in Hackworth, Dig., III, 300–302.

See Loss of Privilege of National Protection, Naturalized Citizens, *infra*, § 389.

of the United States and residing abroad on account of disability incurred in its service.[2]

Subsections (*b*) and (*c*) of Section 404 of the Nationality Act of 1940, quoted above, have no application to a person:

> (*a*) Who shall have resided in the United States not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty-five years when the foreign residence is established;
>
> (*b*) Who is residing abroad upon the date of the approval of this Act, or who is thereafter sent abroad, and resides abroad temporarily solely or principally to represent a bona fide American educational, scientific, philanthropic, religious, commercial, financial, or business organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;
>
> (*c*) Who is residing abroad on account of ill health;
>
> (*d*) Who is residing abroad for the purpose of pursuing studies of a specialized character or attending an institution of learning of a grade above that of a preparatory school, provided that such residence does not exceed five years;
>
> (*e*) Who is the wife, husband, or child under twenty-one years of age of, and is residing abroad for the purpose of being with, an American citizen spouse or parent who is residing abroad for one of the objects or causes specified in section 405 or subsections (*a*), (*b*), (*c*), or (*d*) hereof;
>
> (*f*) Who was born in the United States or one of its outlying possessions, who originally had American nationality, and who, after having lost such nationality through marriage to an alien, reacquired it.[3]

The United States has long recorded in its statutory law a national policy to withhold naturalization from one who fails to declare under oath an intention to reside permanently within its domain.[4] It is reasonable for the United States to cause the residence of a naturalized national within the territory of a foreign State, and particularly within that of the State of origin, for a sub-

[2] Nationality Act of 1940, § 405.

[3] Sec. 406.

According to Sec. 407: "A person having American nationality, who is a minor and is residing in a foreign State with or under the legal custody of a parent who loses American nationality under section 404 of this Act, shall at the same time lose his American nationality if such minor has or acquires the nationality of such foreign State: *Provided*, That, in such case, American nationality shall not be lost as the result of loss of American nationality by the parent unless and until the child attains the age of twenty-three years without having acquired permanent residence in the United States."

It is declared in Sec. 409: "Nationality shall not be lost under the provisions of section 404 or 407 of this Act until the expiration of one year following the date of the approval of this Act: *Provided, however*, That a naturalized person who shall have become subject to the presumption that he has ceased to be an American citizen as provided for in the second paragraph of section 2 of the Act of March 2, 1907 (34 Stat. 1228), and who shall not have overcome it under the rules in effect immediately preceding the date of the approval of this Act, shall continue to be subject to such presumption for the period of one year following the date of the approval of this Act unless it is overcome during such period."

[By an amendment of Sec. 409 of Oct. 16, 1941, Public Law 275 — 77th Cong., Chap. 446, 1 Sess., the one-year period referred to in that section was extended to two years.]

[4] See Impeachment and Revocation of Naturalization, The Law of the United States, *supra*, § 370.

stantial and prescribed period of time, to be the basis of a rule, rather than of a mere presumption, of expatriation.[5] In laying down such a rule, the provisions of the Nationality Act of 1940 (as set forth in Section 404),[6] are a distinct improvement over those of the Act of March 2, 1907,[7] in pursuance of which the Department of State found it necessary to prescribe a series of constantly expanding regulations indicative of the situations when the statutory presumption of cessation of American citizenship might be overcome by the presentation to a diplomatic or consular officer of the United States of satisfactory evidence of the existence of specified facts. These regulations, however numerous and helpful in the application of the earlier statute, will become increasingly inept as the situations to which they referred are covered by provisions of the Nationality Act of 1940.[8]

(4)

§ 384A. **A Limitation When the United States Was at War.** The provision of Section 2 of the Act of March 2, 1907, declaring that "no American citizen shall be allowed to expatriate himself when this country is at war,"[1] caused the Department of State to conclude that an oath of allegiance taken by an American national to a foreign State after the United States entered World War I (April 6, 1917), and prior to the date of the declaration of peace between the United States and Germany and Austria-Hungary (July 2, 1921), would not result in the expatriation of the person taking such oath either at the time the oath was taken or afterwards, except in so far as the particular oath was one of a series of acts constituting naturalization according to the law of the country where it was taken, and to declare that in the latter case, the United States would, as a rule, regard the foreign naturalization as entitled to recognition after the declaration of peace.[2] It appears, however, that in 1937, "this position was modified by a ruling to the effect that it was not necessary that the oath be one of a series of acts constituting naturalization according to

[5] See, in this connection, Art. III of naturalization treaty with Bulgaria, of Nov. 23, 1923, U. S. Treaty Vol. IV, 3973; also Art. III of naturalization treaty with Czechoslovakia, of July 16, 1928, *id.*, 4064. Compare Art. III of naturalization treaty with Albania, of April 5, 1932, *id.*, 3923.

See Art. 16 of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 15.

[6] See, however, Sec. 402 of the Nationality Act of 1940, where, in relation to a relatively narrow class of cases, a presumption of expatriation is made the consequence of specified residence abroad. See Native-born Children, *supra*, § 374.

[7] § 2, 34 Stat. 1228.

[8] The rules promulgated by departmental order No. 761, of June 18, 1938, are set forth at length in Hackworth, Dig., III, 310–312. For documents interpretative of the several rules, see Hackworth, Dig., III, 313–338.

Concerning the applicability of the Act of March 2, 1907, to women who by various processes, embracing marriage, acquired the status of naturalized American citizens, see documents in Hackworth, Dig., III, 338–344, especially Consular Regulations of the United States, Sec. 140, note 1, July, 1931, and March, 1933, *id.*, 342.

§ 384A. [1] 34 Stat. 1228.

[2] Consular Regulations of the United States, Note 2 to section 144, as of August, 1930; also, General Instruction No. 919, of Nov. 24, 1923, Compilation of Certain Departmental Circulars relating to Citizenship, etc., Department of State, 1925, p. 118. See also opinion of the Attorney General of Aug. 22, 1940, 39 Ops. Atty. Gen., No. 133.

the law of the country where it was taken but that it might be affirmed by acts performed subsequent to the termination of the war, indicating a continued allegiance to the State to which the oath had been taken." [3]

The Department has further concluded that the presumption of cessation of citizenship of naturalized Americans in consequence of residence abroad (under the terms of the second paragraph of section 2 of the Act of March 2, 1907), "could not have arisen while this country was at war, but that residence abroad during the war period should be counted in determining whether the presumption has arisen." Thus it announced that "if the two- or five-year period of foreign residence terminated between April 6, 1917, and July 2, 1921, the presumption would not arise until the latter date"; that "if the foreign residence began while this country was at war, such residence during the war period should be counted, although the presumption of loss of citizenship could not have arisen until after the termination of the war," and that "the period between the dates of expatriation and the taking of an oath of repatriation can not be counted in computing the two or five year period." [4]

It should be observed that the injunction set forth in the Act of March 2, 1907, forbidding an American citizen to expatriate himself when his country was at war, which was repealed by the Nationality Act of 1940, was not superseded by any like restriction.[5]

(5)

§ 385. **Residence Abroad of the American Wife of an Alien.** Section 3 of the Cable Act of September 22, 1922, served to raise the same presumption of loss of American citizenship against an American woman citizen who should continuously reside in a foreign State of which her husband was a citizen or a subject for two years or for five years continuously outside of the United States, as was applied in the case of a naturalized citizen of the United States under section 2 of the Act of March 2, 1907.[1] The foregoing provisions of the Cable Act were, however, repealed by an Act of July 3, 1930, which declared that such repeal should not restore citizenship lost under section 3 of the Cable Act.[2]

[3] Statement in Hackworth, Dig., III, 268. See numerous documents interpretative of Section 2 of the Act of March 2, 1907, in Hackworth, Dig., III, § 248.

[4] Consular Regulations of the United States, Note 8 to section 144B, as of March, 1932; also, General Instruction No. 919, of Nov. 24, 1923.

[5] It will be recalled that in virtue of Sec. 326 of the Nationality Act of 1940, alien enemies are not ineligible for naturalization as citizens of the United States. See *supra*, § 354.

§ 385. [1] 42 Stat. 1021.

[2] 46 Stat. 854. See also Act of March 3, 1931, 46 Stat. 1511.

In relation to an American woman who was married to an alien prior to March 2, 1907, or on or after September 22, 1922, and who up to July 3, 1930, was resting under the unrebutted presumption of expatriation under the terms of section 3 of the Act of September 22, 1922, see Consular Regulations of the United States, Note 3 to section 144B, as of March, 1933. See, also, Note 1 appended to section 140, as of March, 1933.

In an opinion of November 23, 1927, in the Case of Mrs. Sophie Maass, born in Germany in 1856, married in 1887 to a native American citizen, residing continuously thereafter in Canada, whose husband died in April, 1922, and who on August 1, 1922, registered at the American Consulate General at Montreal, with a view to retaining her American citizenship in pursuance of section 4 of the Act of March 2, 1907, Mr. Sargent, Attorney General, declared in substance, in harmony with the view of the Solicitor for the Department of State, that Mrs. Maass still remained subject to the presumption of expatriation under section 2

The Nationality Act of 1940 declared that "a person who was a citizen of the United States and who prior to September 22, 1922, lost United States citizenship by marriage to an alien or by the spouse's loss of United States citizenship, and any person who lost United States citizenship on or after September 22, 1922, by marriage to an alien ineligible to citizenship, may, if no other nationality was acquired by affirmative act other than such marriage, be naturalized upon compliance with all requirements of the naturalization laws," with certain specified exceptions designed to simplify the task and ease the conditions of naturalization.[3] It was added that such persons should have, from and after naturalization, the same citizenship status as that which existed immediately prior to its loss.[4]

The Nationality Act of 1940 also declared that: "(1) From and after the effective date of this Act, a woman, who was a citizen of the United States at birth, and who has or is believed to have lost her United States citizenship solely by reason of her marriage prior to September 22, 1922, to an alien, and whose marital status with such alien has or shall have terminated, if no other nationality was acquired by affirmative act other than such marriage, shall, from and after the taking of the oath of allegiance prescribed by subsection (*b*) of section 335 of this Act, be deemed to be a citizen of the United States to the same extent as though her marriage to said alien had taken place on or after September 22, 1922." [5]

(6)

§ 386. **Repatriation of Persons Who Lost American Citizenship in Connection with Services under Certain Foreign Belligerents during World War I.** According to the Act of May 9, 1918, any person who, while a citizen of the United States, and during the existing war in Europe, had entered the military or naval service of any country at war with a country with which the United States was then at war, who should be deemed to have lost his citizenship "by reason of any oath or obligation taken by him for the purpose of entering such service," was permitted to resume his citizenship by taking the oath of allegiance to the United States prescribed by its naturalization law and regulations.[1]

The Nationality Act of 1940 served to repeal these provisions. Through that enactment, a person who shall have been a citizen of the United States and also a national of a foreign State, and who shall have lost his citizenship of the United States under the provisions of Section 401 (*c*) of the Act (which announce loss of American nationality as a consequence of entering or serving in,

---

of that Act, and that such presumption must be overcome to the satisfaction of a diplomatic or consular officer of the United States before she would be entitled to the protection afforded by a passport. 35 Ops. Attys. Gen. 351.

[3] Sec. 317.

[4] *Id.*

[5] Sec. 317 (*b*). Mr. D. V. Sandifer of the Department of State, has called to the attention of the author the fact that the provision discussed in the text was derived from the Act of June 25, 1936, 49 Stat. 1917, as amended by the Act of July 2, 1940, 54 Stat. 715.

§ 386. [1] Paragraph 12, Sec. 1, 40 Stat. 542, 545.

the armed forces of a foreign State without express authorization by the laws of the United States, if the individual has or acquires the nationality of such foreign State), is declared to be entitled to the benefits of subsection (*a*) of Section 317, except that contained in subdivision (2) thereof.[2]

Through a series of conventions providing for reciprocal military service, concluded by the United States in 1918, with France, Great Britain, also Great Britain in respect of Canada, Greece, and Italy, provision was made that no citizen of either country who, under the provisions of the particular convention, entered the military service of the other should, by reason of such service, be considered, after the convention should have expired, or after his discharge, to have lost his nationality or to be under any allegiance to the country under which service was had.[3]

(7)

§ 387. **Miscellaneous Acts Productive of Loss of American Nationality.** According to the Nationality Act of 1940, the following acts are declared to be productive of the loss of nationality by a person who is a national of the United States, whether by birth or naturalization:

(*c*) Entering, or serving in, the armed forces of a foreign State unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign State; or

(*d*) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign State or political subdivision thereof for which only nationals of such State are eligible; or

(*e*) Voting in a political election in a foreign State or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(*f*) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign State, in such form as may be prescribed by the Secretary of State; or

(*g*) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(*h*) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction.[1]

It should be observed that no national under eighteen years of age is permitted to expatriate himself under any of the foregoing subsections other than (*h*).[2]

[2] Sec. 317 (*c*). Subdivision (*a*) of Sec. 317 embraces provisions that simplify the task and ease the conditions of obtaining naturalization.

[3] Art. V, convention with France, Sept. 3, 1918, U. S. Treaty Vol. III, 2593; Art. VI, convention with Great Britain, June 3, 1918, *id.*, 2652; Art. V, convention with Great Britain (in relation to Canada), June 3, 1918, *id.*, 2656; Art. V, convention with Greece, Aug. 30, 1918, *id.*, 2664; Art. V, treaty with Italy, Aug. 24, 1918, *id.*, 2710. See, in this connection, documents in For. Rel. 1918, Supp. 2, 648–732. Also documents in Hackworth, Dig., III, 611–612.

§ 387. [1] Sec. 401.

See also presumptions of expatriation under subsection (*c*) or (*d*) of Sec. 401, set forth in Sec. 402.

The terms of Sec. 401 (*c*) imply that the entering into or service within the armed forces of a foreign State is not productive of expatriation if the individual does not through such action acquire the nationality of such foreign State.

[2] Sec. 403 (*b*). According to Sec. 403 (*a*): "Except as provided in subsections (*g*) and (*h*)

As long as an American national does not bring himself within the operation of the statute, he may doubtless render numerous and varied services in behalf of a foreign State without loss of nationality. Thus it might be possible for him to serve in a consular capacity,[3] or become the adviser of a foreign government, or even act for some purposes as its diplomatic representative.[4]

h

§ 387A. **Non-exclusion of Stateless Persons from the Territory of the State of Which They Were Formerly Nationals.** There are circumstances when it becomes inequitable for a State to regard as completely alien to itself a person who loses its nationality through the operation of its own laws, without acquiring the nationality of another State. His or her statelessness should not in itself suffice to excuse exclusion from the territory of the former in a case where, for example, the individual loses its nationality after entering foreign territory without acquiring another, and when the foreign State requests admission by the State of origin. This principle found terse recognition in the second Basis of Discussion offered by the Preparatory Committee of The Hague Conference of 1930, for the codification of International Law. It was there declared that "if a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose national he was remains bound to admit him to its territory at the request of the State where he is residing." [1] Article XX of the Harvard Draft Convention on Nationality gave expression to the same idea.[2] It is, therefore, to be regretted that the Special Protocol Con-

---

of section 401, no national can expatriate himself, or be expatriated, under this section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and when the national thereafter takes up a residence abroad."

Concerning the effect of desertion from military service prior to the Nationality Act of 1940, see documents in Hackworth, Dig., III, § 250.

[3] Mr. P. Smith, Solicitor, Dept. of State, to Mr. Boerlin, Oct. 12, 1869, 82 MS. Dom. Let. 186, Moore, Dig., III, 716. It may be observed that foreign States have frequently engaged American citizens to act as consular officers within the United States.

[4] In the Corvaïa Case, Italian-Venezuelan Commission, 1903, it was held that where an original claimant, born a subject of the Two Sicilies, lost his citizenship, according to the code of that country, by accepting diplomatic service from Venezuela, and never regained it, the claim of his heirs preferred by Italy against Venezuela should be rejected. The learned Umpire (Mr. Ralston) said by way of *dictum:* "The umpire is disposed to believe that the man who accepts, without the express permission of his own government and against the positive inhibitions of her laws, public and confidential employment from another nation is himself estopped from reverting to his prior condition to the prejudice of the country whose interests he has adopted." (Ralston's Report, 782, 808.)

See Mr. Knox, Secy. of State, to the American Minister at Teheran, Dec. 1, 1911, in relation to the protection of Mr. Shuster, an American citizen about to be recalled or dismissed as treasurer-general of Persia, For. Rel. 1911, 685; Mr. Bacon, Acting Secy. of State, to Mr. Bryan, American Minister to Portugal, May 16, 1907, For. Rel. 1907, II, 958, with respect to the effect of the acceptance of the title of baron by a native-born American citizen long residing in Lisbon, upon his American citizenship and upon his right to protection by the United States.

See Diplomatic Intercourse of States, American Nationality as Obstacle to Reception, ***infra,*** § 425.

§ 387A. [1] Bases of Discussion, I, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 21.

[2] It made the following provision: "A State may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another State, if such

cerning Statelessness,[3] which was produced at the Conference, made the duty of admission so narrow a one that that body itself recommended in its Final Act that States consider the desirability of enlarging it.[4]

## 7

## LOSS OF PRIVILEGE OF NATIONAL PROTECTION

### a

### Foreign Domicile

#### (1)

§ 388. **Native Citizens.** The Executive Department has long been of opinion that the native American national or citizen who makes his permanent home within the territory of a foreign State may, under certain circumstances, cease to be entitled to the protection of the United States.[1] It had been intimated by Chief Justice Marshall in 1804, that until such an individual expatriated himself, he was entitled to the protection of his own country.[2] Possibly, therefore, in order to justify the withholding of protection, the Department of State in earlier days announced that the taking up of a permanent abode in a foreign

---

person is a national of the first State or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other State." (*Am. J.*, XXIII, *Special Supplement*, April, 1929, 16; also Comment, *id.*, 77.)

[3] Article 1 declared that: "If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is: (i) If he is permanently indigent either as a result of an incurable disease or for any other reason; or (ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof. In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request." (Publications of the League of Nations, V. Legal Questions. 1930. V. 6; *Am. J.*, XXIV, *Documents*, 211.)

[4] The Conference recommended "States to examine whether it would be desirable that, in cases where a person loses his nationality without acquiring another nationality, the State whose nationality he last possessed should be bound to admit him to its territory, at the request of the country where he is, under conditions different from those set out in the Special Protocol relating to statelessness, which has been adopted by the Conference." (Publications of the League of Nations, V. Légal Questions, 1930. V. 7; *Am. J.*, XXIV, *Documents*, 169, 182.)

See in this connection R. W. Flournoy, *Am. J.*, XXIV, 467, 481; Manley O. Hudson, *id.*, 447, 453; Sir John Fischer Williams, "Denationalization," *Brit. Y.B.*, 1927, 45; C. Seckler-Hudson, Statelessness, with Special Reference to the United States, Washington, 1934; Lawrence Preuss, "International Law and Deprivation of Nationality," *Georgetown Law Journal*, XXIII, 250.

See Expulsion, In General, *supra*, § 61.

§ 388. [1] The word "native" when employed by way of description of an American national or citizen has reference to an individual regarded as such by right of birth, *jure soli*. It is with such a signification that the term has commonly been employed in American discussions. It should be observed, however, that the Latin forebear (*nativus*) of the English adjective encourages the use of the latter in a broader sense, and firmly supports the employment of it to describe any one fairly claimed by a State as a national by right of birth, regardless of the place of birth, and even as by virtue of the *jus sanguinis*.

[2] See his opinion in Murray *v.* Schooner Charming Betsy, 2 Cranch, 64, 120. Also Mr. Calhoun, Secy. of State, to Mr. Fairfield, U. S. S., Dec. 9, 1844, 35 MS. Dom. Let. 40, Moore, Dig., III, 758.

land produced expatriation.[3] No act of Congress, however, proclaimed such a rule, and none ever has.[4]

Gradually it came to be understood that a native American citizen might forfeit in a domestic sense, the privilege of claiming the protection of the United States without losing also his national character,[5] and that so long as he did not formally renounce his allegiance or become naturalized abroad, it was both unwise and unnecessary to regard him as having forfeited his citizenship by reason of his protracted residence within the territory of a foreign State. Thus Secretary Hay, in circular instructions issued in 1899, declared that "even where expatriation may not be established, a person who is permanently resident and domiciled outside of the United States cannot receive a passport." [6]

According to the same instructions, following the view earlier expressed by Secretary Fish, a presumption of an intention to remain in the country where one had settled was derived from the mere fact of protracted residence therein, a conclusion which was interpreted to signify the acquisition of a foreign domicile. This presumption was, however, said to be capable of rebuttal by proof of a fixed and present intention to return to the United States within a given period.[7] By instructions issued in 1910, the Department of State somewhat mod-

[3] Mr. Webster, Secy. of State, to Mr. Severance, July 14, 1851, H. Ex. Doc. 48, 53 Cong., 2 Sess., 342, 343, Moore, Dig., III, 758; Mr. Marcy, Secy. of State, to Mr. Kinney, Feb. 4, 1855, 43 MS. Dom. Let. 362, Moore, Dig., III, 759.

*Compare* Argument of Mr. Ashton, Agent and Counsel of the United States, in Case of De Leon, No. 593, before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2696–2706; also decision of Commander Bertinatti, Umpire, in Fluvel Belcher Case, No. 23, American-Costa Rican Commission, Convention of July 2, 1860, *id.*, 2695.

[4] It is a significant fact that the Nationality Act of 1940 does not generally declare that mere protracted residence abroad of an American national born within the domain of the United States (and who has not become naturalized by a foreign State) is productive of loss of American nationality in consequence of such residence. This is true despite the following provisions of Sec. 402 that are applicable to two specified categories of persons: "A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family." It is understood that the Departments of State and of Justice have agreed that the six months' residence mentioned in the passage quoted raises a presumption of fact, so that the burden rests upon the person affected to show that he has done neither of the acts referred to in Sec. 401 (c) and in Sec. 401 (d).

[5] Mr. Buchanan, Secy. of State, to Mr. Campbell, Consul at Havana, July 26, 1848, 10 MS. Despatches to Consuls, 473, Moore, Dig., III, 719 (also comment by Prof. Moore thereon); Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, June 28, 1873, For. Rel. 1873, I, 256–259, Moore, Dig., III, 763; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to Great Britain, Feb. 27, 1884, For. Rel. 1884, 216, 218, Moore, Dig., III, 717.

[6] For. Rel. 1907, I, 5, where the same instructions appear as re-issued by Mr. Root, Secy. of State, under date of April 19, 1907.

[7] It was also declared that "The treatment of the individual cases as they arise must depend largely upon attendant circumstances. Where an applicant has completely severed his relations with the United States; has neither kindred nor property here; has married and estab-

ified its earlier position by reason of changed conditions. It was declared that an American citizen

> may now have a permanent foreign residence and yet contribute, indirectly if not directly, to the wealth and strength, the prestige and general welfare of his country, so that as long as he maintains a true allegiance to this Government and is ready, if need be, to come to its defense, he may be entitled to its protection.[8]

It was announced, therefore, that in each case of a native American permanently residing abroad, it would be necessary, before deciding as to his right to protection, to determine among other things whether he maintained his actual connection with the United States and his true allegiance thereto, or whether he had practically abandoned it and identified himself with the political community of the land of his residence. It was said that while with respect to questions arising in regard to registration and the issuance of passports a lack of intention to resume residence in the United States might, upon matters relating to protection as American citizens, still raise the presumption of expatriation, such a presumption should not be considered as conclusive, but the person concerned should be given an opportunity to show that he was "still a true citizen of the United States."[9]

At the present time the Department of State appears to be reluctant to conclude that the mere protracted residence abroad of a native-born American citizen should itself serve to deprive him of the privilege of the protection of the

---

lished a home in a foreign land; has engaged in business or professional pursuits wholly in foreign countries; has so shaped his plans as to make it impossible or improbable that they will ever include a domicile in this country — these and similar circumstances should exercise an adverse influence in determining the question whether or not a passport should issue." (For. Rel. 1907, I, 5.)

[8] Instructions of Mr. Wilson, Acting Secy. of State, to American Diplomatic and Consular Officers, July 26, 1910, For. Rel. 1910, 1. Concerning these instructions see Richard W. Flournoy, in *Am. J.*, VIII, 482; also E. M. Borchard, Diplomatic Protection, § 328.

[9] In the same instructions it was also said: "In this connection are to be considered the cause of the foreign residence, participation in the politics of the country of residence, or abstention therefrom, ties of family, business, or property maintained with this country, and, in the case of a married man, the original nationality of the wife and the mode of raising the children, and, finally, the general conduct of the person in question. It is impossible to lay down a general rule which will be applicable to every case which arises, and each case must be decided upon its peculiar merits. You will, therefore, not finally refuse a passport or registration certificate to any person belonging to the class under consideration until you shall have been authorized to do so by the department after a full presentation of the pertinent facts." These views were embodied in the text of note 2 to Section 137 of the Consular Regulations of the United States, as of March, 1932.

In Circular Instructions to American Diplomatic and Consular Officers issued during the course of World War I, on Dec. 21, 1914, it was declared: "Conditions precedent to the granting of a passport are, under the law and rules prescribed by authority of the law, that the citizenship of the applicant, his identity, and, as a rule, his permanent residence in the United States and definite intention to return to it, with the purpose of performing the duties of citizenship, shall satisfactorily be established. See circular instruction of July 26, 1910, entitled, 'Protection of Native Americans Residing Abroad,' and circular instruction of April 19, 1907, entitled 'Expatriation,' as amended by circular instruction of May 14, 1908. Exceptions to the latter condition may be made in some cases by special direction of the Department, particularly in cases of persons residing abroad as representatives of American trade and commerce and as missionaries of American church organizations." (For. Rel. 1914, Supp., 728.)

United States, as through the instrumentality of an American passport.[10] Moreover, it is inclined to regard evidence, such as is frequently presented, indicative of the maintenance of a connection with the United States or of reasonable grounds for long-continued absence from its territory, as sufficient to repel any implication of forfeiture of that privilege.[11] If, however, the evidence in the particular case satisfies the Department of State that the individual concerned has abandoned whatever ties he may have had with the United States, the application for a passport will be disapproved.[12] In reaching such a conclusion the Department will be influenced by the protracted residence abroad of such individual coupled with an absence of evidence of a definite intention on his part to take up a permanent residence in the United States.

(2)

§ 388A. **American Citizens or Nationals Born Abroad of American Parentage.** There have been noted the conditions under which the United States through the Nationality Act of 1940, confers at birth upon a child born abroad of American parentage, American citizenship,[1] or American nationality that does not embrace citizenship.[2] Moreover, with respect to the former case, there has been observed the important requirement in the situation where one of the parents is a citizen (who prior to the birth of the child, has resided ten years in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years), and the other parent is an alien, that the child reside for specified periods of time within the United States or its outlying possessions before reaching the age of twenty-one years, failure of compliance with this condition being made productive of a cessation of American citizenship.[3] If the child, who is eligible to benefit by them, satisfies the requirements of the statutory law, by taking up his residence in the United States or its outlying possessions as demanded by it, his claim to protection thereafter would appear to be on the same basis as that of one born within the United States.

In the case of the child born outside of the limits and outlying possessions of the United States upon whom the United States, through the Nationality Act of 1940, confers American nationality, but not citizenship, at birth, as a

[10] Declared Mr. Phillips, Under Secy. of State, in a memorandum of Dec. 2, 1922: "There seems no reason why Americans born in the United States of American parentage should be deprived of a passport merely because they are residing abroad continually. By residence abroad they are not barred from assisting this country. Frequently, they can do much more for the United States through their residence abroad than they could by remaining at home. The argument, therefore, that they are not carrying out the duties of American citizenship does not appear to me to hold good in these days." (Hackworth, Dig., III, 282.)

[11] See, for example, attitude of the Department of State in the case of Thibault Theodore Cahn, expressed on Nov. 22, 1924, Hackworth, Dig., III, 283, footnote.

[12] See Instruction of Dept. of State of Aug. 14, 1924, to the Consul at Vienna, denying application of Alois Anger for a passport, Hackworth, Dig., III, 284, footnote; instructions of Dept. of State, of Feb. 25, 1933, and Feb. 15, 1934, to the Consul at Casablanca, with reference to the cases of Salomom E. Benarrosh and Amram J. Ettedgui, Hackworth, Dig., III, 284.

§ 388A. [1] *Supra*, § 345.

[2] *Supra*, § 347.

[3] Sec. 201 (*g*) of Nationality Act of 1940.

consequence of the fact that both parents are nationals, but not citizens of the United States, and have resided in the United States or one of its outlying possessions prior to the birth of the child,[4] it is probable that the readiness of the Department of State to accord protection would be generally influenced by the circumstance whether or not the child, upon reaching adult years maintained a residence within the domain of the United States.

(3)

§ 389. **Naturalized Citizens.** Through the second paragraph of section 2 of the Act of March 2, 1907, in relation to the expatriation of naturalized citizens, the Congress established a rule governing every department of the Government whenever a question of citizenship to which the paragraph was applicable called for solution.[1] The pure question of citizenship, that is to say, whether an individual had through the operation of the law ceased to be an American national and had become an expatriate, was essentially a judicial one and, when judicially determined, bound the executive departments of the Government. Nor could those departments in the absence of such a decision make a conclusive determination of it. They were, however, called upon to heed and give effect to the statute in other ways.

A naturalized citizen residing abroad against whom the presumption had arisen might demand of the Government of the United States official recognition of himself as an American national at a time when no court had passed upon the question whether through the operation of the statute he had ceased to be a citizen. He might, for example, apply to an American consular officer to administer to him the oath of repatriation under the Act of May 9, 1918.[2] Eligibility to take that oath depended upon the American citizenship of the applicant at the time when he contracted the obligation deemed to have produced expatriation. Hence, the Department of State was in such a case obliged to determine whether on the evidence submitted the applicant was to be regarded as a citizen at the time when he took the oath of allegiance to the foreign country. If it found that at that time the presumption had arisen against him by reason of the length of his residence abroad, it was obliged to determine also whether the presumption had been rebutted. If it concluded that there had been no rebuttal, it was obliged to regard the presumption as controlling and to proceed as if cessation of citizenship had in fact occurred. Again, when a naturalized citizen who resided abroad and applied for a passport proved to be an individual against whom the presumption had arisen, the Department of State was obliged to pass on the question whether the presumption had been rebutted. If the conclusion were in the negative, no document such as a passport, which recognized

[4] Sec. 204 (*b*).

§ 389. [1] See, Modes of Expatriation, Residence of a Naturalized Citizen in a Foreign Country, *supra*, § 384.

In this section of the text the author has reprinted portions of an editorial comment appearing in the *American Journal of International Law* (XIX, 742), in the preparation of which he had the benefit of an unpublished memorandum from Secretary Hughes, of July 12, 1924.

[2] 40 Stat. 542, 545.

the applicant as an American citizen, could be issued.[3] Conclusions adverse to the citizenship of the applicant may have appeared to signify more than mere unwillingness to protect an American citizen deemed to have forfeited the right to protection. They challenged the claim of the individual to be recognized as a citizen and served to deny him privileges which a citizen as such might normally invoke. They amounted to an assertion that the record of the applicant was such as would compel a judicial tribunal to take a like stand were the question of expatriation to be determined by it. Nevertheless, such conclusions did not in themselves produce expatriation. A competent court might subsequently pass on the same question and reach a different conclusion on the same set of facts. If it did so, the decision became binding upon the Government.

Lacking in most cases the guidance of a previous judicial decision on the facts submitted to it, the executive branch of the Government was, by reason of the terms of the Act of Congress, constantly burdened with the task of passing upon the question whether the presumption of cessation of citizenship had been rebutted, or, to express it differently, whether the particular individual had ceased to be entitled to recognition as an American citizen. In the endeavor to reach a correct decision the Department of State approached the question in a judicial spirit, seeking to minimize the danger of denying recognition of citizenship through purely routine or administrative action. The decision was based upon all of the evidence at hand when the question was passed upon. No rule of estoppel was applied because of a previous departmental decision, if further evidence were submitted which demanded another.[4]

Another question presented itself — whether the naturalized American citizen under an unrebutted presumption of cessation of his American citizenship through residence abroad, might be free from the operation of that presumption (or be enabled to overcome it) by returning to the United States for permanent residence therein. Notwithstanding a somewhat different position which it had taken in 1924,[5] the Department of State declared in 1926, that in view of the diversity of opinion of various Departments of the Government, and because of certain decisions of courts which did not appear to accord with the strict construction of the statute previously adopted, it had reconsidered the subject and had come to the conclusion that, in the absence of a decision of the court of last resort, the presumption of having ceased to be an American citizen arising under the second paragraph of Section two of the Act of March 2, 1907, should be regarded as existing only while the naturalized American citizen continued to reside abroad, and that upon his return to the United States, and his re-establishment there in good faith of a permanent residence, the reason for

[3] It should be observed in this connection that under rule (*g*), whereunder presumption of cessation of citizenship in the case of a naturalized American citizen may be overcome, presentation to a diplomatic or consular officer of the United States of satisfactory evidence of having made definite arrangements to return immediately to the United States permanently to reside is deemed to suffice for that purpose.

[4] See section 147, of the Consular Regulations of the United States, as of August, 1930.

[5] The earlier practice of the Department is set forth in Hackworth, Dig., III, 290–294, where reference is made to the case of United States *ex rel.* Anderson *v.* Howe, 231 Fed. 546, and to the contrasting opinion of Attorney General Wickersham in the case of Gossin, 28 Ops. Attys. Gen., 504, with which the Department was disposed to agree.

which the presumption had been created no longer existed.[6] The Department is said thereafter to have adhered to the practice thus initiated in 1926,[7] with which it is also said that the decisions of the Federal courts, and of international claims commissions and opinions of the Attorney General were in accord.[8]

Elsewhere has been noted the fact that the Nationality Act of 1940, in prescribing the effect of residence abroad by a person who became an American national by naturalization, purported to do so by rules that pointed to conduct that was to be deemed to produce loss of American nationality rather than to raise a presumption of the cessation of it,[9] and that announced, moreover, with precision when those rules were not to be applicable. By this process the enactment not only relieved the Department of State of a task which the earlier law had placed upon it (save in situations where the Act of March 2, 1907 remained applicable), but also, by laying down conditions under which residence abroad by the naturalized national should produce loss of American nationality, made it easier for the American Government to determine whether such an individual when residing abroad was in a position to invoke its protection as an American national.

(4)

§ 390. **Residence in Some Oriental Countries.** The conditions which might serve to bring about a forfeiture of the privilege of national protection in the case of a native-born American citizen making a permanent or protracted residence abroad are not regarded as applicable to American communities settled as such in some Oriental countries and, to quote Secretary Bayard, "recognized in their distinctively national character by the system of government prevailing in such lands." [1] The Department of State has been disposed to afford the protection of a passport to citizens whose residence was prolonged indefinitely in the territory of a State in which the United States exercised extraterritorial jurisdiction, so long as their pursuits were legitimate and not prejudicial to the friendly relations of the United States with the government of the State of residence.[2]

The situation has, however, long been regarded as otherwise with respect to

[6] Mr. Kellogg, Secy. of State, to Mr. Sargent, Atty. Gen., March 26, 1926, Hackworth, Dig., III, 294–295.

[7] Statement in Hackworth, Dig., III, 295.

[8] *Id.*, III, 296, *citing* Camardo *v.* Tillinghast, 29 F. (2d) 527; Case of Henry Rothmann (United States *v.* Austria and Hungary), agreement of Dec. 12, 1925, Final Report of Commissioner and Decisions and Opinions 78; Case of Lily J. Costello, Maria Eugenia Costello and Anna Maria Costello (United States *v.* Mexico), convention of Sept. 8, 1923, Opinions of the Commissioners (1929), 252.

[9] *Supra*, § 384.

§ 390. [1] Communication to Mr. Winchester, Minister to Switzerland, Oct. 12, 1887, For. Rel. 1887, 1073, 1074, Moore, Dig., III, 776. Mr. R. W. Flournoy has been critical of the language of Secretary Bayard quoted above, declaring in a communication to the author, of December, 1932, that extraterritorial jurisdiction is applied to the persons of particular nationalities rather than to communities as such, except in the case of the foreign community in Shanghai.

[2] Circular Instructions of Mr. Hay, Secy. of State, to American Diplomatic and Consular Officers, March 27, 1899, For. Rel. 1902, 1, 3, Moore, Dig., III, 976. Also Passports, *infra*, § 400.

the naturalized citizen who returned to the territory of the State of his origin, such as that of one in the Near East,[3] regardless of the existence, if any, of an American community settled as such therein. It should be observed that the statutory law, as reflected in the Nationality Act of 1940, in its provisions relating to loss of American nationality through the residence abroad of an American naturalized national, offers no relaxation of its requirements as a consequence of residence in particular countries or areas.[4]

(5)

§ 391. **Americans as Missionaries Abroad.** In harmony with provisions of section 2 of the Act of March 2, 1907,[1] the Department of State prescribed regulations indicating how the presumption of cessation of American citizenship might be rebutted in the case of naturalized citizens residing abroad principally for the purpose of engaging in religious, philanthropic, or other kindred occupations.[2] These were, moreover, designed to be applicable to all foreign countries.

Through the Nationality Act of 1940, it was, as has been noted,[3] definitely laid down that certain provisions causing loss of American nationality of a naturalized citizen to be the consequence of specified residence abroad, should not be applicable to a person who was residing abroad upon the date of the approval of the act, or who was thereafter sent abroad, and resided abroad "temporarily solely or principally" to represent a bona fide American philanthropic or religious organization, having its principal office or place of business in the United States.[4]

## b

## Other Acts

(1)

§ 392. **Participation in the Political Life of a Foreign State. Fugitives from Justice.** Elsewhere it has been noted that through the Nationality Act of 1940, the Congress has undertaken to declare that under certain conditions an American national loses his nationality by the commission of particular acts or services in behalf of a foreign State.[1]

The Government of a State may regard the conduct of a national who participates in certain activities within the domain of another as at variance with

[3] Mr. Rockhill, Assist. Secy. of State, to Mr. Burke, No. 51, Dec. 29, 1896, 154 MS. Inst. Consuls, 682, Moore, Dig., III, 776. See, also, instances of Naturalized American Citizens of Turkish origin who have returned to the Ottoman Empire as Turkish subjects, mentioned in documents *cited* in Moore, Dig., III, 777, 779.

Concerning the present status of earlier rules specially promulgated for the overcoming of the presumption of expatriation, and with reference to residence in extra-territorial countries, see Hackworth, Dig., III, § 253.

[4] See Secs. 404–406.

§ 391. [1] 34 Stat. 1228.

[2] Note 3 to section 144B of the Consular Regulations of the United States, as of March, 1923.

[3] See *supra*, § 384.

[4] Sec. 406 (*b*).

§ 392. [1] See *supra*, § 387.

its own interests, and sufficiently so to justify the withholding of measures of protection that might otherwise normally be accorded.[2] In reaching such a conclusion, that Government may not, moreover, feel itself bound by the circumstance that forms of conduct of which it disapproves are not by the statutory law made the basis of loss of nationality. In withholding protection as a consequence of disapprobation of particular acts committed by a national, considerations of domestic policy rather than requirements of international law are likely to be responsible for final decisions.

It may be observed that the acceptance by an American national of appointment by the Government of a foreign State as an adviser in a legal, fiscal or other capacity, would not necessarily be regarded as adverse to the interests of the United States, or as offering cause for the withholding of interposition in his behalf should occasion arise therefor.[3]

It should be obvious that a State such as the United States may well decline to endeavor to accord protection in behalf of a national who, as a fugitive from its justice, has sought, and is seeking, refuge on foreign soil.[4]

(2)

§ 393. **Unneutral Conduct.** The American citizen who commits acts of hostility against a country with which the United States is at peace is deemed, as has been observed, to forfeit the right of national protection from the legitimate consequences of his conduct.[1] In the course of a circular issued November 1, 1915, the Department of State, without undertaking "to prescribe the duty of an individual with reference to his citizenship," announced its opinion "that the observance of neutrality in the conflicts now engaging certain European powers requires American citizens to avoid participation in those conflicts."[2] If an American citizen participates in a war with respect to which the United States is a neutral, he so identifies himself with the State whose cause he espouses as to render himself liable to treatment as a belligerent.[3] In such case,

[2] Thus the conduct of an American national in participating in a movement in a foreign State subversive of its government might well encourage the Department of State to withhold protection from such individual, even though his acts did not serve to produce his expatriation under the Nationality Act of 1940. See in this connection Mr. Uhl, Acting Secy. of State, to Mr. Willis, Minister to Hawaii, May 14, 1895, For. Rel. 1895, II, 854, 855, Moore, Dig., III, 786.

[3] Concerning the attitude of the Department of State respecting the Case of W. Morgan Shuster, an American citizen, who became Treasurer-General of Persia, see Contractual Claims, *supra*, § 304.

See, also, Section 7 of Claims Circular of Dept. of State of 1919, Revision of Jan. 30, 1920.

[4] See Mr. Bayard, Secy. of State, to Mr. Hanna, Minister to the Argentine Republic, No. 22, June 25, 1886, MS. Inst. Argentine Republic, XVI, 385, Moore, Dig., III, 790.

Claims, Obstacles to Presentation, *supra*, § 274.

§ 393. [1] Claims, Obstacles to Presentation, *supra*, § 274. Also, Dept. of State, Claims Circular revised to Oct. 1, 1924, section 7.

See, also, opinion of Mr. Bradford, Atty. Gen., 1 Ops. Attys. Gen., 57, Moore, Dig., III, 786; Mr. Webster, Secy. of State, to Mr. Peyton, Jan. 6, 1842, 32 Dom. Let. 140, Moore, Dig., III, 787; proclamation of President Taylor, Aug. 11, 1849, Richardson's Message, V, 7, Moore, Dig., III, 787; proclamation of President Taft, regarding disturbances in Mexico, March 2, 1912, For. Rel. 1912, 732; neutrality proclamations of President Wilson of 1914 and 1915, American White Book, European War, II, 15, 17.

[2] For. Rel. 1915, Supp., 772.

[3] George Grafton Wilson, *Proceedings*, Am. Pol. Sc. Ass., 1904, Moore, Dig., VII, 877–878.

his own country cannot assure him protection without making itself a party to his unneutral acts.[4] If, after having entered the service of one belligerent, he becomes the victim of wrongful conduct at the hands of another State, any claim for reparation must be preferred solely by the country in whose service he was engaged when subjected to ill-treatment.[5]

Upon the outbreak of the war between Ethiopia and the Kingdom of Italy, President Roosevelt, by proclamation of October 5, 1935, in pursuance of a joint resolution of the Congress approved August 31, 1935,[6] admonished all citizens of the United States to abstain from traveling as passengers on ships of either of the belligerent nations contrary to the provisions of that Resolution, and gave notice that any citizen who traveled on such vessels contrary to those provisions, would do so at his peril.[7]

It should be observed, however, that if a State which, although not taking part as a belligerent in a war between others, nevertheless, itself participates therein by assisting a favored belligerent, it may not look askance at some efforts made by its own nationals, at home and abroad, to aid the cause of that belligerent. Accordingly, in such a situation, that State may not be disposed to penalize them on account of such action, as by withholding, in certain exigencies, its protection from them.

8

§ 394. **Seamen.** Seamen serving in the naval or mercantile marine under a flag not their own, are said to be entitled, for the duration of that service, to the protection of the flag under which they serve.[1] This result does not signify that such service changes the nationality of a seaman, as by producing his naturalization.[2] It may, however, encourage the State to which the ship belongs or

[4] "The Department of State will not present to a foreign government a claim based on transactions involving a violation of the neutrality of the United States." Moore, Dig., VI 623, based on statement of Mr. Bayard, Secy. of State, to Messrs. Morris and Fillette, July 28, 1888, 169, MS. Dom. Let. 263.

It should be observed, however, that the Department of State "has frequently held that service by American citizens in foreign armies does not of itself operate as a renunciation of American citizenship, unless such service involves the taking of oaths of allegiance to the foreign governments, which would come within the purview of the first paragraph of Section 2 of the act of March 2, 1907." (Mr. Lansing, Secy. of State, to Mr. Sharp, American Ambassador to France, June 11, 1915, For. Rel. 1915, Supp., 909.)

[5] Opinion of Hassaurek, Commissioner, for the Commission in Cases of the *Good Return* and the *Medea*, American-Ecuadorean Commission, Convention of Nov. 25, 1862, Moore, Arbitrations, III, 2731–2740; Opinion of Sir F. W. A. Bruce, in certain cases before American-Colombian Commission, Convention of Feb. 10, 1864, *id.*, 2740–2743; Opinion of Findlay, Commissioner, for the Commission, in certain cases before American-Venezuelan Commission, Convention of Dec. 5, 1885, *id.*, 2743–2751. With reference to these cases see, also, Moore, Dig., III, 788. Also Mr. Fish, Secy. of State, to Mr. Murray, Dec. 7, 1869, 82 MS. Dom. Let. 453, Moore, Dig., VI, 623.

[6] 49 Stat. 1081.

[7] Dept. of State Press Releases, Oct. 5, 1935, 256.

See Aspects of the Neutrality Act of 1939, *infra*, § 868A; also Neutrality Proclamations, *infra*, § 876.

§ 394. [1] The language of the text is that of Sir Edward Thornton, Umpire, in the Case of Francis McCready, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2536, 2537, Moore, Dig., III, 795.

[2] "A question having arisen concerning the nationality of a member of the crew of the steamer *President Hoover*, which was bombed in the vicinity of Shanghai on Aug. 30, 1937,

under which service is had, to smooth the way to naturalization by lessening or removing certain conditions normally to be met by aliens who endeavor to become its nationals.[3] Thus, the United States, as has been observed, under the provisions of an Act of Congress, approved May 9, 1918, announced that every seaman, who was an alien, should, after his declaration of intention to become a citizen of the United States, and after he should have served three years upon merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel thereof, and that such seaman should "for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen."[4] These provisions were, however, repealed by an Act of Congress approved June 15, 1935.[5]

The protected alien seaman remains the alien that he was.[6] Accordingly, the practice of shielding him is one that pertains to a unique situation where a State stretches out its arm to safeguard a particular class of aliens by reason of their special relation to itself, rather than to an instance where the character of their service causes the individuals concerned to be deemed to be nationals by their protector. The statement sometimes made that the seaman owes a "temporary allegiance" to the State under whose flag he serves,[7] is far from indicating a different view.[8]

The Foreign Service Regulations of the United States, as of June, 1941, announce that "seamen employed on vessels of the United States are, during the period of their employment, subject to the jurisdiction of the United States and entitled to the protection of its laws in matters relating to such employment."[9] This is believed to be a distinct improvement over the form of previous regulations in which it was said to be held "that the circumstances that the vessel is American is evidence that the seamen on board are also American, and that in every regularly documented merchant vessel, the crew will find their protection in the flag that covers them."[10]

---

the Department of State instructed the Embassy at Nanking that 'irrespective of nationality of surviving members of crew, they are, as American seamen on American vessel, regarded as entitled to this Government's assistance.'" (Hackworth, Dig., III, 418, footnote.)

[3] See, for example, Sec. 324 of the Nationality Act of 1940 in relation to certain persons serving in armed forces or on vessels.

[4] 40 Stat. 544.

[5] 49 Stat. 376.

[6] See also, decision of Parker, Umpire, April 22, 1925, in Case of Edward A. Hilson, Mixed Claims Commission, United States and Germany, Decisions and Opinions, 1925, 231, 236.

Declares Mr. Hackworth: "However, despite the privileges which they thus enjoy, such seamen remain aliens and owe only a qualified allegiance to the United States." (Hackworth, Dig., III, 417.)

[7] See communication from Secy. Blaine to the British Government of June 16, 1881, quoted by Mr. Justice Field in the case of *In re* Ross, 140 U. S. 453, 473; also decision of Parker, Umpire, in the case of Edward A. Hilson, *cited* above.

[8] This seems to have been understood by Mr. Justice Field when, in the course of his opinion in the case of *In re* Ross, 140 U. S. 453, he declared (475): "Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government."

[9] Section XVI–2, Note 7. See also *id.*, Notes 2 and 3.

[10] Hackworth, Dig., III, 417. The statement quoted was unfortunate in that it conveyed

9

§ 394A. **Corporations.** The Nationality Act of 1940 significantly announces at the outset that for the purposes of the Act "the term 'national' means a person owing permanent allegiance to a State." [1] A corporation is, thus, outside the purview thereof. Nevertheless, the relationship between a corporation and the State in virtue of whose laws it has been created, suffices in international contemplation, to justify that State in treating the entity for many purposes as though it were a national, and in the course of so doing, to interpose, if need be, in its behalf when the corporation has been subjected to internationally illegal treatment at the hands of a foreign State.[2] The solicitude which a State manifests for such a creature of its own devising or making is reflected in a broad practice that, moreover, oftentimes finds expression in international agreements.[3] At times, moreover, the term "citizens" or "subjects" in whose behalf particular privileges are yielded in treaties of commerce, are construed as embracing corporations created by the contracting parties.[4] In arrangements for the adjustment of pecuniary claims, as by judicial process, specific references to corporate entities are likely, however, at the present time to be made.[5]

It is, thus, unnecessary to press the point that, at least in a technical sense, a corporation is not, for many purposes, to be deemed a national of the State to which its life is due, and lacks many privileges that enure to a natural person, such as that of expatriation through naturalization. What stands out in the practice of States is their readiness to protect their own corporations in the course of vicissitudes in contacts with foreign governmental authority, as well as the interests of their own nationals in foreign corporations. These matters are discussed elsewhere.[6]

---

the impression that the seamen, in consequence of their connection with the ship might be deemed to possess an American nationality which lacked other foundation, and in that it, accordingly, failed to reveal the fact that the United States might well endeavor to protect alien seamen on its own ships.

§ 394A. [1] Sec. 101.

[2] See Mr. Hughes, Secy. of State, to Mr. Anderson, American Commissioner, Mixed Claims Commission, United States and Germany, April 22, 1924, Hackworth, Dig., III, 420.

[3] See, for example, Art. XII of the treaty of Friendship, Commerce and Consular Rights between the United States and Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4195, quoted also in Hackworth, Dig., III, 429.

[4] With respect to Art. II of the treaty of Friendship and General Relations between the United States and Spain, concluded on July 3, 1902, Malloy's Treaties, II, 1701, the Department of State construed the words "citizens and subjects of the two High Contracting Parties" who in respect to particular matters were to enjoy most-favored-nation treatment as embracing American corporations. See documents in Hackworth, Dig., III, 430–431.

*Cf.* the factual situation which led the Department of State in 1934, to conclude that Art. II, paragraph 2 of the treaty of Friendship and Commerce with Switzerland, of Nov. 25, 1850, Malloy's Treaties, II, 1764–1765, had no application to corporations, when reference was made to restrictions upon the exaction of imposts from the "citizens of one of the two countries, residing or established in the other." See Mr. Phillips, Acting Secy. of State, to the Swiss Minister at Washington, Jan. 3, 1934, Hackworth, Dig., III, 431.

[5] See, for example, Art. I of Agreement with Germany, of Aug. 10, 1922, U. S. Treaty Vol. III, 2601; Art. I of General Claims Convention with Mexico, of Sept. 8, 1923, U. S. Treaty Vol. IV, 4441.

[6] See Interposition in Behalf of a Domestic Corporation, *supra*, § 278; Interposition in Behalf of Nationals Interested in a Foreign Corporation, *supra*, § 279.

10

§ 395. **Care of Indigent Nationals.** No rule of international law requires a State to provide relief for indigent nationals abroad, or for their return to its territory if for any reason they have become a public charge. The United States has not as yet seen fit to burden itself with such an undertaking by treaty or otherwise.[1] In announcing this fact the Department of State has declared that the patients in the almshouses and asylums throughout the United States comprise large numbers of aliens who are none the less cared for by the authorities of the locality where their illness happens to occur.[2]

On occasions of great emergency when large numbers of Americans have been unable to leave foreign territory where their continued presence involved personal danger or hardship, the Congress has furnished necessary relief by way of subsistence and transportation to the United States.[3]

---

Concerning the registration of American corporations in China, before and after the passage of the China Trade Act in 1922, see documents in Hackworth, Dig., III, 423–426.

§ 395. [1] Instructions to Diplomatic Officers of the United States, as of September, 1931, XI–9; Mr. Wharton, Acting Secy. of State, to Mr. Douglas, Nov. 28, 1891, 184 MS. Dom. Let. 247, Moore, Dig., III, 806.

In his annual message of Dec. 2, 1872, President Grant wisely urged that provision be made for the relief of distressed citizens, other than seamen, who might become destitute or sick abroad. Richardson's Messages, VII, 191, Moore, Dig., III, 804.

[2] Mr. Bayard, Secy. of State, to Count Lippe-Weissenfeld, Austrian Chargé, June 8, 1886, MS. Notes to Austria, VIII, 518, Moore, Dig., III, 806.

In exceptional cases the Department of State gives information through the diplomatic channel as to indigent aliens in the United States, that relatives abroad may have the opportunity to care for those individuals. Mr. Olney, Secy. of State, to Mr. Hengelmüller, Austro-Hungarian Minister, Jan. 13, 1897, For. Rel. 1897, 13–14, Moore, Dig., III, 807.

See Mr. Bayard, Secy. of State, to Mr. Lowell, Minister to Great Britain, April 10, 1885, concerning the aid to be rendered an American citizen charged with crime and lacking, for any reason, all the means of defense which the law allowed. MS. Inst. Great Britain, XXVII, 446, Moore, Dig., III, 805.

See also Mr. Harrison, Assist. Secy. of State, to Mr. Einstein, Minister in Czechoslovakia, Jan. 10, 1924, Hackworth, Dig., III, 650.

[3] The most notable instance was the relief afforded American tourists in Europe at the outbreak of the War in August, 1914. See documents in For. Rel. 1914, Supp., 474–484; Mr. Bryan, Secy. of State, to American Ambassadors and Ministers in European Countries, Aug. 1, 1914, *id.*, 721; Report of Mr. Kent, American Consul at Leipzig, Feb. 28, 1915, For. Rel. 1915, Supp., 22.

"A number of acts were passed by the Congress of the United States, beginning in 1933, appropriating funds for the relief of unemployed persons. The earlier acts made no distinction between nationals and aliens as to the use of funds appropriated for direct relief, but from the beginning provision was made for according preference in employment on work-relief projects to citizens and to aliens who had declared their intention to become citizens. The joint resolution approved February 4, 1939 (53 Stat. 508) amended section 11 of the Emergency Relief Appropriation Act of June 21, 1938 (52 Stat. 809) by providing that no alien should be employed on any project prosecuted under the appropriations contained in the 1938 act or the joint resolution. The Emergency Relief Appropriation Act approved June 26, 1940 (54 Stat. 611) provided in section 15 (*f*) that

> 'No alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution. . . .

"There are no provisions in the Social Security Act of August 14, 1935 limiting the participation of aliens in the benefits of the act." (Statement in Hackworth, Dig., III, 651.)

## 11

# THE TEMPORARY PROTECTION OF DOMICILED ALIENS DECLARING AN INTENTION TO BECOME AMERICAN CITIZENS

### a

§ 396. **Thrasher's Case. Koszta's Case.** From the language of Mr. Webster, Secretary of State, in his report on Thrasher's Case, December 23, 1851,[1] and from that of Mr. Marcy, Secretary of State, in his note of September 26, 1853, to the Austrian Chargé d'Affaires, in the Martin Koszta Case,[2] there developed in the United States confusion of thought, manifest even in utterances emanating from the Department of State, as to the exact significance of domicile as the basis of the right of diplomatic protection.[3] Both of these Secretaries of State were supposed to have been committed to the doctrine that domicile afforded a criterion of national character; and to Mr. Marcy was imputed the intimation that a declaration of intention to become an American citizen afforded some basis for the according of protection.[4]

Professor Moore has removed cause for misapprehension concerning both cases. He has shown that with respect to Thrasher's Case, Mr. Webster "referred to something which, although it did not necessarily presuppose the existence of domicile, went in some respects beyond it"; [5] and that subsequently, upon fuller information, in a paper touching the same case, he banished the suggestion that the acquisition of a foreign domicile involved expatriation, or deprived the indi-

§ 396. [1] Senate Ex. Doc. No. 5, 32 Cong., 1 Sess., Moore, Dig., III, 818.
[2] House Ex. Doc. 1, 33 Cong., 1 Sess., 30, Moore, Dig., III, 824.
[3] Statement in Moore, Dig., III, 817.
[4] Mr. Frelinghuysen, Secy. of State, to Mr. Wallace, Minister to Turkey, March 25, 1884, and April 8, 1884, For. Rel. 1884, 551, 560, Moore, Dig., III, 339.

Declared Mr. Bayard, Secy. of State, to Mr. Mackey, Aug. 5, 1885: "The criterion by which Koszta's and Burnato's cases are to be measured in examining questions arising with respect to aliens who have declared, but not lawfully perfected, their intention to become citizens of the United States, is very simple.

"When the party, after such declaration, evidences his intent to perfect the process of naturalization by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of *original allegiance* whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted." (Wharton, Dig., II, 359–360, Moore, Dig., III, 847.)

[5] Moore, Dig., III, 817, where the same writer adds: "The early published report in Thrasher's Case related to the question whether he was entitled to the intervention of the United States, in respect of his arrest, sentence, and imprisonment in Cuba on a charge of complicity in the Lopez expedition of 1850. It appeared that he had taken out letters of domiciliation in Cuba, and there was reason to believe that he was also domiciled in the island. The process of obtaining such letters involved the taking of an oath of allegiance, which it was thought might have had the effect of making him a Spanish subject and dissolving his allegiance to the United States. But, even assuming that this was not the case, Mr. Webster argued that if he was domiciled in Cuba he was, as a permanent resident, peculiarly subject to the operation of the laws there, and could not ask the United States to intervene to prevent the imposition of any penalties which he might justly have incurred by the violation of those laws."

vidual of the protection of his own government.[6] Respecting the position of Mr. Marcy in the Koszta Case, the same writer has declared:

> First of all, it is seen that the supposition that Mr. Marcy held that Koszta's declaration of intention gave him an American character and a claim to the protection of the United States is not only destitute of foundation, but is directly opposed to his repeatedly expressed opinion. He referred to the declaration of intention merely as an evidence of domicile. In the second place, there likewise disappears the supposition that he held that a domiciled alien, even where he had made a declaration of intention, was entitled to the same protection abroad as a citizen of the United States, or yet to protection against the claims of the country of his original allegiance lawfully asserted, either there or in a third country. In the third place, it appears by Mr. Marcy's instruction to Mr. Marsh, of Aug. 26, 1853, that the claim that Koszta had at the time of his seizure an American character was based, in the first instance, *exclusively* upon his having been duly admitted to American protection, according to the recognized usage in Turkey.[7]

b

§397. **The Act of March 2, 1907.** The Act of March 2, 1907, authorized the Secretary of State to issue, at his discretion, a passport to a person not a citizen of the United States who had made a declaration of intention to become such

[6] Moore, Dig., III, 819, *citing* also Mr. Webster's instruction to Mr. Sharkey, of July 5, 1852, conveying his final opinion on the question of domiciliation, and contained in the summary of the argument on domicile by Mr. J. H. Ashton before the Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2701.

[7] Moore, Dig., III, 843–844. Concerning the Koszta case and interpretations thereof, see documents, *id.*, III, 820–854. See H. B. Learned, on William L. Marcy, in American Secretaries of State and Their Diplomacy, New York, 1928, VI, 268–273.

The facts in the Martin Koszta Case were the following: Koszta, a Hungarian Revolutionist in the movement of 1848–1849, fled from Austria and took refuge in Turkey, from which State his extradition was vainly sought. With other refugees he was, however, confined at Kutahia, but finally released, with the understanding of Austria that they should leave the country. This banishment Austria accepted as a substitute for extradition. By reason of his having left Austrian territory without the consent of the Government and with an intention never to return thereto, he came under the operation, according to Mr. Marcy, of the Austrian statute so as to be regarded as an unlawful emigrant subjected to loss of all civil and political rights. Koszta came to the United States, where on July 31, 1852, he declared his intention to become an American citizen. After a residence of one year and eleven months, he returned to Turkey on account of alleged private business of a temporary character, and thereupon sought to place himself under the temporary protection of the American Consul at Smyrna. Later the Consul and the American Chargé d'Affaires *ad interim* at Constantinople extended protection to Koszta, furnishing him with a so-called *tezkéréh* — a kind of passport or letter of safe-conduct. No objection was made by Austria to Koszta's return to Turkey. While at Smyrna, awaiting, as he alleged, an opportunity to return to the United States, he was seized by lawless men, thrown into the sea, and immediately thereafter taken up by a boat's crew, lying in wait for him, and belonging to the Austrian warship *Huszar,* forced on board that vessel, and there confined in irons. The diplomatic and consular representatives of the United States sought in vain from both Turkish and Austrian authorities the release of the prisoner. Thereupon the U.S.S. *St. Louis* arrived at Smyrna. The Commander, Captain Ingraham, after investigating the case and learning of a plan to take Koszta clandestinely to Austrian territory, demanded his release, and intimated that he should resort to force if the demand were not complied with by a certain hour. No force was used. By agreement the prisoner was delivered to the French Consul-General to be held by him until the United States and Austria should agree as to the disposition of the case. Koszta was ultimately released and returned to the United States.

a citizen as provided by law, and had resided in the United States for three years, the document "entitling him to the protection of the Government in any foreign country," provided, that such passport should not be valid for more than six months and should not be renewed, and that it should not entitle the holder to the protection of the United States "in the country of which he was a citizen prior to making such declaration of intention." [1]

The law conferring this authority was, however, repealed by an Act of June 4, 1920.[2]

According to rules issued by the Department of State June 1, 1915, it was announced that passports could not be issued, under the Act of Congress, to declarants who intended to visit their native lands.[3] It was ordered that before a passport should be issued the following facts should be established to the satisfaction of the Secretary of State: (*a*) that the applicant had resided in the United States for at least three years as provided by law; (*b*) that he was not then eligible under the law for final naturalization; (*c*) that at least six months had elapsed since the applicant's declaration of intention; (*d*) that the applicant had not previously applied for and obtained a similar passport from the Department; (*e*) that a special and imperative exigency existed requiring the absence of the applicant from the United States; [4] (*f*) that the applicant had not applied for and obtained a passport from any other government after he had declared his intention to become a citizen of the United States.

While the enactment of the statute indicated no disposition on the part of the United States to substitute domicile for allegiance as the test of national character for purposes of diplomatic protection in times of peace, save under the exceptional circumstances noted, it is believed that the repeal of the law was altogether desirable.

In endeavors under certain conditions to accord protection to aliens on account of the relationship which they have attained to the United States as a

§ 397. [1] 34 Stat. 1228. See, in this connection, Report on Citizenship of the United States, Expatriation, and Protection Abroad, by J. B. Scott, David J. Hill, and Gaillard Hunt, House Doc. No. 326, 59 Cong., 2 Sess., 19–22.

[2] See Act making appropriation for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921, 66 Cong., 2 Sess., Chap. 223.

[3] The text of the Rules is contained in American White Book, European War, II, 164–165. These rules were somewhat more rigid than certain others announced by the Department of State, Nov. 14, 1913. Appended to the Rules of June 1, 1915, was the statement that "Passports are not issued to declarants who are natives of countries which are at war, nor to declarants who intend to visit belligerent countries."

Shortly after the outbreak of World War I, it was declared by the Department of State, in instructions to the Embassies and Legations in Europe, that "special consular registration certificates may be issued to wives of persons in the United States who have resided here more than three years and have made declarations of their intention to become American citizens. Such certificates should not describe the holders as American citizens, but should set forth their exact status." (Telegram of Mr. Lansing, Acting Secy. of State, Sept. 12, 1914, American White Book, European War, II, 155, 156.)

[4] In this connection it was said that "The burden of proof will, in each case, be upon the applicant to show to the satisfaction of the Secretary of State that there is a necessity for his absence. The statement as to such necessity must be detailed and supported by satisfactory corroborative evidence. Under this rule passports will not be granted to persons who wish to go abroad as commercial travelers."

See, also, Mr. Lansing, Acting Secy. of State, to the American Embassies and Legations in Europe, Sept. 12, 1914, American White Book, European War, II, 155, 156.

result of enrollment in its service, or as applicants for its nationality who have taken initial but far-reaching steps in the pathway to naturalization, the American Government has never acknowledged that either the effort to protect, or the factual situation which was productive of it, signified that the individuals who were the beneficiaries of such action had become American nationals.

12

§ 398. **Extraterritorial Industries of American Nationals.** The Government of the United States has been and remains confronted with a twofold problem arising out of the establishment by American citizens of industrial enterprises, oftentimes assuming the form of branch plants or factories, in the territories of foreign States. It concerns both the protection of American life and property and assistance in the extension of trade. With respect to the former, the Department of State declared in 1930, that "such extraterritorial activities do not impair the right inherent by virtue of American citizenship, to protection of life and property." [1]

With respect to the latter aspect of the problem the position of the Government of the United States appears to be undergoing a change. In 1910, the Department of State decided that firms which had removed "all or a part of their plants from the United States to Canada" were no longer entitled to the assistance of the Government so far as their foreign factories were concerned.[2] It was recognized, however, that circumstances might justify the extension of governmental assistance to an extraterritorial factory either established or projected by American citizens who made use of American capital. It was declared that where, for example, an established manufacturing enterprise in the United States, exporting its products to foreign countries, found it expedient to meet competitive conditions in a certain foreign market by establishing a branch therein for the purpose of preëmpting the field and stopping competition, and thus preserving and fostering the main export business for the benefit of which the branch had thus been established, there would seem to be reason for the extension of the good offices and assistance of the Foreign Service of the United States. It was said that such a case was to be clearly distinguished from one where a foreign branch was a serious undertaking maintained to build up a trade which would compete with the genuine American export trade "and might even result in making the branch in the foreign country a base for distributing foreign-made goods to third countries in competition with American exports." [3]

§ 398. [1] Note 1 (*b*) to section 603 (*a*) of the Consular Regulations of the United States, as of May, 1930.

The section of the text — 398 — embodies a statement by the author in *Am. J.*, XXV, 512–514.

[2] Mr. Knox, Secy. of State, to American Diplomatic and Consular Officers, March 24, 1910, *quoting* Instruction to Consular Officers of April 30, 1906, Dept. of State, Circulars Relating to Citizenship, 1916, 30–32.

[3] *Id.* "In cases of this kind," it was said, "the Department must regard the enterprise as essentially foreign from the point of view of international competition, and, therefore, the activities of the diplomatic and consular officers in behalf of the American citizens who are concerned in the establishment of such extraterritorial factories should be limited to matters of courtesy and supplying of general information only."

There has been increasing doubt whether American branch factories are in fact established with any close regard for the distinction made in the instruction. In May, 1930, the Department of State issued the following instruction to American Consular Officers:

> Consular officers may not furnish information in furtherance of projects for the establishment of American factories abroad. It is the established policy of the Department that when American manufacturing enterprises, for tariff or taxation reasons, establish branch factories abroad they are no longer entitled to trade extension assistance on the part of American consular officers in so far as their foreign factories are concerned. The Department has not seen fit, however, to utilize the machinery of its consular service in procuring for other American concerns specific data with respect to the extraterritorial activities of manufacturers whose headquarters continue to be in the United States.[4]

At the present time it is through the Department of Commerce rather than the Department of State that the Government of the United States concerns itself and deals with the matter of trade extension assistance abroad. The former is understood to be increasingly doubtful whether the establishment of American branch factories in foreign territory is to be deemed necessarily disadvantageous to the economic interests of the United States, save under special conditions productive of an adverse effect that is obvious in particular cases.[5] Accordingly, the Department of Commerce does not appear to be disposed to announce that it will regard such American industrial activities as generally undeserving of support or encouragement.

[4] Note 1 (*b*) to section 603 (*a*) of the Consular Regulations of the United States.
More liberal instructions were expressed in Foreign Service Regulations of the United States, XIV–3, Note 4 (*f*), as of January, 1941, in relation to methods of handling certain types of trade inquiries.

[5] See Louis Domeratzky, "American Industry Abroad," *Foreign Affairs*, VIII, 569; American Branch Factories Abroad, Dept. of Commerce, Washington, 1934, 73 Cong., 2 sess., Senate Doc. No. 120.

# TITLE E

## AMERICAN PASSPORTS

### 1

§ 399. **In General.** "A passport is the accepted international evidence of nationality; in its usual form, it certifies that the person described in it is a citizen or subject of the country by whose authority it is issued, and requests for him permission to come and go, as well as lawful aid and protection." [1] Declared the Department of State in 1933:

> The American passport is a document of identity and nationality issued to persons owing allegiance to the United States and intending to travel or sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other purpose.[2]

A passport is the only permissible certification of American nationality for purposes of international travel.[3] For certain other purposes there may be other

§ 399. [1] The language of the text is that in Moore, Dig., III, 856.

"Other documents, such as safe-conducts, letters of protection, and special passes for individuals, and even passes for vessels, are referred to as passports, and not altogether inaccurately, since their object is to secure for the particular person or property freedom of movement and lawful protection. But these documents are used chiefly in war, and are granted on the strength of the personality rather than of the nationality of the individual, being issued, according to the circumstances of the case, even to enemies." *Id.*

See, generally, documents in Hackworth, Dig., III, §§ 259–276; Gaillard Hunt, The American Passport, Washington, 1898; Rules Governing the Granting and Issuing of Passports in the United States, issued by President Wilson Jan. 24, 1917, For. Rel. 1917, Supp. 1, 573; proclamation and executive order of President Wilson, Aug. 8, 1918, For. Rel. 1918, Supp. 2, 807; President Wilson, message to the Congress, Aug. 25, 1919, respecting the continuance of the passport-control system, Senate Doc. No. 79, 66 Cong., 1 Sess.; also, Passport Regulations, Dept. of State Publication 1165, Passport Series, No. 3, Executive Order No. 7856 of March 31, 1938.

See T. B. Ross, "Passports," *Scots Law Times,* April 21, 1934, 85.

[2] Mr. Carr, Assist. Secy. of State, to the Consul General at Berlin, Oct. 26, 1933, Hackworth, Dig., III, 435.

[3] Mr. Adee, Acting Secy. of State, to Mr. Terres, No. 142, Sept. 26, 1893, For. Rel. 1894, 346. See, also, Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, July 2, 1885, For. Rel. 1885, 373, Moore, Dig., III, 857.

It may be observed that American consular officers have been authorized to issue to American citizens registered at consulates certificates of registration. Such documents do not certify that the registrants are citizens of the United States, but merely that they have registered as such. The same proofs of citizenship are, however, required in applications for registration as are demanded in applications for passports. Registration certificates are intended for use with local officials and not for purposes of travel. For this paragraph the author acknowledges his indebtedness to Mr. R. W. Flournoy. See Consuls, Miscellaneous Duties, *infra,* § 488.

permissible forms of certification. Thus, where no foreign travel is contemplated and a passport is not necessary, a consular registration certificate, which is to be distinguished from a passport, is said to be the more appropriate document for presentation to foreign local officials as evidence of American citizenship.[4]

"A certificate of naturalization is, of course, a permissible certification of American nationality. Congress in recent years has provided for the issue of special certificates of citizenship to obtain recognition as citizens of the United States by the country of former allegiance of such citizens and also for the issue of certificates of derivative citizenship to those persons over the age of twenty-one years who derived citizenship through the naturalization of a parent or husband, and it is provided that 'in all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States, the certificate of citizenship issued under this section shall have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction (45 Stat. 1515, as amended by 48 Stat. 597; U.S.C. title 8, sec. 399(b), sec. 399(a) ).' "[5]

While the United States does not complain of the exaction by a foreign State of a certification as by passports of American citizens within its domain, objection is raised when the exaction constitutes a discrimination against such individuals.[6]

The Government of the United States asserts a paramount right to passports issued to American nationals, frequently exercising it "not only in demanding the return of old passports by persons to whom new passports are granted but also in authorizing officials in this country and diplomatic and consular officers abroad to take up passports which are being used for improper purposes."[7] It has been declared that in a practical sense a passport may be considered the personal property of the person to whom it is issued, "subject always to the paramount right of the Department for good and sufficient reasons to require its surrender, or, lacking the opportunity of taking physical possession of it, to cancel it in any effective way."[8]

---

See Minutes of Plenary Meetings of Passport Conference, held at Geneva, 1926, under League of Nations Organization for Communications and Transit, League of Nations Document — C.423.M.156.1926.VIII; Final Act of the Conference, May 18, 1926, League of Nations Document — C.320.M.119.1926.VIII; E. Reale, *Le Régime des Passeports et la Société des Nations* (with bibliography), Paris, 1930; same writer, *Manuel Pratique des Passeports*, Paris, 1931.

[4] See statement from the Department of State in an instruction of Aug. 13, 1935, Hackworth, Dig., III, 437.

[5] Mrs. Shipley, Chief, Passport Division, Dept. of State, to the author, May 15, 1940. Declares Mr. Hackworth: "Passports are intended for use in travel abroad by the person to whom issued. They are not issued for use as certificates of citizenship, and the Department of State will not issue a passport to a person who indicates that he desires it merely for the purpose of establishing his status as a citizen of the United States. Citizenship 'cannot be conserved by merely obtaining a passport, and . . . passports are not issued to that end.' " (Hackworth, Dig., III, 436.)

[6] See Mr. Bayard, Secy. of State, to Mr. Muruaga, Spanish Minister, May 19, 1886, MS. Notes to Spain, X, 420, Moore, Dig., III, 859.

[7] See Memorandum from the Office of the Solicitor for the Department of State, Jan. 30, 1931, Hackworth, Dig., III, 438.

[8] Mr. Carr, Assist. Secy. of State, to the Chargé d'Affaires *ad interim* in Lima, July 16, 1936, Hackworth, Dig., III, 438, footnote.

According to the Act of July 3, 1926:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consuls general, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.[9]

The Department of State has consistently held that under the statutory law, the issuance of passports is wholly within the discretion of the Secretary of State,[10] a view which is not necessarily at variance with the conclusions of the Supreme Court of the United States, expressed in the case of Perkins *v.* Elg in 1939.[11]

Appropriate rules have been prescribed for the granting and issuing of passports in the United States. Those exemplified in the Executive Order of March 31, 1938, declare that "only the Secretary of State may grant and issue passports in the United States."[12]

The Act of June 15, 1917, established as a condition precedent to the issuance of a passport to any person by or under the authority of the United States, the subscription to and submission by the applicant of a written application duly verified by his oath before a person authorized and empowered to administer

---

"Since 1920 two different types of cases have arisen in which the Department [of State] has consistently protested against the taking up of passports by the officials of foreign governments. One group of cases consists of instances in which passports of naturalized American citizens have been taken up by officials of the country of origin; the second group consists of instances in which passports have been taken up by foreign governments for various reasons — chiefly regulatory or penal in character." (Memorandum of the Office of the Legal Adviser of the Dept. of State, Oct. 24, 1934, Hackworth, Dig., III, 438. In this document instances of complaint in the two classes of cases are set out at length.)

[9] 44 Stat. 887, 22 U.S.C.A. § 211 *a*. See, also, Rev. Stat. §§ 4075 and 4078, as amended by the Act of June 14, 1902, 32 Stat. 386, 22 U.S.C.A. § 211.

[10] See opinion of the Solicitor for the Department of State, Aug. 9, 1926, Hackworth, Dig., III, 467; Mrs. Shipley, Chief of the Passport Division, Dept. of State, to the Director of the Legislative Reference Service of the Library of Congress, May 25, 1935, Hackworth, Dig., III, 470.

[11] 307 U. S. 325.

[12] Executive Order No. 7856, set forth in Passport Regulations, Dept. of State Publication No. 1165, Passport Series 3, 1938. In note 2, p. 1, the following statement is made: "The Secretary of State is authorized by law to cause passports to be issued by diplomatic officers of the United States and by such American consuls general, consuls, or vice consuls when in charge of a consular office abroad as he may designate. A citizen who is abroad and desires to procure a passport should apply therefor to the nearest American consular officer.

"Passports are issued in American Samoa, Guam, Hawaii, Puerto Rico, and the Virgin Islands by the chief executives of those islands. Applications for passports by persons residing therein should be made to such chief executives. Passports are issued in the Commonwealth of the Philippines by the United States High Commissioner to the Philippine Islands. Applications of persons residing in the Commonwealth of the Philippines should be made to the United States High Commissioner to the Philippine Islands." See also documents in Hackworth, Dig., III, § 265. See, also, Rules Governing the Granting and Issuing of Passports in the United States, Jan. 12, 1915, enclosed in circular to American Diplomatic and Consular Officers, Feb. 8, 1915, For. Rel. 1915, Supp., 902–906; Dept. of State, Circulars Relating to Citizenship, 1916, 52.

oaths, and required that such application should contain a true recital of each and every matter of fact which might be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of a passport.[13]

In relation to the issuance of passports in foreign countries, the Department of State now designates the posts at which officers of the Foreign service are authorized to issue passports and other travel documents.[14] Such officers are permitted to accept applications for service passports,[15] and when designated to do so by the Secretary of State, pursuant to the statutory law, to grant and issue such passports to American nationals "who owe allegiance to the United States." [16]

Upon the outbreak of World War I the Department of State authorized American embassies and legations in Europe "to issue emergency passports to American citizens who request them." [17] Such agencies were later instructed to exercise greatest caution in issuing such passports, and to require of each applicant "un-

[13] Chap. 30, title IX, § 1, 40 Stat. 227, 22 U.S.C.A. § 213.

Concerning the matter of applications for passports, see documents in Hackworth, Dig., III, § 267.

Concerning the matter of fees, see documents *id.*, III, § 269.

[14] Consular Regulations of the United States, Note 6 to section 150, as of March, 1933. Also Foreign Service Regulations of the United States, XXI–2, as of August, 1942.

[15] "Service passports" are said to be "passports issued abroad by designated officers of the Foreign Service to American citizens or nationals, who owe allegiance to the United States." *Id.*, XXI–2, Note 2 (*d*).

According to section 2 of the Act of May 16, 1932, 47 Stat. 157, 22 U.S.C.A. § 217 *a:* "The validity of a passport . . . shall be limited to a period of two years: *Provided,* That a passport may be renewed under regulations prescribed by the Secretary of State for a period, not to exceed two years, upon payment of a fee of $5 for such renewal, but the final date of expiration shall not be more than four years from the original date of issue: *Provided further,* That the Secretary of State may limit the validity of a passport, . . . or the period of renewal of a passport to less than two years: *Provided further,* That the charge for the issue of an original passport shall be $9." Passport Regulations of the United States advert to the fact that under the provisions of the Act of June 4, 1920, a fee of $1 must be collected for the execution of each application for a passport, and that there is no exception to this rule.

According to the eleventh paragraph of Note 2 to section 169 of the Consular Regulations of the United States, as amended Dec. 12, 1935: "A passport may be renewed in any office to which is assigned a Foreign Service officer of career. Passports may be renewed by a subordinate officer in the discretion of the principal officer at a particular post. A passport may also be renewed at any office authorized to issue service passports by the officer in charge, whether he be a career or non-career officer."

Executive Order 7856, of March 31, 1938, announced that the Secretary of State might restrict the original or renewal period of a passport to less than two years. [Accordingly, the Foreign Service Regulations of the United States, as of August, 1942, declare: "Under authority of the aforementioned Executive order, the Secretary of State hereby orders that, as a general rule, the period of validity for all passports issued either by the Department or by authorized officers of the Foreign Service abroad shall for the duration of the present war emergency be restricted to six months but that passports so limited may be extended at regular intervals by officers of the Foreign Service without the authorization of the Department, provided such action is permissible under the existing travel and validation regulations. Exceptions may be made to the foregoing rule regarding the issuance of passports in a specific case or class of cases, if authorized by the Department." (XXI–2, Note 3 (*b*).)]

See also documents in Hackworth, Dig., III, § 270.

[16] *Id.*, XXI–2, (*a*).

[17] Telegram of Mr. Bryan, Secy. of State, to the American Embassies and Legations in Europe, Aug. 1, 1914, For. Rel. 1914, Supp., 721.

Shortly after the outbreak of the World War in 1914, it was in many cases difficult for American citizens to go to embassies or legations in order to obtain emergency passports. For that reason consular officers were given authority to issue them. That authority was subsequently withdrawn. See Consuls, Miscellaneous Duties, *infra,* § 488.

questionable evidence of his citizenship and identity."[18] In 1930 it was announced that emergency passports are no longer issued.[19]

2

§ 399A. **Types of Passports.** In the exercise of its right to issue passports, the United States, as a matter of domestic policy, finds it expedient to make use of six types which are described as "regular, special, diplomatic, agency, insular, and service passports."[1] Regular passports "are issued to persons who prove that they are American citizens or that they owe permanent allegiance to the United States, and who are not entitled to receive special or diplomatic passports."[2]

Special passports are, in general, limited to persons proceeding abroad for the Government on official business not of a diplomatic character.[3]

The issuance of diplomatic passports is, in general, said to be "limited in the United States to Foreign Service officers, to other persons in the diplomatic service, and to those enjoying diplomatic status by reason of the office they hold."[4] A diplomatic passport is said to serve both as a travel document and as a certification of the official identity of the bearer.[5] According to Mr. Hackworth: "It is designed to assure to the bearer the enjoyment of special privileges and immunities accruing to him on account of his official position. The transaction of business of a diplomatic character is therefore expedited, and the officials of the country in which the bearer of the passport is traveling are put on notice concerning his diplomatic status and his right to the enjoyment of the privileges and immunities flowing therefrom."[6]

[18] Circular Instructions to American Diplomatic and Consular Officers, Dec. 21, 1914, For. Rel. 1914, Supp., 728; also, telegram of Mr. Lansing, Acting Secy. of State, to the American Embassies and Legations in Europe, Sept. 12, 1914, *id.*, 722.

See, also, Circular Instructions to American Diplomatic and Consular Officers, Feb. 8, 1915, For. Rel. 1915, Supp., 900.

[19] Consular Regulations of the United States, Note 12 to section 150, as of August, 1930.

§ 399A. [1] Hackworth, Dig., III, 445. "The first four types are issued only in the United States. The fifth is issued in the United States as well as by the chief executives of the insular possessions and the United States High Commissioner to the Philippine Islands to inhabitants of the outlying possessions of the United States who owe permanent allegiance to the United States. The last only is issued by authorized Foreign Service officers abroad. Service passports may be amended by diplomatic or consular officers in such manner as to show that the individual is a national but not a citizen of the United States." (*Id.*)

See Consular Regulations of the United States, as of March, 1933, notes appended to section 150.

[2] Hackworth, Dig., III, 445; also documents *id.*, 445–448.

Concerning persons to whom service passports will be issued, see Consular Regulations of the United States, March, 1933, section 150, quoted in Hackworth, Dig., III, 447–448.

[3] Hackworth, Dig., III, 448. It has been announced that "such passports are issued to a limited extent to other persons, including certain members of the immediate household proceeding abroad with the official holding such a passport; persons going abroad on business of special interest to the Government, but not as representatives of it; and, as a matter of courtesy, to a small group of former officials of the Government such as former Ambassadors, widows of former Secretaries and Under Secretaries of State, etc."

See generally, documents in Hackworth, Dig., III, § 261.

[4] Hackworth, Dig., III, 452, where it is added: "In addition they are issued as a matter of courtesy to former Presidents, their wives, widows, and unmarried daughters, and to former Vice Presidents and Secretaries of State and their wives."

[5] *Id.*

[6] *Id.* See also documents *id.*, III, § 262.

The Department of State has noted its objection to the issuance of group passports or group letters of identification.[7] Again, it has made complaint of the form of certificates of identity proposed to be issued by American patriotic organizations when the phrases therein (possibly through the type employed) might give rise to the impression that the documents were issued by the Department or with its approval.[8]

The Department of State desires as far as possible to discourage the use of certificates of identity and registration as travel documents.[9] They are issued only for use in the country in which the individuals to whom they are issued are residing.[10] This attitude is not applicable, however, to the issuance "upon the Department's express authorization of registration certificates to American citizens about to be deported by a foreign government, or in a case of extraordinary emergency where the Department has expressly authorized the use of such certificate for travel." [11]

3

§ 400. **To Whom Issued.** Passports are furnished for the use of native citizens, naturalized citizens, persons acquiring citizenship through the naturalization of a parent, as well as nationals of the United States residing in its insular possessions.[1]

Section 4076, Revised Statutes, as amended by the Act of Congress of July 14, 1902, forbade the issuance of passports to persons other than those owing allegiance, whether citizens or not, to the United States.[2] The Act of March 2, 1907, effected a slight change, in clothing the Secretary of State with discretionary power to issue passports under special circumstances to persons not

[7] See Mr. Hull, Secy. of State, to the Secy. of War, April 8, 1935, Hackworth, Dig., III, 456.

[8] See communication to Representative Speaks, Feb. 8, 1929, Hackworth, Dig., III, 456. See also *id.*, III, 458, with reference to Olympic Games certificates.

"In some instances foreign governments have indicated a willingness to grant a single visa for a group of persons traveling together, provided that the persons responsible for the group presented a list, certified by the Department of State, of the names of the members of the group together with the numbers and dates of issuance of their passports. The Department has upon request issued certificates under its seal concerning such lists." (Hackworth, Dig., III, 459.)

Concerning the issuance of passports, pursuant to an Act of March 2, 1929, for members of so-called Gold Star pilgrimages, and which bore the title of Special Pilgrimage Passport, see *id.*, 459, and documents there cited.

[9] See instruction to the Consul at Moscow, Aug. 16, 1934, Hackworth, Dig., III, 460.

[10] *Id.*

[11] Mr. Carr, Director of the Consular Service, to Consular Officers, Aug. 31, 1922, Hackworth, Dig., III, 459, 460.

Concerning the use of consular registration certificates as satisfactory travel documents for purposes of deportation, see Hackworth, Dig., III, 461, and documents there cited.

See circular instruction of Sept. 28, 1916, authorizing the issuance of emergency certificates of registration in extraordinary cases, Compilation of Certain Departmental Circulars Relating to Citizenship, etc., 1925, 62, 64.

§ 400. [1] Concerning the conditions to be met by various types of eligible applicants for passports as a means of procuring such document, see Passport Regulations of the United States, exemplified in Executive Order No. 7856 of March 31, 1938, Passport Regulations, Dept. of State Publication 1165, Passport Series 3, 1938.

See also documents in Hackworth, Dig., III, § 266.

[2] 32 Stat. 386. Rules Governing the Granting and Issuing of Passports in the United States, Jan. 24, 1917.

citizens of the United States, who had made a declaration of intention to become such, and had resided within the United States three years.[3] The occasions for the issuance of passports under this Act, which was repealed June 4, 1920, have been observed.[4]

American passports may be issued to women.[5] Unless a request is made by the parental or other guardian that a passport be denied, passports may be issued to minors upon their own application. Moreover, children may execute applications on their own behalf when of sufficient intelligence to understand the statements, and the meaning of the oath of allegiance to the United States, contained in the application.[6] It may be observed that only persons who are citizens or who owe allegiance to the United States may be included in a passport issued under its authority.[7] Accordingly, a passport issued to an American husband may not include his alien wife, who is not even to be mentioned therein as accompanying her husband, if such be the case.[8]

According to Passport Regulations as of March 31, 1938, a passport issued to a husband or wife may include his or her spouse; a passport issued to a parent may include his or her unmarried minor children or stepchildren; a minor brother or sister may be included in the passport of an older brother or sister; a minor grandchild, niece, or nephew of tender years may be included in the passport of the relative when the application therefor is accompanied by a request from the parental or other guardian; adopted children who are American citizens may be included in the passport issued to the adoptive parents.[9] In the Passport Regulations of that date it is declared that "passports should not be issued to American seamen employed as such on American vessels unless documentary evidence is submitted to the Secretary of State satisfactorily establishing that it is necessary for the seaman to bear an American passport, in addition to the ordinary official documents issued to seamen, in which case they may be issued passports valid for a period sufficient to enable them to carry out the purpose for which the passport is desired"; that seamen not traveling as such are not exempt from the payment of the passport fee; that passports shall not

[3] § 1, 34 Stat. 1228.

[4] Concerning the granting of passports under this section, see The Act of March 2, 1907, *supra*, § 397; also Rules Governing the Granting and Issuing of Passports to Those who have Declared Their Intention to Become Citizens, of the United States, June 1, 1915, For. Rel. 1915, Supp., 906.

[5] Declared Mr. Blaine, Secy. of State, in a communication to Mr. Hirsch, Minister to Turkey, No. 97, June 18, 1890, MS. Inst. Turkey, V. 134: "The sex of the person is immaterial" in the issuance of passports. Moore, Dig., III, 882.

[6] Passport Regulations of the United States, March 31, 1938, Dept. of State Publication 1165, Passport Series 3, 1938, Part II.

[7] *Id.*

[8] Such has long been the ruling of the Department of State. See instruction to American Diplomatic and Consular Officers of April 12, 1924, Compilation of Certain Departmental Circulars Relating to Citizenship, etc., 123, Hackworth, Dig., III, 464.

[9] Department of State Publication 1165, Passport Series 3, Part III, p. 2 where it is added: "A minor child who will attain majority within two years may be included in a passport issued to a parent under the conditions stated in this Part but such passport shall be limited in validity to the date when such minor child shall attain majority. In the discretion of the Secretary of State an exception may be made to this paragraph when the minor child will attain majority within a period not exceeding three months prior to the date of the expiration of the usual two year period for which a passport is issued."

Concerning the verification of passports, see documents in Hackworth, Dig., III, § 271.

be issued to American citizens who are employed or expect to be employed as seamen on foreign vessels unless the necessity for the possession of a passport is established to the satisfaction of the Secretary of State; that, however, in such case the seaman is not exempt from the payment of the passport fee.[10]

In 1936, the Department of State declared that it did not desire that a passport be withheld from an applicant merely because there was reason to believe that the authorities of the foreign State would not permit him to leave the country and intended to induct him into the military service. It was said that after the identity and American citizenship of a passport applicant had been established and it had been quite conclusively shown that he had not expatriated himself, a passport should be issued unless he was actually performing military service.[11]

4

§ 401. **Grounds of Refusal.** The issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen; but a passport is not to be refused to an American citizen, even if his character is doubtful, unless there is reason to believe he will put the passport to an unlawful use.[1] Mr. Hackworth, referring to the discretion of the Secretary of State, has recently observed that there may be many reasons why a passport should be withheld even though the applicant establishes that he is a citizen or national of the United States.[2]

A passport has been refused where the evidence showed that the applicant was engaged in "blackmailing projects, and was disturbing, or endeavoring to disturb, the relations of this Country with the representatives of foreign countries." [3]

In the course of World War I the Secretary of State exercised more exten-

[10] Dept. of State, Passport Series 3, Ex. Order 7856, Hackworth, Dig., III, 483–484.

[11] Communication to the Consul at Belgrade, Nov. 11, 1936, Hackworth, Dig., III, 484. Concerning the treatment of deserters, see documents in Hackworth, Dig., III, 484–486.

§ 401. [1] The language of the text is that of Mr. Wilson, Acting Secy. of State, to Mr. Beaupré, Minister to the Argentine Republic, No. 120, April 27, 1907, For. Rel. 1907, II, 1082.

[2] Hackworth, Dig., III, 498, where it is noted that at the present time "this discretionary authority is conferred by section 1 of the act of July 3, 1926 (44 Stat. 887; 22 U.S.C. § 211*a*)."

[3] Mr. Wilson, Acting Secy. of State, to Mr. Beaupré, Minister to the Argentine Republic, April 27, 1907, For. Rel. 1907, II, 1082. Also same to Mr. Giddings, Consul-General at Cairo, Jan. 31, 1907, *id.*, II, 1081; Memorandum of the Solicitor for the Dept. of State, respecting the same case, Jan. 2, 1907, *id.*, II, 1079. See, also, instructive note of Mr. Adee, Acting Secy. of State, to Mr. Conger, Minister to China, Aug. 24, 1899, For. Rel. 1899, 186–187, Moore, Dig., III, 922–923; Opinion of Mr. Knox, Atty. Gen., 23 Ops. Attys. Gen., 509, Moore, Dig., III, 921.

See generally, documents in Hackworth, Dig., III, § 268.

"If an officer has any doubt as to the loyalty of an applicant for a service passport or if it is suspected that such applicant intends to commit crime or otherwise to bring grave discredit on the United States as an evader of justice, a political adventurer desiring or intending to take part in the political or military affairs of a foreign government in ways which would be contrary to the policy or inimical to the welfare of the United States, or is a revolutionary radical, the issue of a service passport should be declined and the application should be forwarded to the Department with a statement of the facts of the case." (Consular Regulations of the United States, Note 13 (*d*) to section 150, as of August, 1930, Hackworth, Dig., III, 501.

sively than before his discretionary authority to refuse passports. During the earlier part of the conflict, the obtaining of, and the attempting to obtain, American passports for purposes of espionage and participation in belligerent activites rendered imperative the taking of great precautions in the issuance of such documents. Among those taken was the establishment of a rule not to issue passports for use in the belligerent countries except in cases of reasonable necessity. When the United States itself became a belligerent, more stringent rules were made and passports not issued for use in any country except in cases of such necessity.[4]

A passport is necessarily refused when the applicant is deemed to have expatriated himself. Again, a passport is withheld from a native or naturalized citizen who, on account of his domicile abroad, or for any other reason, is deemed to have lost his right to protection by the United States.[5]

While it was announced in consular regulations of 1930, that in the absence of a statute expressly authorizing the cancellation of the naturalization of an American citizen who used a foreign passport, the Department of State had discontinued its former practice of recommending the institution of cancellation proceedings in such cases.[6] The Department declared in 1935, that it viewed with disapproval the use of a foreign passport, whether diplomatic, special, official, or otherwise, by an American citizen.[7] It said that it particularly objected to the use by an American citizen of a passport issued by a foreign Government describing him erroneously as a citizen of the foreign country by which the passport was issued; that ordinarily it considered that an American citizen by the use of a foreign passport describing him as a foreign citizen "forfeits his right, at least while he continues to use it, to recognition and protection as a citizen of the United States."[8]

[4] For the paragraph in the text the author acknowledges his indebtedness to Mr. R. W. Flournoy.

See, in this connection, Mr. Sharp, American Ambassador to France, to Mr. Bryan, Secy. of State, May 18, 1915, For. Rel. 1915, Supp., 908; Mr. Lansing, Secy. of State, *ad interim*, to Mr. Sharp, June 11, 1915, *id.*, 909; Mr. Lansing, Secy. of State, to Mr. Van Dyke, American Minister to the Netherlands, Sept. 2, 1915, *id.*, 910; also documents *id.*, 899–908, concerning new regulations regarding the issuance and control of passports.

See Proclamation of President Wilson, No. 1473, Aug. 8, 1918, Regulating the Issuance of Passports and the Granting of Permits to Depart from and enter the United States, For. Rel. 1918, Supp. 2, 807, 809.

[5] See Loss of Right to National Protection, *supra*, §§ 388–393. Concerning the *Cancellation of Passports* procured by false representations or under circumstances when the retention of American citizenship at the time of issuance was doubtful, see documents in Moore, Dig., III, 983–984.

[6] Hackworth, Dig., III, 505.

[7] Mr. Carr, Assist. Secy. of State, to the Minister in Nicaragua, March 26, 1935, Hackworth, Dig., III, 505.

[8] In a circular instruction of July 15, 1936, in relation to the use by American wives of aliens of foreign passports it was said: "In many cases, even though she is not required to obtain a passport of such foreign State, she is included in the foreign passport issued to her husband. In some cases the obtention and use of a foreign passport may be dictated by questions of convenience and the difference between the cost of an American passport and the cost of a foreign passport. The Department is unable to lay down any definite rule with regard to the question whether or not the right to receive the protection of the United States should be withdrawn from a woman of the class under discussion merely because she has obtained and used a passport of the country of which she is considered a national by reason of her marriage to a national thereof, or by reason of the naturalization or re-

There may be a denial of a passport "on the ground of the applicant's participation in local politics where it appears that such participation is of a character to indicate that he has identified himself with the local life of the community in which he lives and consequently is no longer in a position to discharge his obligations as an American citizen." [9] Again, the Department of State is of opinion that during the time an American citizen voluntarily serves in the military or naval forces of a foreign State, he should not be furnished an American passport, "since while engaged in such service he owes a temporary allegiance to the foreign country in whose army or navy he serves and, in general, should look to it for protection." [10]

## 5

## INTERNATIONAL EFFECT

### a

§ 402. **Evidential Force.** On the theory that a State is the sole and ultimate judge of the "citizenship of its own dependents, and is, in its sovereign capacity, competent to certify to the fact," the United States demands that an American passport be respected abroad as *prima facie* evidence of the citizenship of the bearer.[1] Thus the Department of State asserts that it is not, in the first instance, incumbent upon the bearer to prove his citizenship by extraneous evidence at the will of the country of sojourn, nor upon the United States to support its official attestation of the fact of citizenship by collateral proof.[2] In case a foreign government has reason to believe that a passport has been fraudulently issued, or is held by a person other than the one to whom it was issued, or that the holder was fraudulently naturalized within the United States, it is declared that the matter should be brought to the attention of the American diplomatic officer accredited to the State making complaint, who will render the

---

acquisition of the nationality of that country on the part of her husband. Each such case must be decided by the Department in the light of the particular facts." (Hackworth, Dig., III, 506.)

See case of Mrs. Luisa B. Sanger, referred to in an instruction of April 7, 1936, Hackworth, Dig., III, 508.

[9] Consular Regulations of the United States, Aug., 1930, Hackworth, Dig., III, 509.

[10] Instruction to the Consul at Casablanca, Morocco, March 30, 1934, Hackworth, Dig., III, 509.

See Miscellaneous Acts Productive of Loss of American Nationality, *supra*, § 387; Loss of Privilege of National Protection, *supra*, §§ 388–394.

See also documents in Hackworth, Dig., III, 511–512.

§ 402. [1] Mr. Gresham, Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Sept. 4, 1893, in the Case of John Benich, For. Rel. 1893, 23, 24, Moore, Dig., III, 987; Case of Solomon Czosnek, For. Rel. 1895 I, 13–20, Moore, Dig., III, 989–991; Mr. Olney, Secy. of State, to Mr. Risley, Minister to Denmark, Nov. 28, 1896, For. Rel. 1897, 118, Moore, Dig. III, 986.

In a case decided by the Supreme Court of the United States in 1835, Urtetiqui *v.* D'Arbel, 9 Pet. 692, 699, when there were no laws regulating the issuance of passports, it was declared that a passport issued by the Secretary of State was not evidence in an American court that the person to whom it was given was a citizen of the United States. See, also, *In re* Gee Hop, 71 Fed. 274.

[2] Mr. Gresham, Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Sept. 4, 1893, For. Rel. 1893, 23, 24, Moore, Dig., III, 987.

necessary assistance (if need be in conjunction with the Department of State), in examining the authenticity of the document.[3] "There is no doubt that upon proof of fraud in the obtainment of a passport the Department would regard such passport as a nullity." [4]

When, according to a naturalization treaty, recognition of a change of allegiance is made dependent upon both naturalization and a residence of five years within the domain of the State of adoption, the Department of State has admitted, that in the absence of disrespect to a passport as *prima facie* evidence of citizenship, it is not easy to dispute the claim of a contracting State of a right to ascertain by some separate process whether the requirement as to residence has been fulfilled, in the case of a person capable of acquiring citizenship in less time than five years, and in view of the fact that a passport does not disclose the statute under which naturalization was effected.[5]

b

§ 403. **Visa.** Mr. Gaillard Hunt declared that

> Some foreign countries, before recognizing the validity of a passport, require that a visa, or *visé,* shall be, or shall have been, affixed to it. This is an endorsement denoting that the passport has been examined and is authentic, and that the bearer may be permitted to proceed on his journey. Sometimes it is required that the visa be affixed in the country where the passport is issued, by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought. It may even be required from a diplomatic or consular officer of the government which issued the passport.[1]

While the United States does not dispute the right of a foreign State to require that a visa be affixed to an American passport, objection is made if American citizens are subjected to discrimination in the amount of the charge exacted.[2]

[3] *Id.* See, also, Mr. Foster, Secy. of State, to Mr. White, Minister to Russia, Nov. 26, 1892, For. Rel. 1893, 530, Moore, Dig., III, 986; Mr. Uhl, Acting Secy. of State, to Mr. Hengelmüller, Austrian-Hungarian Minister, May 22, 1895, MS. Notes to Austrian Legation, IX, 217, Moore, Dig., III, 1000.

[4] Mrs. Shipley, Chief, Passport Division, Dept. of State, to the author, May 15, 1940.

Also Mr. Marcy, Secy. of State, to Mr. Jackson, Jan. 10, 1854, MS. Inst. Austria, I, 89, Moore, Dig., III, 1000. Also Impeachment of Naturalization, *supra,* §§ 370–371.

See Consular Regulations of the United States, Note 48 (concerning fraudulent alteration of passports) to section 150, as of March, 1932.

Concerning Proof of Nationality see *supra,* § 348A.

[5] Mr. Olney, Secy. of State, to Mr. Jackson, Chargé at Berlin, No. 544, Feb. 13, 1896, For. Rel. 1895, I, 520, 522–523, Moore, Dig., III, 993. The class of persons especially referred to were minors, honorably discharged soldiers, merchant seamen, naturalized under special provisions of law on less than five years' residence.

§ 403. [1] The American Passport, 5, quoted in Moore, Dig., III, 994, and *citing* Dana's Wheaton, p. 298, note; also, definition of a passport visa under American law, contained in Note 8 of Supplement A of the Consular Regulations of the United States, Notes to Section 361, revised to Jan. 1, 1936.

See, also, notice respecting the visas of passports issued by the Department of State, May 20, 1915, American White Book, European War, II, 163; Notice to Bearers of Passports, revised to Jan. 16, 1939, Dept. of State Publication 1316, Passport Series, No. 2, pp. 12–13.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Foster, Minister to Spain, March 12, 1884, MS.

The Department of State objects, moreover, to any indorsement on a passport serving to deface it or to impair its usefulness, by a representative of a foreign government who, for any reason, declines to affix a visa to the document.[3]

The Department of State at one time lodged vigorous protest against the practice of Russian consuls in the United States, of interrogating American citizens as to their race and religion, and, upon the ascertainment thereof, of denying to persons of Jewish faith the authentication of passports for use in Russia.[4]

American consuls are said to be responsible for determining whether aliens applying to them for documentation as non-immigrants are properly classifiable as non-immigrants.[5]

In view of the responsibility placed upon such officers for the proper classification of aliens either as immigrants or as nonimmigrants and for the issue or refusal of visas to them, all matters concerning visas, with the exception of diplomatic visas, fall within the competence of such officers. Diplomatic visas are, however, granted by diplomatic officers according to regulations prescribed by the Secretary of State. They are granted only by diplomatic missions, and only to persons within specified categories embracing chiefly persons associated with foreign public services.[6]

Nonimmigrants entering the United States are obliged to present unexpired passports or official documents in the nature of passports issued by the governments of the countries to which they owe allegiance or other travel documents showing their origin and identity, and also valid passport visas issued by consular or other authorized officers of the United States, except in the cases noted below.[7]

---

Inst. Spain, XIX, 504, Moore, Dig., III, 999; Mr. Bayard, Secy. of State, to Mr. Muruaga, Spanish Minister, May 19, 1886, MS. Notes to Spain, X, 420, Moore, Dig., III, 999.

[3] Mr. Runyon, Ambassador to Germany, to Baron Rotenhan, Sept. 2, 1895, For. Rel. 1895, I, 540, Moore, Dig., III, 997–998; also For. Rel. 1896, 517–519.

[4] President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, xxxii, Moore, Dig., III, 996; see, also, documents in Moore, Dig., II, 8–12, especially Mr. Adee, Acting Secy. of State, to Mr. Breckinridge, Minister to Russia, Aug. 22, 1895, For. Rel. 1895, II, 1067, Moore, Dig., II, 11.

It may be observed that the refusal of Russia to honor passports of American citizens of Jewish faith was a reason which caused President Taft to have the American Ambassador at St. Petersburg notify the Russian Government, Dec. 17, 1911, of the intention of the United States to terminate the operation of the treaty of commerce and navigation with Russia of Dec. 18, 1832, and which caused the Congress to pass a joint resolution ratifying the action taken by the President. The resolution was approved by President Taft, Dec. 21, 1911. See editorial comment, *Am. J.*, VI, 186–191.

[5] Visa Supplement A of the Foreign Service Regulations of the United States, XXII–1, Note 7, as of November 1, 1940.

[6] See Foreign Service Regulations of the United States, XXII–3, and Notes appended thereto, as of January, 1941.

[7] "(*a*) A national of a contiguous country who passes from the country of which he is a national in direct transit through the United States back to the country of which he is a national by means of a transportation line which runs through the territory or waters of both countries.

(*b*) A nonimmigrant alien lawfully admitted into the United States who later goes in transit from one part of the United States to another through foreign contiguous territory.

(*c*) A nonimmigrant alien child born subsequent to the issuance of the passport visa of an accompanying parent, the visa not having expired.

(*d*) Certain alien seamen.

Immigrants entering the United States must likewise present unexpired passports or official documents in the nature of passports issued by the governments of the countries to which they owe allegiance or other travel documents showing their origin and identity; and they must also present valid immigration visas, quota or nonquota, in accordance with the requirements of the statutory law, except in the cases given below.[8] A visa is withheld from an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, or if the application fails to comply with the provisions of the Immigration Act, or if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.[9] An immigrant to whom an immigration visa has been issued is not entitled to enter the United States if, upon his arrival therein, he is found to be inadmissible to the United States under the immigration laws.[10]

---

(*e*) A nonimmigrant alien not included in any of the foregoing exceptions who is passing in transit through the United States, provided he presents, in lieu of a passport visa, a transit certificate.

(*f*) A nonimmigrant alien not included in any of the preceding exceptions who enters the United States for a period not exceeding ten days, landing temporarily while the vessel on which he is a passenger is in port or crossing the border, entering and departing via the same port of entry, provided he presents, in lieu of a passport visa, a limited entry certificate.

(*g*) A nonimmigrant alien who is a citizen of Canada, Newfoundland or Mexico and domiciled therein or who is a British subject domiciled in Canada or Newfoundland not included in any of the preceding exceptions who desires to enter the United States as a temporary visitor for a period of less than 30 days may present a passport, or a document in the nature of a passport, issued by the government of the country to which he owes allegiance, and a Non-Resident Alien's Border-Crossing Identification Card issued by either an American diplomat or a consular officer." (Visa Supplement A of the Foreign Service Regulations of the United States, XXII–1, Note 5, as of November, 1940.)

[8] "(*a*) An alien immigrant child born subsequent to the issuance of the immigration visa of an accompanying parent, the visa not having expired.

(*b*) An alien immigrant child born during the temporary visit abroad of an alien mother who has previously been legally admitted into the United States for permanent residence, provided the child is accompanying a parent to the United States upon the first return of the parent to the United States and applies for admission into the United States within a period of 2 years after the date of birth. The case of an alien child of tender age which does not come precisely within the terms of these conditions, may be referred to the Department with full particulars for reference to the Department of Justice.

(*c*) An alien immigrant who has previously been legally admitted into the United States for permanent residence and who is the bearer of a Border-Crossing Identification Card.

(*d*) An alien immigrant who has previously been legally admitted into the United States for permanent residence, has departed therefrom and has returned from a temporary visit abroad, and who presents an unexpired permit to reenter issued pursuant to section 10 of the Immigration Act of 1924." (Visa Supplement A of the Foreign Service Regulations of the United States, XXII–1, Note 82, as of November, 1940.)

It is declared that alien seamen whose occupational status as such is found to be bona fide, entering the ports of the United States solely in pursuit of their calling as seamen, but not members of the crew of the vessel on which they arrive, may be admitted temporarily in the discretion of the Attorney General and under regulations prescribed by him without passports or visas if arriving in the United States under specified circumstances that are set out in Note 80 of Visa Supplement A of the Foreign Service Regulations of the United States, XXII–1, as of November, 1940.

[9] Act of May 26, 1924, section 2 (*f*), 43 Stat. 153, 154.

[10] *Id.*, section 2 (*g*).

In 1928, the American Government informed the League of Nations that it had had no occasion to modify the attitude expressed in the second paragraph of the following note to the Secretary General of August 5, 1924: "The American Government is not in a position to issue travel documents to aliens. It does not require certificates of identity of aliens sojourning

In view of "the critical international situation" that had at the time developed, the Department of State announced on June 5, 1940, that it had been found necessary to adopt a close supervision over aliens entering the United States, and that on and after July 1, 1940, all aliens, in addition to meeting other requirements, would be required to be in possession of passports or other documents of identity and nationality and have visas obtained from American consular officers abroad. Accordingly, the exemption from passport and visa requirements that had been previously extended to certain categories of persons entering the United States from particular countries, temporarily, was to be suspended after that date.[11] On June 5, 1940, an executive order prescribed elaborate regulations in reference to documents to be required of bona fide alien seamen entering the United States; [12] and another executive order of like date prescribed regulations pertaining to documents to be required of aliens entering the United States.[13]

Through an Act of Congress approved June 20, 1941, the duty was imposed upon American diplomatic or consular officers, knowing or having reason to believe that any alien sought to enter the United States for the purpose of engaging in activities which would endanger the public safety of the United States, to refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States.[14]

6

§ 404. **Local Papers.** Certain foreign countries require an alien, upon entering the national domain, to deposit his passport with the local authorities or with

---

within its territory or of those desiring to depart therefrom. For entry into the United States alien immigrants are required to present an immigration visa issued by the appropriate American Consul. The American Consuls will accept from aliens unable to present passports in connection with their applications for immigration visas appropriate documents of identity in lieu of passports. The Nansen certificates issued to Russian refugees have been considered to fall within the category of documents in lieu of passports. Similarly, nonimmigrant aliens are granted passport visas upon personal affidavits or other documents in lieu of passports when they are unable to present passports. Aliens resident in the United States who desire to depart temporarily, may obtain from the Commissioner-General of Immigration, Washington, D. C., permits to return, valid for six months, capable of further extension in the discretion of the Commissioner-General of Immigration." It was added that the United States had been represented at the Third General Conference on Communications and Transit for the sole purpose of discussing matters pertaining to the collection and distribution of information concerning communications and transit. (League of Nations Document No. C.245.M.84. 1929.VIII.)

See Third General Conference on Communications and Transit, Geneva, 1927, Vol. III, Records and Texts relating to Identity and Travelling Documents for Persons Without Nationality or of Doubtful Nationality, League of Nations Document No. C.558(b).M.200(b). 1927.VIII.

[11] Dept. of State, *Bulletin*, June 8, 1940, 620.

[12] No. 8429, *id.*

[13] No. 8430, *id.*, 622.

[14] Public Law 113, 77 Cong., 1st Sess., S. 913.

See also Act of June 21, 1941, amending Act of May 22, 1918 (40 Stat. 559), Public Law 114, 77 Cong., 1st Sess., H.R. 4973, in relation to certain war-time restrictions in the issuance of passports.

his diplomatic or consular representative, and thereupon to secure a permit to sojourn or travel.[1]

When, as sometimes happens in Latin-American countries, an American citizen is obliged to deposit his passport with his embassy or legation or consulate, and receive a certificate of registry, in the native tongue, the Department of State has announced that the certification must in no sense partake of the nature of a passport, attesting the nationality of the bearer, but must be simply either a certificate of the deposit of the passport and of the registration of the individual, or an indorsement on the passport itself certifying what that document purports to attest. Whatever certificate is given must be predicated upon a regular passport and not issued in lieu thereof.[2]

## 7

## WAR REGULATIONS

### a

§ 405. **In General.** A State engaged in war may with reason adopt extraordinary precautions respecting the entering and departing from its territory of both aliens and nationals.[1] Passports duly visaed may be required of all persons seeking admission from a foreign country.[2] The departure of aliens may be conditioned upon their obtaining passports from their own governments or the representatives thereof, and upon the countersigning of such documents by

§ 404. [1] See documents in Moore, Dig., III, 1004–1006, especially Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, No. 14, May 10, 1887, MS. Inst. Turkey, IV, 573.

[2] Mr. Gresham, Secy. of State, to Mr. Buchanan, Minister to the Argentine Republic, No. 24, Aug. 15, 1894, For. Rel. 1894, 19, Moore, Dig., III, 1007; Mr. Sherman, Secy. of State, to Mr. Stuart, Minister to Uruguay, May 25, 1897, For. Rel. 1897, 593, 594, Moore, Dig., III, 1008.

Respecting the use in China of travel certificates and transit passes as well as passports, see Moore, Dig., III, 1009–1015 and documents there cited.

Respecting the certification by American consular officers in Italy of Italian or French translations of American passports, and the desirability that American travelers in that country provide themselves with *livrets d'identité*, see For. Rel. 1908, 482–483.

Concerning the *Registration of American Citizens Abroad*, see Consuls, Miscellaneous Duties, *infra*, § 488.

"Safe conducts, in a form similar to that of special passports, have also been issued to aliens, especially as bearers of despatches.

"So, also, letters of safe conduct, commonly called passports, are given to foreign ministers traveling in or departing from the United States." (Moore, Dig., III, 1002, *citing* Hunt, American Passports, 7–35.)

"During the recent war the Department of State adopted the practice of European Governments in issuing to diplomatic and principal consular officers documents known as 'diplomatic passports.' They are in form similar to 'special passports,' but bear the heading '*Passeport Diplomatique*' in red ink, according to the European custom. These documents insure to the bearers unusual courtesies and facilities." Communication of Mr. R. W. Flournoy to the author, Sept. 20, 1920.

§ 405. [1] The rigor of the regulations of the United States during the Civil War is fully narrated in Moore, Dig., III, 1015–1021.

See, also, War, Pacific Intercourse of Belligerents, Passports. Safe Conducts, *infra*, §§ 640–642.

[2] Mr. Seward, Secy. of State, to Diplomatic & Consular Officers, circular, May 25, 1864, MS. Circulars, I, 270, Moore, Dig., III, 1019; Circular of Dec. 17, 1864, No. 55, MS. Circulars, I, 281, Moore, Dig., III, 1019.

the foreign office of the belligerent.[3] Aliens who, for any reason, have become subject to military service may be compelled to obtain local permits in order to quit the country.[4]

Rigid regulations may be prescribed as to the movements of naturalized citizens of a neutral State, with whose State of origin the country of sojourn is at war, especially when, according to the law of the enemy State, such persons are not deemed to have expatriated themselves, or are not regarded as exempt from military service. Restraint of such individuals, if naturalized American citizens, would not necessarily indicate disregard of the change of their allegiance or of the validity of their passports, but would rather betoken an appreciation by the belligerent State of sojourn of the consequences to be anticipated, should such persons be subjected to the control of their former sovereign.[5] Their departure, therefore, from belligerent soil might be fairly conditioned upon their return to the United States.

In the early months of World War I, bearers of American passports were arrested in all of the countries at war. In every case of apparent illegal arrest, the Government of the United States entered vigorous protest, with request for release. There were, however, authentic cases in which American passports had been fraudulently obtained and were used by certain German subjects; and there were indications that a systematic plan had been devised to obtain Amer-

[3] Statement in Moore, Dig., III, 1016, with reference to the practice of the United States during the Civil War prior to the enactment of the Act of March 3, 1863; also Mr. Fish, Secy. of State, to Mr. Williamson, No. 97, July 24, 1874, MS. Inst. Costa Rica, XVII, 190, Moore, Dig., III, 1022.

[4] Mr. F. W. Seward, Acting Secy. of State, to Mr. Irving, Aug. 18, 1863, acting under the authority of the Act of March 3, 1863, 61 MS. Dom. Let. 412, Moore, Dig., III, 1018.

See "new regulations" governing the issuance of passports and embracing the matter of emergency passports, between August and December, 1914, set forth in For. Rel., 1914, Supp., 721–731.

[5] On Nov. 17, 1914, the Department of State issued the following notice to American citizens who contemplated visiting belligerent countries:

"All American citizens who go abroad should carry American passports, and should inquire of diplomatic or consular officers of the countries which they expect to visit concerning the necessity of having the passports visaed therefor.

"American citizens are advised to avoid visiting unnecessarily countries which are at war, and particularly to avoid, if possible, passing through or from a belligerent country to a country which is at war therewith.

"It is especially important that naturalized American citizens refrain from visiting their countries of origin and countries which are at war therewith.

"As belligerent countries are accustomed, for self-protection, to scrutinize carefully aliens who enter their territories, American citizens who find it necessary to visit such countries should, as a matter of precaution and in order to avoid detention, provide themselves with letters or other documents, in addition to their passports, showing definitely the objects of their visits. In particular it is advisable for persons who go to belligerent countries as representatives of commercial concerns to carry letters of identification or introduction from such concerns.

"American citizens sojourning in countries which are at war are warned to refrain from any conduct or utterances which might be considered offensive or contrary to the principles of strict neutrality." (For. Rel. 1915, Supp., 905.)

See, also, General Instruction of the Secretary of State to American Diplomatic and Consular Officers (including consular agents), Feb. 8, 1915, embracing rules effective Feb. 1, 1915, Governing the Granting and Issuing of Passports in the United States, For. Rel. 1915, Supp., 900; Rules of Dec. 17, 1915, *id.*, 912; Rules of April 17, 1916, For. Rel. 1916, Supp., 787; Rules of Jan. 24, 1917, and General Instruction of the Secretary of State to American Diplomatic and Consular Officers (including consular agents), Feb. 28, 1917, For. Rel. 1917, Supp. 1, 573 and 576, respectively.

See, also, Grounds of Refusal *supra*, § 401.

ican passports through fraud for German officers and reservists desiring to return to Germany. Such fraudulent use of passports by Germans themselves had no other effect than to cast suspicion upon American passports generally.[6] Naturalized American citizens were, on occasion, unable to resist the temptation to utilize valid American passports as a means of safeguarding themselves as agencies for the transmission of communications to belligerent powers in Europe. In such cases, the Department of State, when apprised of the facts, took appropriate steps to revoke the passports, and to advise its representatives abroad of its reasons for so doing.

b

§ 406. **Regulations of the United States as a Belligerent.** A joint order of July 26, 1917, issued by the Secretary of State and the Secretary of Labor, required aliens coming to the United States to bear passports visaed by consular officers of the United States. Before being granted visas, the holders of passports were obliged to fill out a *questionnaire* on a prescribed form, disclosing such information as to their antecedents, nationality, residence, occupation and purpose of coming to the United States as the Government deemed necessary. A circular instruction to diplomatic and consular officers was issued on the same date. Those officers had been instructed by telegraph shortly after the United States became a belligerent, to require aliens seeking to enter the United States to have their passports visaed, and to scrutinize applicants carefully before granting visas; but the joint order of July 26, 1917, made the visa regulations much more thorough and effective.[1]

By virtue of authority vested in him by an Act of May 22, 1918, to prevent in time of war departure from or entry into the United States contrary to the public safety,[2] the President, by proclamation of August 8, 1918, and by an

[6] The statement in the text is taken from a Memorandum accompanying a communication from Mr. Polk, Counselor for the Dept. of State, to Representative Fitzgerald, Aug. 18, 1916, For. Rel. 1916, Supp., 3, 8.

§ 406. [1] The paragraph in the text is taken from a memorandum by Mr. R. W. Flournoy, addressed to the author, Sept. 21, 1920, where it is added: "In the meantime the Department of State had already made informal arrangements with the Departments of the Treasury and of Commerce under which all persons boarding vessels for foreign countries were required to submit passports. Steamship companies were notified that clearances would be withheld from their vessels unless there was strict compliance with the passport regulations.

"The above mentioned action was taken without waiting for special authorization by Congress. It was a case where practical necessity and common sense seemed to dictate prompt and vigorous action without awaiting special legislative authorization." For the text of the joint order, see For. Rel. 1918, Supp. 2, 802, and for that of the circular instruction see *id.*, 794. See also executive order No. 2619, of May 11, 1917, concerning the verification of American passports and visa of Foreign Passports, *id.*, 791. Also in this connection, documents in Hackworth, Dig., III, 528–529.

It may be observed that by the executive order of Aug. 8, 1918, in pursuance of the Act of May 22, 1918, the joint order of July 26, 1917, was confirmed and continued in effect. It is printed with the executive order as Appendix A thereof.

[2] Chap. 81, 40 Stat. 559. The President adverted in his proclamation to the provisions of other laws relating to departure from and entry into the United States, as contained in § 3, subsection (*b*), of the Trading with the Enemy Act of Oct. 6, 1917, and in § 4067, Rev. Stat., as amended by the Act of April 16, 1918, and §§ 4068, 4069, 4070, Rev. Stat., and to regulations prescribed in his own proclamations of April 6, 1917, Nov. 16, 1917, Dec. 11, 1917, and April 19, 1918.

The Act of May 22, 1918, declared that when the United States was at war, if the Presi-

executive order of the same date, established a series of rules governing the issuance of passports and the granting of permits to depart from and enter the United States.[3] According to the proclamation, no citizen of the United States was to receive a passport entitling him to leave or enter the United States, unless it should affirmatively appear that there were adequate reasons for such departure or entry, and that such movements were not prejudicial to the interests of the United States. No alien was to receive permission to depart from or enter the United States unless it should affirmatively appear that there was a reasonable necessity for such departure or entry, and that such movements were not prejudicial to the interests of the United States.

According to the rules and regulations of August 8, 1918, no passports or permits to depart from or enter the United Staes were required of persons "*other than hostile aliens*" traveling between ports of the continental United States on vessels making no intermediate calls at foreign or non-continental ports,[4] or between points in the continental United States and points in Canada or Bermuda, or passing through Canada on a trip betweeen two points in the continental United States (except in the case of persons liable to military service).[5] Nor were passports or permits to depart from or enter the United States required of persons attached to the military or naval forces of the United States, "or of any nation associated with the United States in the prosecution of the war," under conditions specified.[6]

No permits to depart from or enter the United States were required of "officials or representatives of foreign countries duly accredited to the United States or a friendly country," provided that they bore valid passports and provided the Department of State was notified in advance of the movements of such individuals and consented thereto.[7]

---

dent should find that the public safety required that restrictions and prohibitions in addition to those provided otherwise than by the Act be imposed upon the departure of persons from, and their entry into, the United States, and should make public proclamation thereof, it should, until otherwise ordered by the President or Congress, be unlawful (among other things) "for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

[3] The proclamation and the executive order embracing the rules and regulations governing the issuance of passports and the granting of permits to enter and leave the United States were published as a single document in 1918. They are printed in For. Rel. 1918, Supp. 2, at 807, and 810, respectively.

[4] Section 9 (*a*).

[5] Section 9 (*b*).

[6] Section 9 (*c*). Special provision was made for the issuance to aliens of so-called "border permits" for the crossing and recrossing of the Mexican border. Section 10 (*a*).

Arrangement was made for the granting of permission to aliens passing through the United States en route between two foreign points, and not remaining in the United States more than thirty days. Section 10 (*f*).

[7] Section 10 (*g*). It was required, however, that such officials, when desiring to enter the United States, should have their passports visaed by a diplomatic or consular officer of the United States in the country from which they came and in the country from which they embarked for or entered the United States. Such officials desiring to depart from the United States were required to have their passports visaed by the Department of State.

"The act of May 22, 1918 was amended by the act approved on June 21, 1941, making it applicable not only during war but also 'during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states.'" (Hackworth, Dig., III, 528, *citing* 55 Stat. 252.)

Citizens of the United States traveling between American ports not within the continental United States, or between such ports and ports within the continental United States, on vessels making no intermediate calls at foreign ports other than those of Canada or Bermuda, were not required to bear passports provided they should have received from the immigrant inspector at the port of departure "United States citizens' identity cards." [8] Such cards were also permitted to suffice for such citizens traveling across the Mexican border, unless otherwise ordered by the Secretary of State.[9] Citizens of the United States who were seamen on vessels entering or leaving ports of the United States were not required to bear passports provided they bore seamen's certificates of American citizenship, issued by collectors of the ports of the United States in accordance with the statutory law.[10]

It was declared that no person registered or enrolled or subject to registry or enrollment for military service in the United States should depart from the United States without the previous consent of the Secretary of War or of such persons as he might appoint to give it. The Secretary of State was enjoined to issue no passport or permit entitling such person to depart without securing satisfactory evidence of such consent.[11]

Elaborate arrangements were made for the issuance of permits to aliens to depart from and enter the United States.[12] A general system of control at points of entry and departure was established.[13] It is not believed that the regulations of the United States in relation to alien persons betokened an abuse of power. The extraordinary conditions confronting the nation appeared to justify amply the measures adopted.[14]

[8] Section 11 (*a*).

[9] Section 11 (*b*).

[10] Section 11 (*c*).

[11] Section 12.

It was declared in Section 14 that passports were not valid for return to the United States unless verified in the country from which the holder started on his journey thereto, and further verified in the foreign country from which he embarked for or entered the United States.

[12] Sections 15–39.

[13] Sections 36–38.

On Aug. 25, 1919, the President, upon the suggestion of the Secretary of State, recommended to the Congress that the passport-control system under the Act of May 22, 1918, be extended for one year after peace should be concluded between the United States and the Central Powers of Europe. Senate Doc. No. 79, 66 Cong., 1 Sess. By an Act received by the President Oct. 29, 1919, and which became a law without his approval, on Nov. 10, 1919, it was provided that if the President should find that the public safety required that restrictions and prohibitions in addition to those provided otherwise than by the Act, be imposed upon the entry of aliens in the United States, and should make public proclamation thereof, it should (among other things), until otherwise ordered by the President or Congress, be unlawful "for any alien to enter or attempt to enter the United States except under such reasonable rules, regulations, and orders, and subject to such passport, visé, or other limitations and exceptions as the President shall prescribe." This Act was to take effect upon the date when the Act of May 22, 1918, should cease to be operative, and was to continue in force and effect until and including March 4, 1921. 41 Stat. 353.

According to an Act of March 2, 1921, 41 Stat. 1205, 1217, the provisions of the Act of May 22, 1918, in so far as they related to requiring passports and visas from aliens seeking to come to the United States, were to continue in force and effect until otherwise provided by law.

[14] See Mr. Lansing, Secy. of State, to the President, Aug. 20, 1919, Senate Doc. No. 79, 66 Cong., 1 Sess., 3.

By an executive order of June 27, 1920, amending that of Aug. 8, 1918, persons defined by

c

**§ 406A. Restriction of American Passports Against Travel to Belligerent and Other Countries Engaged in Conflict Since World War I.**[1] In view of the dangers of travel to or from, as well as of residence within, the territories of countries engaged in armed conflict whether foreign or domestic, and regardless of whether a condition of war is deemed to exist, an outside State may, as a matter of its own policy, withhold from its nationals the benefits of passports for use within the disaffected areas. The United States has, since World War I, frequently pursued such a course.

Thus, in 1935, application for passports of persons desiring to proceed to Ethiopia were disapproved, and passports issued for travel in adjacent countries were rendered invalid for use in Ethiopia.[2] For most of the Civil War period in Spain (from July 28, 1936, to December 18, 1936, and from January 12, 1937, to April 3, 1939) the United States restricted American passports against travel therein. On August 18, 1937, the Department of State, by restrictive endorsements, rendered all passports issued to persons proceeding to or through the Far East, invalid for travel to or in China.[3]

Upon the outbreak of the war between Germany and the Allied Powers of Poland, Great Britain and France, in September, 1939, new passport regulations were drawn up, rendering such documents invalid for travel to Europe unless specifically validated by the Department of State for such travel.[4] Following the enactment of the Neutrality Act of November 3, 1939, passport regulations in harmony therewith were duly issued. Those of November 6, 1939, permitted holders of American passports "presently in the combat areas defined by the proclamation of the President," under date of November 4, 1939, to proceed into and through such areas in connection with travel in accordance with the authorizations and subject to the restrictions noted on such passports, until further regulation.[5] On November 17, 1939, fresh regulations, amending and supplement-

---

statute or proclamation as hostile or enemy aliens, and who might be desirous of departing from the United States were not, unless the Secretary of State might so order, to be required to obtain a permit of the Government prior to such departure. It was declared that such persons would be permitted to depart upon presentation of passports issued, renewed or visaed by representatives of their respective Governments within one year prior to the proposed date of departure, accompanied by certificates of compliance with the income tax law.

Concerning passport restrictions after the termination of hostilities while the United States remained a belligerent in the World War, and concerning also the final termination of the passport control system in 1921, see documents in Hackworth, Dig., III, 529–531.

§ 406A. [1] The author acknowledges his indebtedness to Mrs. Ruth B. Shipley, Chief of the Passport Division, Department of State, for the materials and documents used in the preparation of this Section.

[2] It may be observed that beginning Aug. 16, 1937, all American passports were endorsed: "This passport is not valid for travel to or in any foreign State in connection with entrance into or service in foreign military or naval forces." (See circular telegram to the Diplomatic and Consular Officers of the United States, Aug. 10, 1937; also Instructions to Passport Agencies in the United States, Aug. 9, 1937.)

[3] See also documents in Hackworth, Dig., III, 531–534.

[4] See Departmental Order No. 811, Sept. 4, 1939, and statement for the press of like date, Hackworth, Dig., III, 534.

[5] Hackworth, Dig., III, 535. The text is also contained in Departmental Order No. 827, of Nov. 17, 1939.

ing those of November 6, 1939, were duly issued by the Department of State.[6] Through them, American nationals were not permitted to travel on any surface vessel or aircraft into or through a combat area unless possessed of passports endorsed as valid for such travel by the Passport Division of the Department of State or by an American Diplomatic or Consular officer abroad. Each endorsement of a passport was to be restricted in validity to one specific journey into or through a combat area, and was not to be valid for travel on a belligerent vessel unless transportation on a neutral vessel was not reasonably available.[7]

8

§ 406B. **The Registration of Nationals.** It is reasonable for a State, as a means of adequately protecting its nationals residing abroad, to endeavor to cause them to register at appropriate consular offices. The Government of the United States makes such an endeavor, inviting all persons residing abroad who claim American citizenship to make application for registration in the consular district where residence is had.[1] Compliance is not obligatory.[2] Nevertheless, failure or unwillingness to register may greatly diminish the interest of the Government in the matter of safeguarding and protecting the individual concerned.[3] A certificate of registration is not designed to be a travel document, and its use for such a purpose is discouraged.[4] Such a certificate issued to an American citizen "may be prima facie evidence of the right of the person to whom it is issued to the protection of the Government of the United States, but it is not conclusive, especially in a case in which it was issued under a misunderstanding of the laws and regulations or on the basis of an inadequate presentation of the pertinent facts." [5]

It has been announced that a person of American nationality "who is deemed to be entitled to the protection of the United States may be registered in an

[6] Regulations Relating to Travel in Combat Areas and on Belligerent Vessels, Departmental Order No. 827.

[7] *Id.* The regulations were not, under conditions that were laid down, made applicable to officers and enlisted personnel and members of the crews of specified categories of American public and private vessels.

In June, 1940, the Department of State informed enquirers that after July 1, 1940, a person leaving the United States without an American passport should be in possession of documentary evidence of his American citizenship on his return thereto from a foreign country such as Canada.

§ 406B. [1] See Consular Regulations of the United States, March, 1933, Sec. 173, embracing Executive Order of May 26, 1928, Hackworth, Dig., III, 537, where it is stated that "principal consular officers shall keep at their offices a register of persons residing in their several districts who submit satisfactory evidence of American citizenship, and shall invite all persons in their districts who claim American citizenship to make the necessary applications for registration."

[2] Mr. Carr, Chief Clerk, Department of State, to the Consul at Kehl, Germany, Sept. 4, 1907, Hackworth, Dig., III, 537.

[3] Same to the Consul at Messina, Aug. 8, 1908, Hackworth, Dig., III, 537; also same to the Consul at Tahiti, Jan. 15, 1909, Hackworth, Dig., III, 537.

[4] See Mr. Carr, Director of the Consular Service, to Consul Carleton, Sept. 9, 1924, Hackworth, Dig., III, 538.

See Types of Passports, *supra*, § 399A.

[5] Memorandum from the Office of the Legal Adviser, Dept. of State, Aug. 14, 1936, Hackworth, Dig., III, 538.

American consular office upon approval of his or her application." [6] Registration is not for "mere transients." [7] "The same general principles govern applications for registration which govern applications for passports." [8] Applications for registration are to be made before the nearest American consular officer or, in the absence of such, before a diplomatic officer.[9] The refusal of a citizen to make any explanation of his reasons for residence abroad has been declared to constitute sufficient grounds for refusing to register him.[10] If the applicant has been residing abroad for many years and does not intend to return to the United States, it has been said to matter not whether he is native or naturalized, and that he should not be registered.[11] It has been declared that the Department of State is opposed, in principle, "to extending its protection to any person who desires to obtain it merely in order to evade the performance of duties in the country in which he is established, and who has no intention to perform any duties towards this country." [12]

[6] Statement in Hackworth, Dig., III, 540, citing general instruction to diplomatic and consular officers, diplomatic serial 828, June 10, 1929.

[7] Mr. Hale, Assist. Secy. of State, to Consul Coffin, Jan. 12, 1910, Hackworth, Dig., III, 541.

[8] Executive Order, April 8, 1907, Hackworth, Dig., III, 542. See also other documents there cited.

[9] See communication to the Consul at Regina, Canada, Aug. 18, 1933, Hackworth, Dig., III, 543, where the following is added: "Where the applicant resides at a place remote from a consular or diplomatic office, his application may be sworn to before a notary or other local officer authorized to administer oaths and forwarded to the consular or diplomatic officer. Where not even a notary or other local officer is accessible to the applicant, he may transmit the application to the consular or diplomatic officer accompanied by a certificate signed by himself and two witnesses."

In relation to the matter of applications see other documents in Hackworth, Dig., III, § 275.

[10] See Mr. Adee, Acting Secy. of State, to the Consul General at Habana, Aug. 15, 1908, Hackworth, Dig., III, 545.

[11] Mr. Carr, Chief Clerk, Dept. of State, to the Consul General at Large, Jan. 10, 1908, Hackworth, Dig., III, 546, where it was added: "On the other hand, if a native citizen maintains a connection with the United States and intends to return, he should be registered, no matter how long he has resided in Mexico; but whenever a native citizen, who has resided for a long time in Mexico, is registered, the Consul General must accompany the certificate of registration with a statement under oath, if practicable, from the person registered, explaining his prolonged residence in Mexico, and the Consul General should report on the case himself." See further documents in Hackworth, Dig., III, § 276.

[12] Mr. Carr, Chief Clerk, Dept. of State, to Consul Hoover, March 21, 1910, Hackworth, Dig., III, 548.

# *PART III*

# Diplomatic Intercourse of States

## TITLE A

§ 407. **In General.** The practice of States has revealed the fact that both the processes and instrumentalities of diplomatic intercourse have long been regarded as matters requiring, for sake of mutual convenience, adherence to certain principles designed to promote justice. It is significant, moreover, that among the rules in which States, and the political entities which preceded them, have since the earliest times been ready to acquiesce, were those pertaining to the treatment to be accorded diplomatic officers.

When the United States came into being many rules begotten of the foregoing principles were well established. During the interval that has since elapsed some of them have been modified. It seems important to observe those on which the United States has placed reliance and laid emphasis.

It must be constantly borne in mind that the canons of international law restraining the action of States are distinct from, and may in fact oppose, theories of diplomatic action to which particular States may be committed. The conflict between law and policy is vividly illustrated in the nature of tasks that are too frequently imposed upon public ministers. Because the method of fulfillment of essentially legal obligations pertaining to diplomatic intercourse rests largely in the discretion of the individual State, the nature and scope of its duties may at times have been obscured. The success, therefore, of any attempt to ascertain what, in the light of American opinion, those obligations, in so far as they are attributable to international law, may entail, and wherein they should be modified, must depend upon the care taken to distinguish that which by common consent is assigned to local regulation according to domestic policy, from that which is demanded as of right by the international society from each of its members.

With the changing years matters calling for discussion between States have greatly increased both in kind and number, and have involved subjects with which the diplomat of an earlier generation was not conversant. The financial depression which in 1929 and for a protracted period thereafter cast its blight upon civilization, served not only to emphasize the importance of a common effort to conserve the economic welfare of the several members of the international society, but also to render imperative the most intelligent and active endeavor on the part of individual States to ascertain where their own interests

lay in relation to that effort, and how to advocate and defend the same to best advantage. Those speaking for a State found it necessary to respond to a demand that differed from any which previous decades had projected. The difference was manifest in the character of the knowledge which the successful negotiator was obliged to possess. Inasmuch as the training of the professional diplomat had not in previous years been deemed to demand profound studies in the field of political economy, and as, moreover, the estimate by his own country of what its own economic requirements might dictate was in some cases undergoing a radical change, States generally found it unsafe to discuss with each other numerous matters of primary import through normal agencies that were unaided by technical advisers of special competence.[1] It dawned upon foreign offices that the character of the service of diplomatic missions had been transformed overnight, and that the success of that service depended upon the availability of representatives who were able to respond to the new demands and alert to do so. Moreover, international law loomed on the horizon anew. It obviously behooved the negotiator to be able to understand the bearing of that law upon interests which his country was seeking to advance; and it so became his function to perceive, and warn that country of, the existence of any gap between what it sought to achieve and what that law seemingly forbade. In a broad sense this was no new function for the diplomat to perform. The application of it to current problems called, however, for fresh conclusion in fields in which there were few diplomatic foot-prints, and where sound deductions necessitated close regard for general principles.

Simultaneously, there grew up a widening consciousness of the fact that the influence of the diplomatic representative within and upon the State to which he was accredited was measured by his deference for the sensibilities of its people and his respect for the local law. Here was an influence tending to develop a practice calculated to stiffen the rigidity of the lines beyond which a diplomat should not go in his endeavor to further the ends of his country. If there was a special field of political science in which for the first time he became obliged to work and think, he found himself also confronted with an impressive barrier of disapproval if he pursued certain methods for the advancement of his cause.

Still another factor made itself felt. Statesmen perceived anew the importance of ascertaining and anticipating foreign reactions to policies sought to be instituted.[2] It became, therefore, the special burden of the diplomat to make use of

§ 407. [1] The Diplomatic List published by the Department of State, as of August, 1941, contained the names of a British "Commercial Counselor of Embassy," and "Financial Counselor"; a Peruvian "Commercial Counselor"; an Argentine "Commercial Counselor" and a "Financial Counselor"; a Belgian "Commercial Counselor"; a Mexican "Legal Counselor" and a "Financial Counselor"; a Chinese "Commercial Counselor"; a Brazilian "Financial Counselor" and a "Commercial Counselor"; a Venezuelan "Commercial Counselor"; an Italian "Commercial Counselor" and a "Counselor for Emigration"; a Polish "Financial Counselor"; a Swedish "Financial Counselor"; a Norwegian "Financial Counselor" and a "Commercial Counselor"; a Dominican "Commercial Counselor"; an Egyptian "Commercial Counselor"; a Netherland "Commercial Counselor"; a Greek "Commercial Counselor"; and a Paraguayan "Commercial Counselor."

[2] See "The Influence of Mental Reactions on the Development of International Law," *Am. J.*, XXIV, 357.

all available instrumentalities in the country of his sojourn to gain authoritative information in relation to such matters. He thus was expected to become a potential bulwark between the expression of thought or the commission of acts by or in behalf of his country, which unless restrained would foment discord and possibly disrupt amicable relationships.

From the foregoing discussion it may be apparent that diplomatic intercourse, as in instrument responsive to the exigencies of the present time, has demanded changes in the background, thinking, and functioning of officials through whom States are obliged to act. The bearing of those changes upon what the law of nations may expect of the individual State in the technique or procedure of that intercourse remains to be seen.

# TITLE B

## AGENTS OF A STATE

### 1

**§ 408. The President of the United States.** The foreign relations of a State are necessarily conducted by an agent or agents who act either directly or through subordinates.[1] Each member of the family of nations enjoys a large

§ 408. [1] Respecting American diplomatic officers, see Instructions to the Diplomatic Officers of the United States, 1897, and continuations thereof, especially as revealed in the more recent Foreign Service Regulations of the United States; Documents in Moore, Dig., IV, 425–806; Documents in Hackworth, Dig., IV, Chap. XIV.

See, also, generally, Fauchille, 8 ed., §§ 652–732, with bibliography; Edward S. Corwin, The President's Control of Foreign Relations, Princeton, 1917; bibliography in Clunet, *Tables Générales,* I, 449–451, 875–876; A. de Clercq and C. de Vallat, *Formulaire des chancelleries diplomatiques et consulaires,* 7 ed., Paris, 1909; John W. Foster, A Century of American Diplomacy, Boston, 1901; American Diplomacy in the Orient, 1903; The Practice of Diplomacy, Boston, 1906; Diplomatic Memoirs, Boston, 1909; Hall, Higgins' 8 ed., 353–371; Hershey, revised ed., 391–415, with bibliography; David Jayne Hill, History of Diplomacy in the International Development of Europe, New York, 1905–1914; Gaillard Hunt, A History of the Department of State, New Haven, 1914; H. C. R. Lisboa, *Les Fonctions Diplomatiques en Temps de Paix,* Santiago de Chile, 1908; Baron Charles de Martens, *Causes Célèbres,* Leipzig, 1827; Denys P. Myers, Notes on the Control of Foreign Relations, The Hague, 1917; J. B. Moore, Principles of American Diplomacy, New York, 1918; Charles Ozanam, *L'Immunité Civile de Juridiction des Agents Diplomatiques,* Paris, 1912; C. Oscar Paullin, Diplomatic Negotiations of American Naval Officers: 1778–1883, Baltimore, 1912; Phillimore, II, §§ 94–242; Walter Alison Phillips, "Diplomacy," in Encyc. Brit., Eleventh ed., VIII, 294; Coleman Phillipson, International Law and Custom of Ancient Greece and Rome, London, 1911; P. Pradier-Fodéré, *Cours de Droit Diplomatique,* Paris, 1899; E. T. Rayneli, *Derecho Diplomático Moderno,* Buenos Aires, 1914; Jean Roederer, *De l'Application des Immunités de l'Ambassadeur au Personnel de l'Ambassade,* Paris, 1904; Sir Ernest Satow, Guide to Diplomatic Practice, 3 ed., revised by H. Ritchie, London, 1932; Eugene Schuyler, American Diplomacy, New York, 1895, 105–190; Charlemagne Tower, Essays Political and Historical, Philadelphia, 1914; Frederick Van Dyne, Our Foreign Service: The "A B C" of American Diplomacy, with bibliography, Rochester, 1909; T. A. Walker, History of the Law of Nations, London, 1899; R. P. Ward, An Inquiry into the Foundation and History of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius, Dublin, 1795; Dana's Wheaton, §§ 206–251, also Dana's Note, No. 129; G. G. Wilson, 2 ed., 153–172; Woolsey, 6 ed., §§ 86–98.

See also, Giulio Diena, Report of Sub-committee on Diplomatic Privileges and Immunities, to Committee of Experts for the Progressive Codification of International Law, 1926, League of Nations Doc. No. C.196.M.70.1927.V., 78, published also in *Am. J., Supplement,* July and Oct., 1926, XX, 151; Project of the International Commission of American Jurists, Rio de Janeiro, 1927, No. VII, Diplomatic Agents, *Am. J., Special Supplement,* Jan. 1928, XXII, 249; Convention on Diplomatic Officers, adopted at Sixth International Conference of American States, Feb. 20, 1928, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, Appendix 11, 203; Resolution of the Institute of International Law on Diplomatic Immunities, New York, 1929, *Annuaire,* XXXV, Vol. 2, 307; Harvard Draft Convention on Diplomatic Privileges and Immunities, with Comment, Professor Jesse S. Reeves, Reporter, with appendices and excellent bibliography, 1932, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 19.

Also, E. R. Adair, The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries, London, 1929; Suzanne Basdevant, *Les Fonctionnaires Internationaux,* Paris, 1931; Francis Deák, Classification, Immunities and Privileges of Diplomatic Agents, *Southern California Law Review,* I, 209, 332; Raoul Genet, *Traité de Diplomatie et de Droit Diplomatique,*

freedom in determining through what instrumentalities it will hold intercourse with the outside world.[2]

The Constitution of the United States confides the direction of its foreign affairs to the President, whose freedom of action is, however, in certain matters, made dependent upon the approval of the Senate.[3] The President is, therefore, the representative of the nation in its official correspondence with foreign powers. The Supreme Court of the United States declared in 1936, through Mr. Justice Sutherland:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613.[4]

Accordingly, it has been deemed improper for a foreign diplomatic officer to attempt to make official communication to the Government through any channel other than the executive,[5] of which the Secretary of State is the organ.[6]

---

Paris, 1931; Chesney Hill, "Sanctions Constraining Diplomatic Representatives to Abide by the Local Law," *Am. J.*, XXV, 252; Sir Cecil Hurst, *Les Immunités Diplomatiques, Recueil des Cours,* 1926, II, 115; same writer, Diplomatic Immunities — Modern Developments, *Brit. Y.B.,* 1929, 1; Siegmund Kauffmann, *Die Immunität der Nicht-Diplomaten,* with bibliography, *Frankfurter Abhandlungen zum modernen Völkerrecht,* Part XXXIII, Leipzig, 1932; Lawrence Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," *New York University Law Review,* X, 170; R. E. L. Vaughan Williams, *Les Méthodes de Travail de la Diplomatie, Recueil des Cours,* 1924, III, 225; H. M. Wriston, Executive Agents in American Foreign Relations, Baltimore, 1929.

[2] It is not without interest that following the so-called "Boxer" trouble in China in 1900, the Imperial Government of that State was obliged by the Powers to reform its Office of Foreign Affairs (*Tsungli Yamen*) and to transform it into a Ministry of Foreign Affairs (*Wai-wu Pu*) which should take precedence over the six other Ministries of State. Art. XII of protocol of Sept. 7, 1901, Malloy's Treaties, II, 2011; also Imperial Edict of July 24, 1901, For. Rel. 1901, Appendix (Affairs in China), 337.

[3] According to paragraph 2, Section 2, Art. II, the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

[4] United States *v.* Curtiss-Wright Export Corporation, 299 U. S. 304, 319.

[5] Declared Mr. Jefferson, Secy. of State, to Mr. Genet, the French Minister, Nov. 22, 1793, "In my letter of October 2, I took the liberty of noticing to you, that the commission of consul to M. Dannery ought to have been addressed to the President of the United States. He being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation; and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it, to interpose between him and any other branch of Government, under the pretext of either's transgressing their functions, nor to make himself the umpire and final judge between

Dr. Eugène Borel, as arbitrator in the case of the "*Kronprins Gustaf Adolf*" and the "*Pacific,*" found occasion to declare in 1932:

> There is no doubt that, for the Swedish Government, the only way to intervene on behalf of a Swedish subject claiming a right under the Treaty was for the Swedish Minister to make a representation addressed to the Secretary of State in the form of a note, as it was most correctly done. The Minister of Sweden could not apply to the War Trade Board. His request could only be lodged in the hands of the Secretary of State, and he was fully entitled to ask from that official that the Treaties in force be complied with by the proper American authorities.[7]

Any communications had by foreign diplomatic representatives with particular agencies of the United States other than the Secretary of State must depend upon the approval of the President or the Secretary of State as his representative. It will be recalled that after his election as President in 1932, and prior to his inauguration in 1933, Mr. Franklin D. Roosevelt, with the approval of President Hoover, had numerous conferences with the heads of certain European diplomatic missions at Washington, in relation to economic matters of concern to the United States. These conferences with a President-elect were, nevertheless, discussions with an individual who at the time held no office under the Government of the United States.

*2*

§ 409. **Communications through Non-Governmental Channels.** The government of a State may in fact communicate information to that of another through the public press rather than the diplomatic channel. The propriety of such action may be regarded as dependent upon the circumstances of the particular case. If the design is to advise the people of the State thus sought to be informed of conditions calculated to arouse popular opposition to its own government in a matter of international concern, that government must be expected to take offense.[1]

---

them." Am. State Pap., For. Rel. I, 184. See, also, Moore, Dig., IV, 680–682, and documents there cited.

In December, 1920, the Guatemalan Minister at Washington, and also the Secretary of the British Embassy sought to communicate information (the former, in a personal conference, and the latter, by writing) to members of the Senate respecting matters of international import and bearing upon the foreign relations of the United States. It is understood that in both instances, the Department of State made known the incorrectness of this procedure to the foreign governmental agencies which doubtless inadvertently had recourse to it.

The communications of the President to the Congress in relation to foreign affairs are not regarded as justifying any demand for explanation from abroad, or as an appropriate subject for diplomatic discussion. See documents in Moore, Dig., IV, 683–686, especially Mr. Forsyth, Secy. of State, to Mr. Livingston, Minister to France, March 5, 1835, MS. Inst. France, XIV, 191, 193.

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." John Marshall, in House of Representatives, March 7, 1800, 6 Cong., Annals, 613, quoted in Crandall, Treaties, 2 ed., § 47.

[6] See *infra,* § 410.

[7] Dept. of State, Arbitration Series, No. 5 (6), 66.

§ 409. [1] The necessary implication in such case is that the employment of such a channel of communication was due to a belief that possibly the information would not have been re-

Until very recent times it was not assumed in intercourse between friendly States that the governments constitutionally entrusted with the management of foreign affairs were to be regarded as other than identical with the States which they purported to represent. Therefore, it was not supposed that a State through those in control of its government could win the acquiescence or approval of a foreign State whose government was in any sense sought to be overridden. The theory of an essential agreement or of singleness of purpose between States in opposition to the government of either did not obtain, and thus found little room for application in practice. Impressive invocation of such a theory appears, however, in late years, to have been observed by high representatives (if not the Governments) of the United States and Great Britain.[2]

On April 23, 1919, when the subject was under discussion between representatives of the United States and Italy, at the Peace Conference, President Wilson permitted the publication in the press of a statement indicating what in his judgment was the sole basis of the just solution of the controversy concerning Fiume, and which opposed the position taken by the Italian plenipotentiaries.[3] In his guarded reply, Premier Orlando adverted to the procedure as constituting an innovation in international relations. Without charging that such was the case, he declared that if such appeals were to be "considered as addressed to the nations outside of the governments which represent them (I might even say against the governments)," he would feel deep regret in recalling that such process, previously applied to enemy governments, was then applied for the first time to a government which had been and intended to remain a loyal ally of the great American Republic, namely, the Italian Government.[4]

On January 31, 1920, Lord Grey, British Ambassador designate to the United States, while in England, permitted the publication in the London *Times* of an unofficial communication from himself, in which he expressed sympathy for those who in the United States sought to attach reservations to the pending treaty of peace with Germany, and announced that Great Britain might be disposed to acquiesce should the United States ratify the treaty with reservations.[5] This information was deemed to possess unusual significance in view of

---

vealed to the people had it been communicated through the customary diplomatic agencies, and that fear of such a contingency induced recourse to a more direct procedure.

[2] See, in connection with this subject, as supplementary thereto, Official Negotiations, The Diplomatic Channel, *infra*, § 454.

[3] For the text of President Wilson's statement, see *Current History*, June, 1919, X, Part I, p. 405.

[4] *Current History*, June, 1919, X, Part I, p. 407. Premier Orlando added: "To place the Italian people in opposition to the Government would be to admit that this great free nation would submit to the yoke of a will other than its own, and I should be forced to protest strongly against suppositions justly offensive to my country." See Temperley, IV, 300–301.

[5] This communication was published in the Philadelphia *Public Ledger*, and in the *New York Times*, Feb. 1, 1920. No opinion is ventured as to the propriety of the discussion by a diplomatic officer accredited to the United States of a matter of political importance to it, and calling for possible action on the part of one branch of the Congress. It may be observed, however, in this connection, that the distinguished Ambassador designate gave expression to his views while in his own country, and that his action in so doing doubtless had the warm approval of his Government. Had the Government of the United States expressed disapproval of Lord Grey's course as at variance with the traditional obligations of a minister to abstain from interference in the domestic politics of the State to which he is accredited, the British Government might have evinced readiness to ratify the statement and to assume themselves

the existing conflict of opinion as to the terms, if any, on which the Senate should advise and consent to ratification, and at a time when it was not generally known in the United States how an Associated Power such as Great Britain would regard reservations such as had been proposed.

The foregoing instances illustrate more than the innovation which they record. They reveal the fact that at the present time information of such vital concern to a foreign State as to be likely to influence its conduct will necessarily be brought home to it by the straightest path and through the simplest means; and that when any conventional channel seems for any reason to obstruct rather than facilitate the communication of intelligence of such a kind, other means of enlightenment will be employed. In a word, governmental agencies established for the management of foreign affairs no longer appear to perform adequately their proper functions if they endeavor or incline to withhold from the people in times of public stress information which if known would control the foreign policies of the State. For that reason it is to be anticipated that such agencies, both in the United States and elsewhere, will hereafter, as a means of retaining power and of directing securely the control of foreign affairs, become increasingly disposed to enlighten public opinion, on matters pertaining to the outside world.

All negotiations between States must be carried on through the medium of governmental agencies constitutionally or legally established for the purpose. Effective diplomatic intercourse demands, therefore, mutual respect for them. In token thereof it must be assumed, under normal circumstances, that a government of a foreign State with which diplomatic relations are maintained will fail in no obligation which it owes to the people of its own country. Consequently, action based on a different assumption must be regarded with hostility by the government which is denied this customary imputation of efficiency or loyalty to its domestic institutions and constituents.[6] The fact of such hostility

---

responsibility for recourse to the procedure followed. The case raised a larger question than one concerning the propriety of conduct of a particular diplomatic officer, involving rather the issue whether a government such as that of Great Britain might not reasonably, under the circumstances, make known to the people of the United States and incidentally to the Senate, information deemed to be of vital concern to both.

[6] The Interparliamentary Union "has for its aim the uniting in common action the Members of all parliaments constituted in National Groups in order to bring about the acceptance in their respective countries, either by legislation or by international treaties, of the principle that differences between nations should be settled by arbitration or in other ways either amicable or judicial." Constitution, Revision of 1912, Art. I. The Union is declared to expect of its members that they, "as far as possible, see that the resolutions passed at the Interparliamentary Conferences be brought to the attention of their respective parliaments." *Id.*, Art. V. The organization although made up chiefly of responsible statesmen belonging to the legislative departments of numerous States embracing the United States, does not undertake to communicate information from one government to the legislature of another. It is not understood that the views which are communicated as among various legislatures are more than those of the several National Groups constituting the Union. According to the statement of Dr. C. L. Lange, Secretary General, published by the American Group in 1914, the Union had up to that time always limited itself to the discussion of questions relating to international law, refraining from the discussion of economic questions, and from pronouncements of a political nature, in which the interests of different States might be opposed. See The Interparliamentary Union Hand Book of the American Group, 1914, 14; Dr. C. L. Lange, "The Interparliamentary Union," *Advocate of Peace*, XCIV, March, 1932, 26.

See also The Inter-Parliamentary Union from 1889–1939, Paris, 1939; Inter-Parliamentary

must weigh heavily against the winning of popular approval in the State to whose people a direct appeal is taken. It thus requires an extraordinary combination of circumstances to cause the communication of intelligence to a foreign State by a process which designedly evades official channels to meet with a friendly response and so to achieve the end desired. For that reason recourse to such procedure is not likely to be a frequent occurrence.

3

**§ 410. The Secretary of State as Organ of Correspondence. The President.** As early as 1789, the Congress created an executive department to be known as the Department of State, and a Secretary of State who was to be its head.[1] It was provided that that officer should perform such duties as the President might enjoin on or entrust to him relative to correspondence, commissions or instructions to or with diplomatic or consular officers of the United States, or to negotiations with foreign public ministers, or to memorials or to other applications from such officials or other foreigners, or to such other matters respecting foreign affairs as the President might assign to the Department. It was expressly declared that the business of the Department should be conducted by the Secretary in such manner as the President should direct.[2] Said Secretary Hughes, in 1922: "The Department of State is the instrumentality through which the President gives his instructions to public ministers and consuls and conducts his negotiations with representatives of foreign governments, and thus stands in a peculiar relation to the Executive in the performance of his constitutional functions." [3]

In early days of the Republic it was regarded as "not the established course" for diplomatic officers to have direct correspondence with the President; [4] and as late as 1888, Secretary Bayard declared that "all the acts of the President, in his official capacity, pass through the constitutional and statutory channel of the Secretary of State." [5] In more recent years the President has, on numerous occasions, addressed himself directly to the heads of foreign States, from whom also he has himself been the recipient of communications.[6] It may be observed

---

Bulletin, Official Publication of the Bureau of the Inter-Parliamentary Union, Geneva, 1921–1941.

§ 410. [1] Rev. Stat. § 199, Moore, Dig., IV, 780.

Before the adoption of the Constitution, the foreign affairs of the United States were conducted by the Congress, which at first endeavored to perform certain of its duties through committees. In 1781, it established a Department of Foreign Affairs in charge of a "Secretary for Foreign Affairs," who in 1785 was declared to be the medium of all communications to and from the Congress in respect to foreign relations. Gaillard Hunt, History of the Department of State, Chap. I, and documents there cited.

[2] Rev. Stat. § 202, Moore, Dig., IV, 781.

The acts of the Department of State with respect to foreign affairs "are in legal contemplation the acts of the President." Gray, J., in Jones *v.* United States, 137 U. S. 202, 217.

[3] Charles E. Hughes, "Some Aspects of the Work of the Department of State," *Am. J.*, XVI, 355.

See also documents in Hackworth, Dig., IV, § 413.

[4] Mr. Jefferson, Secy. of State, to M. Genet, French Minister, Aug. 16, 1793, 5 MS. Dom. Let. 231, Moore, Dig., IV, 686.

[5] Communication to Mr. Pratt, Minister to Persia, No. 104, Dip. Series, April 5, 1888, MS. Inst. Persia, I, 208, Moore, Dig., IV, 687, 688.

[6] See statement in Moore, Dig., IV, 689; telegram of condolence from President Roosevelt,

that on May 16, 1933, President Franklin D. Roosevelt addressed a message to the heads of States participating in the Disarmament Conference and the Monetary and Economic Conference of that year.[7] Foreign ambassadors have, moreover, availed themselves on occasion of the privilege of conferring with the President.[8] In 1929, and again in 1933, Mr. Ramsay MacDonald, Prime Minister of Great Britain, and likewise, in 1931, M. Laval, President of the Council of Ministers of the French Republic, visited the United States for official conferences with the President thereof. Again, in 1933, Mr. Maxim Litvinoff, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, came to Washington and engaged in communications with President Roosevelt, looking to the establishment of diplomatic relations between the two countries.[9] In January, 1939, President Roosevelt, in direct communication with President Vargas of Brazil, invited Dr. Aranha, the Brazilian Minister of Foreign Affairs, to visit Washington as the guest of the Government of the United States.[10]

In the course of World War I, both before and after the United States became a belligerent, the President himself undertook to make suggestions in relation to the terms of peace. In December, 1916, certain of them were communicated to both belligerent and neutral powers through the medium of the Department of State.[11] In January, 1918, others were announced in an address to the Congress,[12] and thereby attained wide publicity abroad regardless of the official channels through which they were brought to the attention of foreign powers.[13] Later, the President, "acting in his own name and by his own proper authority," became the head of the American Commission for the conclusion, in conjunction

---

to the King of Portugal, Feb. 3, 1908, in respect to the assassination of the King and Crown Prince of that State, For. Rel. 1908, 687. Correspondence between President Roosevelt and the Emperor of Japan in 1905, respecting the services of the former in the cause of peace between Japan and Russia, For. Rel. 1905, 823–824.

President Taft, to Prince Chun, Regent of the Chinese Empire, July 15, 1909, respecting the participation by American capital in a railway loan, For. Rel. 1909, 178; same, to the President of Cuba, Aug. 2, 1911, referring to European claims against that State, For. Rel. 1911, 129.

See the President's Message of May 22, 1917, to the Russian Provisional Government on the Objects of the United States in the War, Mr. Lansing, Secy. of State, to Mr. Francis, Ambassador in Russia, May 22, 1917, For. Rel. 1917, Supplement 2, Vol. I, 71; message from the President to the people of Russia through the Soviet Congress, Mr. Lansing, Secy. of State, to the Consul General at Moscow, March 11, 1918, For. Rel. 1918, Russia, I, 395.

[7] Dept. of State, Treaty Information Bulletin, No. 44, May, 1933, 2–7.

See, also, Exchange of Correspondence between President Roosevelt and President Kalinin in Oct. 1933, concerning the establishment of diplomatic relations between the United States and the Union of Soviet Socialist Republics, Department of State, Eastern European Series, No. 1, Washington, 1933.

[8] Ambassadorial Privileges, *infra*, § 459.

[9] See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Department of State, Eastern European Series, No. 1, Washington, 1933.

[10] See correspondence set forth in *New York Times*, Jan. 16, 1939.

[11] Communication of Mr. Lansing, Secy. of State, to the Ambassadors and Ministers in Belligerent Countries, Dec. 18, 1916, For. Rel. 1916, Supplement, 917.

[12] President Wilson, address to the Congress, Jan. 8, 1918, announcing a proposed basis for a program of peace, For. Rel. 1918, Supplement 1, 12–17.

[13] It is to be noted that at the time of this address, responsible statesmen of Europe were making known their views in relation to peace through the medium of public speeches which were given widest circulation in America and elsewhere.

with the Allied and Associated Powers, of a treaty of peace with Germany.[14] In that capacity he became the direct spokesman of the United States in the matter of negotiation. In assuming in person the conduct of negotiations which are normally confided to the Secretary of State or to diplomatic representatives, the President does not appear to be restricted by the statutory law. Such action on his part is, moreover, without international significance.

It will be recalled that through Secretary Hull, President Roosevelt, on December 13, 1937, informed the Japanese Ambassador at Washington that he was "deeply shocked and concerned by the news of the indiscriminate bombing of American and other non-Chinese vessels on the Yangtse," requesting that "the Emperor be so advised."[15] In August, 1939, President Roosevelt made direct appeal to Chancellor Hitler of Germany, to President Moscicki of Poland and King Victor Emmanuel of Italy, for a peaceable adjustment of the existing controversies that threatened war.[16] In August, 1941, President Roosevelt and the Prime Minister of Great Britain met at sea and duly issued a joint declaration through which they made known certain common principles in the national policies of their respective countries on which they based "their hopes for a better future for the world."[17]

4

**§ 410A. Direct Negotiations between Heads of Governments.** No requirement of international law obliges a State to negotiate with any other through a particular governmental agency such as an officer attached to its diplomatic service. Common interests may best be conserved when the heads of governments themselves undertake to negotiate through personal contacts with each other.[1] By such process those who are possessed of greatest power in their respective countries may be enabled to effect accord calling for large commitments which may be more likely to find requisite support at home than should the attempt to reach agreement be confided to diplomatic agents of even highest rank.[2] The conference of the Prime Minister of the United Kingdom with the Chancellor of the German Reich in September, 1938, and the ensuing conference of those individuals with the heads of the Governments of France and

[14] Senate Doc. No. 49, 66 Cong., 1 Sess., p. 3.
See David Hunter Miller, "Some Legal Aspects of the Visit of President Wilson to Paris," *Harvard Law Rev.*, XXXVI, 51.

[15] Facsimile of Memorandum from the President for the Secretary of State, *New York Herald-Tribune*, Dec. 14, 1937.

[16] Dept. of State Bulletin, Aug. 26, 1939, 157–159.

[17] *Id.*, Aug. 16, 1941, 125.

§ 410A. [1] See The President of the United States, *supra*, § 408; The Secretary of State as Organ of Correspondence. The President, *supra*, § 410.

[2] Declared Earl Baldwin of Bewdley in the House of Lords, Oct. 4, 1938: "When I was Lord President of the Council it became obvious that dictators would not use the machinery of diplomacy. They have scrapped it. If you want to get anything home to them it has got to be told to them direct by a man in authority." (*New York Times*, Oct. 5, 1938, 8.)
It must be borne in mind, however, that the President of the United States, although acting as the head of the American Commission, in conjunction with the Allied and Associated Powers, in the negotiation of a treaty of peace with Germany that was signed on June 28, 1919, was unable to obtain the requisite approval by his country of the instrument which he had accepted in its behalf.

Italy, are illustrative.[3] They accentuate the fact that where agreement is necessary in matters of grave and immediate concern as a means, for example, of arresting the outbreak of a war that appears to be imminent, the normal instruments of diplomacy available in the persons of ambassadors or others associated with the foreign service may be supplanted by the heads of the governments of the States concerned. Moreover, the relative ease with which, through the aid of aircraft, the heads of States whose territories are not in close proximity to each other may meet in conference, serves to encourage them to hold direct intercourse with each other, and thus to supplant in numerous exigencies the use of diplomatic agents. Such considerations make it plain that the art of diplomacy as applied to the solution of the most difficult problems of the international life may find its best expression through the service of non-diplomatic yet super-diplomatic persons.

## 5

## DIPLOMATIC MISSIONS

### a

§ 411. **Classification of Diplomatic Representatives.** In determining the relative rank and precedence of diplomatic representatives, the Department of State has adopted and prescribed the seven rules of the Congress of Vienna, found in the protocol of the session of March 9, 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of November 21, 1818.[1] They are as follows:

> Article I. Diplomatic agents are divided into three classes: That of ambassadors, legates, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers for foreign affairs.
>
> Art. II. Ambassadors, legates, or nuncios only have the representative character.
>
> Art. III. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.
>
> Art. IV. Diplomatic agents shall take precedence in their respective

[3] It will be recalled that Mr. Chamberlain conferred with Herr Hitler with regard to the controversy concerning Czechoslovakia at Berchtesgarden on Sept. 15, 1938, and at Godesberg on Sept. 22, 1938. Messrs. Chamberlain, Daladier and Mussolini were in conference with Herr Hitler at Munich on Sept. 28, 1938.

§ 411. [1] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. II, Feller and Hudson, Diplomatic and Consular Laws and Regulations, 1255.

The rules of the Congress of Vienna are contained in *Nouv. Rec.*, II, 449; the supplementary rule of the Congress of Aix-la-Chapelle, *id.*, IV, 648.

See Rules of Precedence, *infra*, § 458.

Concerning the desirability of revising the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle see Report of Messrs. Guerrero and Mastny to League of Nations Committee of Experts for the Progressive Codification of International Law, 1927, *Am. J.*, XXII, *Special Supplement*, Jan. 1928, 112.

Also, David J. Hill, "Classification of Diplomatic Agents," *Am. J.*, XXI, 737; Francis Deák, "Classification, Immunities and Privileges of Diplomatic Agents," *So. California Law Rev.*, I, 209 and 332, at 339–342.

classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

Art. V. A uniform mode shall be determined in each State for the reception of diplomatic agents of each class.

Art. VI. Relations of consanguinity or of family alliance between courts confer no precedence on their diplomatic agents. The same rule also applies to political alliances.

Art. VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

Art. VIII. It is agreed that ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between ministers of the second class and chargés d'affaires.

The diplomatic representatives of the United States are as follows:

(*a*) Ambassadors extraordinary and plenipotentiary, and special and high commissioners with the rank of ambassadors extraordinary and plenipotentiary.

(*b*) Envoys extraordinary and ministers plenipotentiary, and special and high commissioners, with the rank of envoys extraordinary and ministers plenipotentiary.

(*c*) Ministers resident.

(*d*) Chargés d'affaires commissioned by the President as such and accredited by the Secretary of State to the Minister for Foreign Affairs of the government to which they are sent.[2]

It is the view of the Department of State that there is no distinction in rank between envoys and ministers (other than ministers resident) except that attributable to seniority, and that, accordingly, the representative of a foreign State accredited as a minister plenipotentiary has equal rank with an envoy extraordinary and minister plenipotentiary.[3]

[2] Foreign Service Regulations of the United States, II–2, as of January, 1941, *citing* executive order No. 8210, July 17, 1939.

"*Definition.* The term 'diplomatic officers' shall include ambassadors, ministers (whether plenipotentiary or resident), diplomatic agents, chargés d'affaires, chargés d'affaires *ad interim*, counselors of embassy or legation, and secretaries of embassy or legation." *Id.*, II–1 (a), *citing* executive order No. 8210, July 17, 1939.

As to the use of the office of chargé d'affaires in the earlier part of the nineteenth century, see Mr. Clay, Secy. of State, to the President, Jan. 31, 1827, Am. State Pap., For. Rel., VI, 554; also documents in Moore, Dig., IV, 432–433.

Declared Mr. Cushing, Attorney General, in the course of an opinion, May 25, 1855: "The title chargé d'affaires, which is in itself quite as generic and comprehensive as any of the others, and may be and often is borne by persons exercising as ample and high functions as any of the others, has settled into the designation of a mere provisional officer, and in dignity of the lowest rank." 7 Ops. Attys. Gen., 186, 192.

See documents in For. Rel. 1915, Supplement, 914–916, concerning American diplomatic representation in Bulgaria in 1915.

[3] The letter of credence of Professor Timothy A. Smiddy, addressed by King George V to the President of the United States under date of September 1, 1924, declared: "We have judged it expedient to confer the rank of Minister Plenipotentiary upon Our Trusty and Well-beloved Timothy Aloysius Smiddy, Esquire, with the especial object of representing in the United States of America the interests of Our Irish Free State." In the Diplomatic List of the Department of State of May, 1925, Professor Smiddy was accorded the benefit of the usual order of sequence among envoys extraordinary and ministers plenipotentiary.

A secretary or counselor of embassy may be given the rank of envoy extraordinary and minister plenipotentiary by his government.[4] Notification of that fact to the State of his sojourn does not necessarily indicate that the officer has been accredited as an envoy extraordinary and minister plenipotentiary, but may be regarded by it as merely an indication that higher personal rank has been conferred upon him.[5] Whether a diplomatic officer is accredited in a representative capacity depends upon the terms of his letter of credence.[6] A State may be reluctant to accredit a subordinate officer in such a capacity save for a special interval. If, however, such be its desire, the design should be appropriately manifested by the terms of the letter of credence.

The Department of State has expressed the view that the precedents available to the Government of the United States fortify the conclusion that secretaries or counselors of embassy having the personal rank of minister plenipotentiary are outranked by a minister plenipotentiary accredited as such in a representative capacity. Accordingly it has held that a counselor of embassy given merely the personal rank of envoy extraordinary and minister plenipotentiary cannot be permitted to outrank, upon becoming chargé d'affaires *ad interim*, a minister plenipotentiary accredited in a representative capacity to the President.[7]

In its Instructions to Diplomatic Officers of the United States of March 8, 1927, the Department of State declared that in the absence from the country to which he is accredited, or in the event of the death or disability of the chief of mission, the counselor or ranking diplomatic secretary, as the case may be, acts *ex officio* as chargé d'affaires *ad interim* without special instructions or credentials to that end; that if there should be no counselor or diplomatic secretary at the mission the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the Minister for Foreign Affairs; that when the office of consul general is added to that of envoy extraordinary and minister plenipotentiary, minister

[4] In 1941, Mr. Herschel V. Johnson, a Foreign Service Officer, was appointed Minister Counselor of the United States in London. The Diplomatic List published by the Department of State of August, 1941, reveals the increasing disposition of foreign States to accord the rank of Minister to Counselors of Embassy.

[5] See Mr. Hughes, Secy. of State, to Sir Esme Howard, British Ambassador at Washington, Aug. 22, 1924.

[6] Thus the letter of credence of Sir Esme Howard addressed by King George V to the President of the United States under date of Jan. 10, 1924, declared that the King had made choice of that individual "to reside with you in the character of our Ambassador Extraordinary and Plenipotentiary."

[7] See Mr. Grew, Under Secretary of State, to Sir Esme Howard, British Ambassador at Washington, Dec. 18, 1924.

Declared the Solicitor for the Dept. of State, Dec. 5, 1925: "The limited practice which it appears has developed of conferring upon diplomatic officers in lower grades than that of Minister, the rank of Minister, without making them Ministers in fact, may therefore be regarded as a departure from the well settled and generally recognized meaning of the term." (Hackworth, Dig., IV, 397.)

See also statement, *id.*, 436, indicating the decision of the Secretary of State, Feb. 8, 1927, that "owing to the provision in the Constitution for the appointment of ambassadors and other public ministers by and with the advice and consent of the Senate, it would be illegal to accredit a counselor of embassy as an envoy extraordinary and minister plenipotentiary without the advice and consent of the Senate and that to give such a counselor of embassy the personal rank of minister might be interpreted as an attempt to circumvent the law."

resident, chargé d'affaires, or secretary of embassy or legation, the diplomatic rank is regarded as superior to and independent of the consular rank.[8]

b

§ 412. **Secretaries of Embassy or Legation. Counselors of Embassy or Legation.** A secretary of a mission is, according to the admitted principles of international law, a "public minister." His personal privileges, immunities, domiciliary privileges, and exemptions are generally those of the diplomatic representative of whose official household he forms a part.[1] Under the existing statutory law the term "Foreign Service Officer" is employed to denote permanent officers in the Foreign Service of the United States below the grade of minister.[2] Secretaries of embassy or legation are obviously embraced in this category. The President may, whenever he considers it advisable to do so, designate and assign any foreign service officer as counselor of embassy or legation.[3] This authority is utilized.[4] Such action on the part of the United States is in harmony with a practice that is widely followed. It may be observed that a foreign service officer of the United States who is designated as counselor of embassy or legation outranks every other foreign service officer assigned to the

[8] Chap. II, Feller and Hudson, Diplomatic and Consular Laws and Regulations, 1254.

According to the Foreign Service List of the United States, of Jan. 1, 1935, the American Diplomatic representative in Iraq was accredited as minister resident and consul general.

Some foreign governments do not recognize the union of consular with diplomatic functions. See President Cleveland, Annual Message, Dec. 8, 1885, For. Rel. 1885, xvii, Moore, Dig., IV, 445, also documents, *id.*, respecting difficulties with Italy and Venezuela.

The Diplomatic List published by the Department of State, June, 1935, recorded the fact that the Consul General of Latvia in New York City, and the Acting Consul General of Estonia in that city were in charge of the Legations of their respective countries.

Declared Mr. Foster, Secy. of State: "So far as the rule of this government is concerned, the diplomatic function of a consular officer is only recognized when he bears a special letter of credence addressed to the Secretary of State; and conversely a consular officer of the United States, even when left in custody of a legation, has no diplomatic rank, function or immunities, unless he be expressly accredited to the minister for foreign affairs." Communication to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I, 414, Moore, Dig., IV, 445. Also *In re* Baiz, 135 U. S. 403.

See Consuls, Privileges and Immunities under International Law and Treaty, *infra*, § 464.

§ 412. [1] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. VII, § 7, Feller and Hudson, Diplomatic and Consular Laws and Regulations, 1265.

Under former instructions to diplomatic officers of the United States it was declared that "as long as the head of the mission is present, the secretary is not recognized by any foreign government as being authorized to perform a single official act other than as directed by the head of the mission." (Moore, Dig., IV, 433, where it is stated: "This passage, in substantially the same form, has long stood in the formal instructions to secretaries of legation.")

[2] § 2, Act of May 24, 1924, 43 Stat. 140, 22 U.S.C.A. § 2, as amended by Act of Feb. 23, 1931, 46 Stat. 1207.

[3] § 16 of Act of May 24, 1924, which was amendatory of the Act of July 1, 1916, 39 Stat. 252.

§ 4 of the Act of 1924 permits the appointment of foreign service officers as secretaries in the diplomatic service or as consular officers "or both." It is provided "that all official acts of such officers while on duty in either the diplomatic or the consular branch of the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers."

According to the Foreign Service List of Jan. 1, 1935, two counselors of embassy were assigned to the American Mission at Paris, and one of them was referred to as a "consul general."

[4] See documents in Moore, Dig., IV, 434–436, which illustrate the uncertainty of American official opinion concerning the significance of the title "*conseiller*" at the close of the nineteenth century, and prior to the enactment by Congress of any law in relation to the matter.

same mission who is not so designated, such, for example, as a "first secretary." [5]

The diplomatic lists published by the Department of State record the disposition of foreign States to designate as counselors of embassy or legation, or as counselors (without further descriptive title), financial, commercial and certain other advisers, who are thus given diplomatic status and a designation which commonly serves to clothe them with a rank higher than that possessed by secretaries of their respective missions, and which seemingly sets them apart from officers who are accredited merely as attachés.[6] This practice which testifies to the changing and broadening functions of the diplomat and which has been productive of a nomenclature responsive to the fact, has no special significance in point of law.

c

§ 413. **Attachés.** The Foreign Service Lists of the United States refer to the assignment to American diplomatic missions of various types of officials to whom the term "diplomatic officer" as defined in the Instructions to Diplomatic Officers of the United States, as of 1927, can not be applied. Within this category are so-called attachés, such, for example, as those described as "military," "naval," or "commercial," or "agricultural." [1] According to those Instructions, "an attaché is not recognized under the law as a diplomatic officer." [2] The implications from this statement are important. Nevertheless, the Department of State has declared that "attachés and assistant attachés to embassies and legations as members of the staffs of the missions enjoy the same privileges and immunities as a counselor or secretary of embassy or legation." [3] Such enjoyment based upon reciprocal advantages to interested States, may, with respect to certain classes of attachés, such as those associated with military or naval services, mark an irrevocable concession for the benefit of a favored class of non-diplomatic officials assigned to diplomatic missions. It may be difficult, however, to establish that as yet the requirements of international law as tested by the practice of States forbid the withholding from attachés of other categories, at least after appropriate notice of such design, numerous privileges and

[5] See Department of State, Foreign Service List of July 1, 1940, which contains abundant illustration of the statement in the text.

[6] See, for example, instances given in the Diplomatic List, published by the Dept. of State, as of August, 1941. In that publication the name of the Italian "Counselor for Emigration" followed that of the First Secretary of Embassy.

§ 413. [1] See, for example, Department of State, Foreign Service List of Jan. 1, 1935. It will be noted that among the non-diplomatic officials referred to therein are so-called language officers connected with the missions at Tokyo and Peiping.

According to press despatches published in the *New York Times* of Dec. 15 and 16, 1934, the Department of State announced willingness to acquiesce in a request from the Japanese Government that diplomatic status be withheld from language officers belonging to the United States Army or Navy who were assigned to the American mission at Tokyo.

[2] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. IV–1, citing Rev. Stat. § 1674, par. 5.

[3] Instructions to Diplomatic Officers of the United States, Chap. IV–3, note 1, of December, 1931.

See, in this connection, Armand Paul Beauvais, *Attachés Militaires, Attachés Navals, et Attachés de l'Air,* Paris, 1937.

immunities that must be, and are commonly accorded diplomatic officers.[4] It should be borne in mind that the Secretary of State may designate Foreign Service Officers to serve as agricultural attachés when the public interest so requires.[5]

Military, naval and other attachés in the American service are assigned by the Secretaries of their respective Departments, and are commissioned by the Secretary of State to reside at the seats of the various missions as the public interests demand. The duties of these attachés are such as may be given to them by the heads of their respective Departments. They receive their instructions from and report directly to them. While these duties are not under the direction or control of the chief of mission, they are subject to his supervision. In ceremonial matters, however, attachés are subject to the direction of the chief of mission and in their personal conduct are responsible to him.[6]

A foreign military or naval attaché assigned to a diplomatic mission at Washington is presented by his chief to the President and to the Secretary of War or of the Navy, and is thereafter introduced as occasion offers to other high officers of the Government of the United States.[7] The Diplomatic List published by the Department of State contains the names of the attachés, of whatsoever type, who are assigned to the several diplomatic missions at Washington.[8]

d

§ 414. **Commissioners and Special Envoys.** When persons designated as commissioners have been appointed to perform diplomatic functions in behalf of the United States, they have been regarded by it as diplomatic officers.[1] The title is, nevertheless, vague, and as Secretary Foster declared in 1892, "only the language and purport of the encumbent's commission and credential letters can

[4] The Act of Congress approved Jan. 13, 1925 (43 Stat. 748), provided *inter alia* for "customs attachés." Under section 649 of the Tariff Act of 1930 (46 Stat. 762), the designation was changed to "Treasury attachés."

The Act of Congress approved June 5, 1930 (46 Stat. 497), provided *inter alia* for "agricultural attachés" and "assistant agricultural attachés."

See also Foreign Service Regulations of the United States, IX–1, and IX–2, as of January, 1941.

[5] Foreign Service Regulations of the United States I–11, as of January, 1941.

Concerning the consolidation in 1939 of the Foreign Services of the Departments of Commerce and of Agriculture into that of the Department of State, pursuant to a joint resolution of the Congress (53 Stat. 813), see statement in Hackworth, Dig., IV, 406, and announcement there quoted.

[6] See Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. IV, Feller and Hudson, Diplomatic and Consular Laws and Regulations, 1261.

[7] See Mr. Root, Secy. of State, in Circular Instruction to American Diplomatic Officers, Feb. 14, 1906, in which he said: "The peculiar and delicate functions of military and naval attachés, combining membership of the official diplomatic representation of their own government with the added privilege of direct intercourse with other than the diplomatic branches of the foreign administration and even of official association, on some occasions, with the Head of the State and with the highest officers of its military establishment, make it desirable that American officers serving in those capacities shall enjoy no less privileges than their colleagues of other nationalities." (Hackworth, Dig., IV, 402.)

See, also, documents in Moore, Dig., IV, 437–439.

[8] The Diplomatic List is a monthly publication containing the names of the several diplomatic officers accredited to the United States, as well as of their families and official staffs.

§ 414. [1] See in this connection, opinion of Mr. Cushing, Atty. Gen., 7 Ops. Attys. Gen., 186, 192.

determine whether it possesses a diplomatic character." [2] In clothing a commissioner with such a character, the Department of State has commonly made announcement of the fact in the text of his commission and oftentimes also his rank.[3] At the present time, the chiefs of the permanent missions of the United States are not designated or accredited as commissioners. The existing statutory law permits, however, the President at his discretion to appoint any Foreign Service officer "to act as commissioner, chargé d'affaires, minister resident, or diplomatic agent for such period as the public interest may require." [4]

In November, 1918, Mr. Heck, the Turkish Secretary of the American Embassy at Constantinople, who was then in Switzerland, was instructed to return immediately to Constantinople, "with rank of Commissioner." His duty was to keep the Department of State and the American Embassy in Paris informed on conditions, diplomatic affairs of the United States remaining in the hands of the Swedish Legation. In that situation he was advised that it was not necessary that for the time being he should have any official relations with the Turkish Government.[5] Mr. Heck was succeeded in 1919, by Mr. Ravndal, who was instructed to assume the title of American Commissioner. He was advised that he was "not a diplomatic officer accredited to Turkey"; and he was instructed to avoid all acts which might convey the idea that his presence or that of other American officials in Turkey meant a resumption of diplomatic relations with Turkey.[6] In August, 1919, Rear Admiral Bristol, U.S.N., was appointed American High Commissioner at Constantinople.[7] He served in that capacity for a period of years until an ambassador to Turkey, in the person of Mr. Joseph C. Grew, was appointed in 1927.[8]

[2] Communication to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I, 414, Moore, Dig., IV, 440.

[3] Mr. Hay, Secy. of State, to Secy. of the Navy, July 20, 1900, relative to the commission of Mr. W. W. Rockhill, who was appointed "commissioner of the United States to China, with diplomatic privileges and immunities," 246 MS. Dom. Let. 485, Moore, Dig., IV, 440.

In the treaty with China of July 3, 1844, the representative of the United States, Mr. Caleb Cushing, was described as "Commissioner, . . . Envoy Extraordinary and Minister Plenipotentiary." Malloy's Treaties, I, 196.

Declared Mr. Polk, Acting Secy. of State, in a communication for Consul Haynes, May 24, 1919: "You are appointed Commissioner of the United States to Finland with rank of Minister Plenipotentiary." (For. Rel. 1919, II, 219.)

[4] § 17, Act of May 24, 1924, 43 Stat. 140, 143.

Thus in December, 1908, Mr. William I. Buchanan was commissioned a special commissioner to represent the President with full power to confer with the Government of Venezuela in all matters relating to the reëstablishment of diplomatic relations between the United States and that country. Mr. Root, Secy. of State, to Special Commissioner Buchanan, Dec. 21, 1908, For. Rel. 1909, 609. See, also, numerous earlier instances given in John W. Foster's The Practice of Diplomacy, Chap. X.

[5] See documents in For. Rel. 1919, II, 810–811. In this connection the Department of State declared that it "merely desired to have an official representative stationed at Constantinople from whom it could receive information of interest and importance."

[6] Mr. Polk, Acting Secy. of State, to Mr. Ravndal, May 3, 1919, For. Rel. 1919, II, 812.

[7] Mr. Lansing, Secy. of State, to the Commission to Negotiate Peace, Aug. 12, 1919, For. Rel. 1919, II, 812.

[8] While the High Commissioner was one of the American observers at the conference at Lausanne in 1922, between Turkey and the powers then at war with it, he was not present at the second conference between Turkey and those powers in 1923. Nor was he commissioned to negotiate and sign the treaty concluded in behalf of the United States with Turkey on July 24, 1923, which failed to receive the requisite approval of the Senate. See, in this connection, H. M. Wriston, Executive Agents in American Foreign Relations, 1929, 380–382.

In the interval between the Autumn of 1919, and the conclusion of a treaty restoring friendly relations with Germany, the United States found occasion to appoint a commissioner to be its representative at Berlin. The following instructions to its appointee, Mr. E. L. Dresel, of November 5, 1919, illustrate well the character of his mission in the capacity which he was to assume:

> You will proceed to Berlin and assume the title of American Commissioner. It is not contemplated that you should have at present any official relations with the German Government. Spanish Embassy continues to handle the diplomatic affairs of this Government and Department merely desires to have an official representative at Berlin from whom it can receive information of interest and importance. While you will do for American citizens everything compatible with your present instructions, your chief mission consists in keeping Department and Mission at Paris fully informed of political and economic conditions in Germany, the present attitude of the German Government toward American citizens and institutions as well as toward naturalized citizens of German origin, the aspirations of foreign governments in Germany, the military, economic and financial situation, etc. It is highly important that you maintain friendly and intimate relations with the representatives of Allied Governments in Germany, bearing in mind that the rupture of diplomatic relations between the German Government and the United States still continues, and that you are not a diplomatic officer accredited to Germany. You will avoid all acts which might convey the idea that your presence or that of other American officials in Germany means a resumption of diplomatic relations.[9]

This instruction reveals the employment by the United States of an individual described as a commissioner, for the performance of a task of diplomatic aspect without accrediting him as a diplomatic officer to the State within whose domain he was to exercise his functions.[10] It may be observed that Mr. Dresel ultimately, as "Commissioner of the United States of America to Germany," signed the treaty restoring friendly relations with that country on August 25, 1921.[11]

Special envoys are appointed for particular purposes, such as the negotiation of treaties, or participation in international conferences,[12] or to attend cere-

[9] Mr. Lansing, Secy. of State, to the Commission to Negotiate Peace, Nov. 5, 1919, For. Rel. 1919, II, 244.

[10] See Mr. Lansing, Secy. of State, to Mr. Grant-Smith, Dec. 10, 1919, in relation to his appointment as an American commissioner to Hungary, For. Rel. 1919, II, 410.

[11] U. S. Treaty Vol. III, 2596, 2599.

[12] Thus, for example, the President appointed three ambassadors extraordinary (Messrs. Joseph H. Choate, Horace Porter and Uriah M. Rose), and four ministers plenipotentiary (Mr. David J. Hill, Rear-Admiral Charles S. Sperry, Brig.-Gen. George B. Davis and Mr. William I. Buchanan), all of whom were described as delegates plenipotentiary, as well as two technical delegates (Messrs. James Brown Scott and Charles Henry Butler), to represent the United States at the Second Hague Peace Conference in 1907. See Final Act of Oct. 18, 1907, Malloy's Treaties, II, 2369.

The commissioning of a special representative to attend an international conference, take part in its proceedings and even sign an international convention resulting from its deliberations, does not necessarily indicate that the delegate is regarded by the State appointing him as a diplomatic officer, or as one entitled, while engaged on his mission, to the privileges of such an officer. The view of his own country respecting his status is to be derived from the form or language of his commission, and is likely to be reflected also in the description of himself embodied in the convention to which he attaches his signature. The representa-

monies deemed to possess significance, such as the marriage of a foreign monarch.[13] Early in 1917, a High Commission, headed by Mr. Elihu Root, was sent to Russia.[14] In 1933, Mr. Norman H. Davis was appointed a special ambassador of the United States on disarmament and economic work for the representation of his country at the Disarmament Conference conducted under the auspices of the League of Nations, and also in discussions with heads of the foreign offices of certain European States.[15]

Special envoys, of whatsoever rank, appointed as delegates to an international conference bear credentials not necessarily addressed to any one of the governments taking part therein, but rather such as are capable of exhibition by the delegates to their colleagues from other States, in proof of the powers given to confer and conclude agreements in respect to matters of mutual concern and interest.[16]

e

§ 415. **Agents.** The United States does not at the present time seek diplomatic representation in independent States through persons designated as agents. The Department of State has expressed the opinion that such officials would come within the second class of public ministers described in the first rule of the Congress of Vienna as "envoys, ministers, or other persons accredited to sovereigns." [1]

The diplomatic representative of the United States in Egypt was long desig-

---

tives of the United States (Rear-Admiral Charles H. Stockton and Professor George G. Wilson), at the International Naval Conference of 1908 and 1909 were appointed delegates plenipotentiary. Instructions of Mr. Root, Secy. of State, Nov. 21, 1908, Charles' Treaties, 327. The Declaration of London — the product of the Conference — described the several representatives who signed that document as "plenipotentiaries." *Id.*, 282. On the other hand, the representatives of the United States at the Fourth International Conference of American States at Buenos Aires in 1910, appeared to have been commissioned merely as "delegates." Instructions of Mr. Knox, Secy. of State, June 14, 1910, For. Rel. 1910, 14. In the preambles of the conventions adopted at the Conference, the several negotiators were described as "delegates," while the same individuals were described in relation to their signing the conventions, either as "plenipotentiaries," or as "plenipotentiaries and delegates." *Id.*, 50–56.

[13] See, for example, For. Rel. 1906, II, 1344–1347, concerning the special embassy sent by the United States to attend the celebration of the marriage of the King of Spain to Princess Victoria Eugenia of Battenberg, in May, 1906; Frederick Van Dyne, Our Foreign Service, 52–53.

[14] See Address of Mr. Root as head of the Commission, at Petrograd, June 15, 1917, contained in communication of Mr. Root, Ambassador on Special Mission to Russia, to the Secy. of State, June 17, 1917, For. Rel. 1918, Russia, I, 118.

[15] The character of his mission served to inspire the reference to Mr. Davis in American press despatches as "ambassador at large."

[16] Mr. Adee, Acting Secy. of State, to Señor Don Pedro y Zeledon, Sept. 24, 1889, MS. Notes to Costa Rica, II, 115, Moore, Dig., IV, 463, in reference to an autograph letter from the President of Costa Rica to the President of the United States, accrediting one Mr. Aragon as the delegate of Costa Rica to the Conference of American States, and respecting the request for the designation of a day for the formal presentation to the President by Mr. Aragon of his letter. See, also, McNair's 4 ed. of Oppenheim, I, § 377.

§ 415. [1] Mr. Evarts, Secy. of State, to Mr. Schuyler, June 28, 1880, MS. Inst. Roumania, I, 1, 5–6, Moore, Dig., IV, 444, concerning the appointment of Mr. Schuyler as diplomatic agent and consul general of the United States to Roumania. Also documents in Moore, Dig., IV, 443–445.

Concerning the practical concession and subsequent cessation of the recognition by the United States of the representative capacity of Mr. John Hitz, in 1868, as political agent of the Swiss Confederation, see Moore, Dig., IV, 441–443, and documents there cited.

nated as "agent and consul general." At the present time, however, the United States is represented at Cairo by an envoy extraordinary and minister plenipotentiary.[2] Pursuant to the power conferred upon him by the statutory law, the President appointed on May 14, 1925, a Foreign Service officer to act as Diplomatic agent and Consul General to Morocco.[3] In 1939 the Department of State declared that "an agent, in the practice of the United States, is a diplomatic representative accredited to the minister for foreign affairs of a dependent State," and that there was then only one such officer in the service, namely, the Diplomatic Agent and Consul General to Morocco, the consular office being superadded.[4]

f

§ 416. **Non-Diplomatic Missions.** The United States has on several occasions sent representatives abroad upon missions in which the service involved called for the exercise of no diplomatic functions. Such individuals have, accordingly, not been clothed with a diplomatic character.[1] This was true even with respect to the secret and confidential mission sent to Europe in 1861, by Secretary Seward, for the purpose of influencing sentiment in regard to the Civil War.[2] Commissions sent to investigate political conditions in foreign States have been similarly regarded.

In 1902, Mr. William H. Taft, Civil Governor of the Philippines, was commissioned by the Secretary of War to proceed to Rome, and there ascertain what authorities of the Roman Catholic Church were empowered to sell to the Government of the United States lands belonging to the religious orders in the Philippine Islands; and upon finding that the officers of the Church at Rome possessed such power, to endeavor to reach a basis of negotiation. The Secretary of War declared that the errand would "not be in any sense or degree diplomatic in its nature," but rather "purely a business matter of negotiation." [3] Governor Taft was successful in his mission.

[2] See Department of State, Foreign Service List, Jan. 1, 1935.

[3] *Id.*

[4] Mr. Davis, Chief, Division of Foreign Service Administration, to Miss Lillie T. Bittling, Aug. 22, 1939, Hackworth, Dig., IV, 415.

§ 416. [1] At times American diplomatic officers have been burdened with the performance of non-diplomatic duties. Such officers while so employed have not ceased to retain their diplomatic character.

[2] Moore, Dig., IV, 446–447, and documents there cited.

[3] The statement in the text is based upon that contained in Moore, Dig., IV, 447–448, in which the facts stated are taken from a paper by Hon. Simeon E. Baldwin, in the *Yale Law Journal* for Nov. 1902, xii, 1.

SELF-CONSTITUTED MISSIONS. The United States has strongly condemned, and by Act of Congress declared to be illegal, self-constituted missions. See Act of Jan. 30, 1799, 1 Stat. 613, repealed by § 5, Chap. 321, 35 Stat. 1088, Rev. Stat. § 5335. § 5 as amended April 22, 1932, Chap. 126, 47 Stat. 132, 18 U.S.C.A. § 5 is as follows: "Every citizen of the United States, whether actually resident or abiding within the same, or in any place subject to the jurisdiction thereof, or in any foreign country, who, without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures of conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction

g

§ 416A. **Non-Diplomatic Persons Not Associated With Diplomatic Missions.** It is not believed that commissioners appointed to fulfill judicial functions through service on mixed claims commissions, joint commissions or courts of arbitration are to be regarded as deriving from their offices a diplomatic character.[1] According to Article XLVI of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, members of a tribunal selected from the Permanent Court shall, "in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities." [2] Such a provision is for

---

thereof, and not duly authorized, who counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than $5,000 and imprisoned not more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects." See, in this connection, Moore, Dig., IV, 448–450, and documents there cited, with reference especially to the mission of Dr. George Logan in 1798; also Lindell T. Bates, Unauthorized Diplomatic Intercourse by American Citizens with Foreign Powers as a Criminal Offense under the Laws of the United States, New York, 1915; Charles Warren, History of Laws Prohibiting Correspondence with a Foreign Government and Acceptance of a Commission, 1917, Senate Doc. No. 696, 64 Cong., 2 Sess.

According to Title VIII, of the so-called Espionage Act of June 15, 1917, 40 Stat. 226, § 1, 22 U.S.C.A. § 231, it is rendered a criminal offense for any person, in relation to any dispute or controversy between a foreign government and the United States, willfully and knowingly to make any untrue statement, either orally or in writing, under oath before any persons authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the Government of the United States, or of any branch thereof, to the injury of the United States. § 3 of the same Title declares that "Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State," shall be subjected to punishment.

Concerning representatives of unrecognized and fallen governments, see documents in Hackworth, Dig., IV, § 377.

§ 416A. [1] Mr. Monroe, Secy. of State, to Mr. Harris, Chargé d'Affaires at St. Petersburg, July 31, 1816, MS. Inst. United States Ministers, VIII, 89, Moore, Dig., IV, 428. Also Moore, Arbitrations, I, 345–349, respecting the question as to the immunities claimed in 1796 by Messrs. Gore and Pinkney, American commissioners under Art. VII, of the Jay Treaty with Great Britain of Nov. 19, 1794.

Mexico invested its commissioners serving on the Mixed Claims Commission under the convention with the United States of April 11, 1839, Malloy's Treaties, I, 1101, with a diplomatic character. "By their respective commissions each of them was appointed 'a plenipotentiary of the Mexican Republic' as well as a commissioner." Moore, Arbitrations, II, 1220.

[2] Malloy's Treaties, II, 2236.

According to Art. 19 of the Statute of the Permanent Court of International Justice, "The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." On May 22, 1928, the President of the Court and the Minister for Foreign Affairs of the Netherlands Government by exchange of notes announced agreement upon a certain number of points at issue concerning the external status of members of the Court, this agreement being drawn up in the form of four General Principles and followed by Regulations for their Application. Art. I of the General Principles provided that "The diplomatic privileges and immunities which in view of the terms of Article 19 of the Statute of the Permanent Court of International Justice, the Dutch authorities accord to Members of the Court, are the same as those which they grant in general to heads of missions accredited to H.M. the Queen of the Netherlands." According to Art. II, "The higher officials of the Court shall in principle enjoy the same position as regards diplomatic privileges and immunities as diplomatic officials attached to legations at The Hague." (Publications, Permanent Court of International Justice, Series E, No. 4, 56, 57, Hudson, Int. Legislation, No. 37 *g*.)

the purpose both of safeguarding a judicial officer from interference in the performance of his duties, and of enhancing respect for the office which he holds. It purports to confer upon an arbitrator certain rights possessed by a public minister without suggesting that the former is in any sense a diplomatic representative of the State appointing him, or that he is engaged in any diplomatic service in its behalf. It must be clear that a general agreement to clothe an administrative officer with diplomatic privileges and immunities does not necessarily indicate that the individual is regarded as possessed of a diplomatic character.

There is a distinction between the reason which causes the yielding of jurisdictional immunities to a non-diplomatic person who is closely associated with a diplomatic mission, such as a military attaché,[3] and that which causes the yielding of a like privilege to a non-diplomatic person who is unassociated therewith, and whose labors, however important, have no connection with the diplomatic tasks of his country as they are performed through the medium of its diplomatic service.[4] In the latter case, it is to conventional arrangements rather than to a practice as yet assignable to the law of nations pertaining to diplomatic usages, that must be ascribed such concessions as have been yielded.[5] Those arrangements may ultimately, however, in the event of sufficiently widespread approval, be regarded as declaratory of the precepts of a common law that is still in the making: and they may thus prove to be illustrative of the process by which what comes to be regarded as the customary law derives its form and scope from conventional beginnings. At the present time, however, the United States in the absence of agreement may be expected to deny a legal obligation to accord immunity from the local jurisdiction to one who lacks not only a diplomatic status, but also an intimate association with the work of a permanent diplomatic mission.

In 1933 the Department of State declared that "under customary interna-

---

Art. 6 of the convention for the Establishment of an International Central American Tribunal, signed at Washington, Feb. 7, 1923, confers upon all members of the permanent list of the tribunal "the rank, privileges and immunities of Ministers Plenipotentiary in the Contracting Republics." (Hudson, Int. Legislation, No. 79.)

See also documents in Hackworth, Dig., IV, § 378, concerning Members of International Bodies.

[3] See Attachés, *supra*, § 413.

[4] See Sir Cecil J. B. Hurst, "Diplomatic Immunities — Modern Developments," *Brit. Y.B.*, 1929, 1, 6.

[5] See excellent discussion by Lawrence Preuss, in "Diplomatic Privileges and Immunities of Agents Invested With Functions of an International Interest," *Am. J.*, XXV, 694, 695, where he declares: "International functionaries, acting in the interests of the collectivity of States comprised in an organization, enjoy the benefits of diplomatic privileges and immunities only by virtue of express treaty provision or by the concession of the States on whose territories they act. Any further claim to diplomatic treatment rests upon extremely tenuous legal grounds."

See, also, C. van Vollenhoven, "Diplomatic Prerogatives of Non-Diplomats," *Am. J.*, XIX, 469; R. Secrétan, "*Les Privilèges et Immunités diplomatiques des Agents de la Société des Nations*," *Rev. Droit Int. Privé*, XX, 1; Francis Deák, "Classification, Immunities and Privileges of Diplomatic Agents," *So. California Law Review*, I, 209 and 332; José Gascon y Marin, "*Les Fonctionnaires Internationaux*," *Recueil des Cours*, 1932, III, 725; Siegmund Kauffmann, *Die Immunität der Nicht-Diplomaten*, with bibliography, *Frankfurter Abhandlungen zum modernen Völkerrecht*, Part 33, Leipzig, 1932.

tional law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one State to another on diplomatic missions." It was added: "Officials of the League of Nations are not as such considered by this Government to be entitled while in the United States to such privileges and immunities under generally accepted principles of international law, but only under special provisions of the Covenant of the League which have no force in countries not members of the League. It is believed that the authorities of this Government would not be warranted under our law which is declaratory of international law, in according to agents of the League of Nations diplomatic immunities in the United States since such agents are not comprehended in the definition of diplomatic officers contained in our statutes."[6]

Opinions may differ concerning the extent to which States should by general agreement concede immunities from the local jurisdiction to essentially non-diplomatic persons not associated with any permanent diplomatic mission as a means of enabling them to perform without molestation functions of international aspect. As yet the matter is one of policy rather than of law. Consequently it remains to be seen whether the members of the international society will find an interest in the successful functioning of desired agencies sufficient to yield immunities calculated to render a considerable number of non-diplomatic foreign officials exempt from the local jurisdiction.

h

§ 417. **Foreign Diplomatic Missions in the United States.** Following the outbreak of World War I, and notably after the participation by the United States therein as a belligerent, foreign diplomatic missions at Washington were enlarged not only in personnel, but also in the functions entrusted to the officials accredited. Thus, Lord Reading presented credentials as British High Commissioner, as well as Ambassador Extraordinary and Plenipotentiary.[1] The British Government, moreover, found it expedient to accredit also an officer with the rank of Minister Plenipotentiary as an aide to the Ambassador.[2] Attached to certain embassies were also special missions for financial or other purposes and headed by an officer of specified diplomatic rank, and given a

[6] Mr. Phillips, Under Secy. of State, to the Turkish Ambassador, Oct. 16, 1933, Hackworth, Dig., IV, 422–423.

See Art. VII of the Covenant of the League in relation to the diplomatic privileges and immunities of representatives of members of that body as well as of officials of the League when engaged in the business thereof. U. S. Treaty Vol. III, 3338. Concerning Swiss concessions of immunities, see communication from the Swiss Federal Council to the Secretary General of the League of Nations, July 19, 1921, contained in League of Nations Doc. No. C.66.1926.V; also, *modus vivendi* concerning the diplomatic immunities of the staff of the League organizations at Geneva, contained in note by the Secretary General, submitted to the Council Sept. 20, 1926, Annex 911*a*, League of Nations, *Official Journal*, 1926, 1422; also, Annex 911, *id.*

§ 417. [1] *Official Bulletin*, Feb. 14, 1918, No. 234, p. 5.

[2] Thus in October, 1919, Sir William Tyrrell was appointed Minister Plenipotentiary, on the staff of the Ambassador. It may be observed that other States were not reluctant to pursue, upon occasion, a similar course, especially where it was deemed wise to attach a special mission of importance to an embassy.

particular designation such as "Financial Commissioner General." [3] These special supplementary missions attached to permanent embassies or legations doubtless possessed an essentially diplomatic character, although the functions of the individuals composing them were in large degree of a commercial character, pertaining to the purchase of supplies and war material, or to the negotiation of loans and the extension of credit.

As has been noted elsewhere, some States still find it expedient to assign to embassies at Washington, counselors of ministerial rank, and are increasingly disposed to clothe with diplomatic status and accredit as counselors, individuals whose advice is needed in relation to economic or financial matters.[4]

[3] Thus in 1919, the Italian Government supplemented its Embassy at Washington with a special mission headed by an officer with the rank of Envoy Extraordinary and Minister Plenipotentiary, and designated as "Financial Commissioner General," and whose headquarters were established at New York. Diplomatic List, January, 1920.

[4] See, *supra*, §§ 407, 411 and 412.

# TITLE C

## BEGINNING AND END OF MISSION

### 1

§ 418. **Appointments.** "The power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government." [1]

The President has, on numerous occasions, without the advice or consent of the Senate, employed such agencies as he has seen fit, for the negotiation of treaties or the making of investigations.[2] The names of the plenipotentiaries to adjust the existing controversies with France in 1799, and to conclude a treaty of peace with Great Britain to terminate the War of 1812, were submitted to the Senate for its approval.[3] It does not appear that President Polk pursued such a course in appointing Mr. Trist, to negotiate a treaty of peace with Mexico.[4] The commissioners plenipotentiary chosen by President McKinley to negotiate

§ 418. [1] The language quoted is that of Mr. Cushing, Attorney General, May 25, 1855, in an exhaustive opinion respecting ambassadors and other public ministers of the United States, 7 Ops. Attys. Gen. 186, 193. See, also, statement in Moore, Dig., IV, 451. See documents in Hackworth, Dig., IV, § 381.

[2] Declared Mr. Sherman, Chairman of the Senate Committee on Foreign Relations, in the course of a debate upon a treaty concluded with Great Britain Feb. 15, 1888, by representatives appointed by the President without the advice and consent of the Senate: "The President of the United States has the power to propose treaties, subject to ratification by the Senate, and he may use such agencies as he chooses to employ, except that he cannot take any money from the Treasury to pay those agents without an appropriation by law. He can use such instruments as he pleases. . . . In my judgment, he has a right to use such means as are necessary to bring about any treaty." *Congressional Record,* Aug. 7, 1888, pp. 7285, 7287, Moore, Dig., IV, 455–456. For the report of the Senate Committee on Foreign Relations adverse to the treaty, see Reports of Senate Committee on Foreign Relations, VI, 259. For a minority report sanctioning the method of negotiating the treaty, see *id.,* VI, 286, 332–333.

In 1913 President Wilson sent Mr. John Lind, formerly Governor of Minnesota, as his "personal spokesman and representative" to Mexico to negotiate with parties exercising authority in that country. Address of President Wilson to the Congress Aug. 27, 1913, For. Rel. 1913, 820.

See list of instances of appointments in Moore, Dig., IV, 452–457, indicating the discussion that has at times arisen respecting the constitutionality of executive appointments lacking Senatorial approval. Also E. S. Corwin, The President's Control of Foreign Relations, 49–70; Quincy Wright, The Control of American Foreign Relations, 1922.

[3] United States Peace Commissions, statement showing all commissioners appointed by the President to negotiate terms of peace upon the conclusion of the various wars in which the United States has been engaged, 1775–1898. Senate Doc. No. 311, 65 Cong., 3 Sess.

[4] *Id.,* where it is declared that the commission of Mr. Trist does not appear in the Senate Executive Journal.

Concerning the secrecy attending Mr. Trist's appointment, see Polk's Diary, II, 465–467, quoted in Geo. L. Rives, United States and Mexico, II, 423–424.

a treaty of peace with Spain in 1898,[5] and likewise those selected by President Wilson in 1918, to conclude such a treaty with Germany, were appointed without the approval of the Senate.

It seems to be the accepted view that the provisions of the Constitution forbid the permanent appointment of an individual, whether as a Foreign Service Officer or otherwise, to the regular diplomatic service of the United States without the approval of the Senate.[6]

2

§ 419. **Reciprocity of Treatment.** As a general rule, no government sends to, or at least continues in, another country a minister of a higher grade than that country may reciprocate.[1] For a substantial period following the restoration of friendly relations with the United States after the conclusion of World War I, Austria was represented at Washington by a chargé d'affaires, while the United States was represented at Vienna by an envoy extraordinary and minister plenipotentiary.[2]

An Act of Congress of March 1, 1893, authorized the President when advised that any foreign government was or was about to be represented in the United States by an ambassador, envoy extraordinary, minister plenipotentiary, minister resident, special envoy, or chargé d'affaires, to direct that the representative of the United States to such government should have the same designation.[3] Shortly thereafter, Great Britain, France, Italy and Germany conferred upon their respective representatives at Washington, the rank and title of ambassador. President Cleveland responded by elevating the representatives of the United States accredited to each of those countries to the same grade.[4] A like elevation of mission reciprocally followed with respect to certain other States. The Act of 1893 was, however, repealed in 1909, by an enactment declaring that thereafter no new ambassadorship should be created unless the same should be provided for

[5] The commissions of these plenipotentiaries were issued Sept. 13, 1898, when the Senate was not in session. See, also, Crandall, Treaties, Their Making and Enforcement, 2 ed., 1916, §§ 37–38.

[6] Constitution, Art. II, Section 2, paragraph 2, where it is declared that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls."

This provision is not regarded as forbidding a recess appointment when the Senate is not in session, enabling the appointee to act temporarily, pending his nomination and confirmation when the Senate convenes.

See Act of May 24, 1924, c. 182, § 4, 43 Stat. 140, 22 U.S.C.A. § 4.

§ 419. [1] The language of the text is that of Mr. Marcy, Secy. of State, to Mr. Pennington, Chairman of the Committee on Foreign Affairs, House of Representatives, May 23, 1856, 7 MS. Report Book, 274, Moore, Dig., IV, 458. Mr. Marcy added: "This rule, however, is by no means invariable, and for various reasons it seems to be proper to leave it to the President to determine the cases in which exceptions ought to be made. There are not sufficient advantages in having ministers of the highest grade accredited to all governments — the most inconsiderable as well as the most important — to justify a departure from a long prevalent and common usage, with many good reasons to sustain it."

[2] In 1925, the Austrian chargé d'affaires was given ministerial rank.

[3] 27 Stat. 496.

[4] President Cleveland, Annual Message, Dec. 4, 1893, For. Rel. 1893, xii, Moore, Dig., IV, 739. Respecting the appointment of the first British Ambassador to the United States, Sir Julian Pauncefote, and of the first American Ambassador to Great Britain, Mr. Thomas F. Bayard, see For. Rel. 1893, 333, 334, and 336.

by act of Congress.[5] Since that time the Congress has raised the rank of numerous missions of the United States to that of the highest grade.[6] The elevation of the American mission in China to the ambassadorial grade took place in 1935.[7] On March 13, 1939, the elevation of the grade of the American Mission in Panama to that of an embassy was announced as "a further evidence of the increasingly close and cordial relations which have obtained between the United States and the Republic of Panama during recent years."[8] In January, 1941, announcement was made that the President had given his approval to raising the status of the American Legation in Uruguay to the grade of an Embassy, and that the Government of that country was taking similar action with respect to its Legation in Washington.[9] [The action of reciprocally transforming ministerial into ambassadorial representation was to become a frequent occurrence on the part of the United States after it became a belligerent in World War II.]

## 3

## CREDENTIALS AND RECEPTION

### a

§ 420. **Letters of Credence.** Upon the arrival at the seat of mission, the newly appointed diplomatic representative shall request, through the actual incumbent of the mission, an informal conference with the Minister for Foreign Affairs, or such other officer of the government to which he is accredited as may be found authorized to act in the premises, in order to arrange for his official reception. He shall at the same time, in his own name, address a formal note to the Minister for Foreign Affairs, communicating the fact of his appointment and requesting the designation of a time and place for presenting his letter of credence and the letter of recall of his predecessor.[1]

When the representative is accredited by the President to the Chief of State, he is instructed, on requesting audience for the purpose of presenting the original sealed letter of credence in person, to communicate to the Minister for Foreign Affairs the open office copy thereof accompanying his original instructions.[2] If

[5] Act of March 2, 1909, Chap. 235, 35 Stat. 672.

[6] As a recent instance, see Act of March 4, 1919, Chap. 123, making appropriation for the salary of an ambassador extraordinary and plenipotentiary to Peru, 40 Stat. 1325.

[7] See Department of State Press Release, May 18, 1935, 335. Dr. Sao-Ke Alfred Sze presented to the President his letter of credence as the first Ambassador of China to the United States on August 21, 1935. On Sept. 17, 1935, Mr. Nelson T. Johnson presented to the President of the National Government of China his letter of credence as Ambassador Extraordinary and Plenipotentiary of the United States.

[8] Dept. of State Press Release, March 18, 1939, 216, where it was also announced that similar action with respect to its Legation in Washington was being taken by the Government of Panama.

[9] Dept. of State Bulletin, Jan. 11, 1941, 79.

§ 420. [1] The language of the text is that set forth in Foreign Service Regulations of the United States, II–4, as of January, 1941.

See also documents in Hackworth, Dig., IV, §§ 283 and 284.

[2] Foreign Service Regulations of the United States, II–4, as of January, 1941. In Note I appended thereto it is added: "On the occasion of presenting letters of credence it is usual at most capitals for the incoming diplomatic representative to make a brief address. A

the diplomatic representative be of the rank of chargé d'affaires, bearing a letter of credence addressed to the Minister for Foreign Affairs, he is instructed, on addressing to the Minister the formal note, to convey to him the office copy of his letter of credence and to await the Minister's pleasure for presentation of the original.[3]

b

§ 421. **End of Mission.** The processes whereby a diplomatic mission is ended are distinct from the causes which may set them in operation. The former rather than the latter are here observed.

The announcement by a government, for whatsoever reason, that the office of a foreign minister is at an end,[1] or of a refusal to hold further official intercourse with him, terminates his mission.[2] According to existing practice in such cases, the actual termination of the diplomatic function of the minister by the State to which he is accredited, is accomplished by the delivery to him of his passports.[3]

---

representative of the United States delivering such address shall write and speak it in English. A copy of the address should be furnished the Minister for Foreign Affairs in advance. Copies of the address and of the reply must be sent to the Department."

It may be observed that on one occasion in 1924, the Department of State declined to permit a counselor of embassy, commissioned by his sovereign as envoy extraordinary and minister plenipotentiary, to present to the President a letter of credence in the latter capacity, on the ground that as his country was represented at Washington by an ambassador, the counselor, whose ministerial rank was purely personal, was not to be regarded as the diplomatic representative of his State at that capital.

[3] Foreign Service Regulations of the United States, II-4, as of January, 1941.

§ 421. [1] Mr. Knox, Secy. of State, in a communication to the Nicaraguan Chargé d'Affaires, Dec. 1, 1909, respecting the revolution then in progress in Nicaragua, and announcing the unwillingness of the President to maintain thereafter regular diplomatic relations with the Government of President Zelaya, said: "From the foregoing it will be apparent to you that your office of chargé d'affaires is at an end. I have the honor to inclose your passport, for use in case you desire to leave this country. I would add at the same time that, although your diplomatic quality is terminated, I shall be happy to receive you, as I shall be happy to receive the representative of the revolution, each as the unofficial channel of communication between the Government of the United States and the *de facto* authorities to whom I look for the protection of American interests pending the establishment in Nicaragua of a Government with which the United States can maintain diplomatic relations." (For. Rel. 1909, 455, 457.)

On Aug. 4, 1914, M. Davignon, Belgian Minister for Foreign Affairs, wrote to Herr von Below Saleske, German Minister: "I have the honour to inform your Excellency that from today the Belgian Government are unable to recognize your diplomatic status and cease to have official relations with you. Your Excellency will find enclosed the passports necessary for your departure with the staff of the legation." Diplomatic Correspondence Respecting the War published by the Belgian Government. Misc. No. 12, 1914, Cd. 7627, p. 28.

[2] See, for example, Mr. Bayard, Secy. of State, to Lord Sackville, the British Minister, Oct. 30, 1888, For. Rel. 1888, II, 1672, Moore, Dig., IV, 537; also Dr. Paúl, Venezuelan Minister for Foreign Affairs, to Mr. de Reus, Minister Resident of the Netherlands, July 20, 1908, For. Rel. 1909, 631.

[3] Thus, early on the morning of April 21, 1898, Mr. Woodford, American Minister at Madrid, was notified officially by the Spanish Minister of State that diplomatic relations with the United States had been severed, "all official communication between their respective representatives ceasing." Thereupon Mr. Woodford was obliged to write to the Minister of State requesting his passports and a safe conduct to the French frontier. For. Rel. 1898, 767.

"Letters of safe conduct, commonly called passports, are given to foreign ministers traveling in or departing from the United States." (G. Hunt, The American Passport, 35, Moore, Dig., III, 1002.)

See Mr. Lansing, Secy. of State, to the German Ambassador, Dec. 18, 1915, respecting the obtaining of safe conducts for the German Military and Naval Attachés who had been recalled, For. Rel. 1915, Supplement, 952.

The death of a minister puts an end to his mission; [4] likewise, the loss by a State of the power and right to deal with diplomatic representatives, by reason, for example, of its very extinction,[5] or of the transfer of the control of its foreign affairs to another State.[6]

The change of a head of a State, or the change of its government, is not believed to terminate a foreign mission. The utmost consequence of either event is the suspension of the functions of the minister until the presentation of new letters of credence.[7] Even suspension may not, in a particular case, be deemed to have been effected.[8]

A State may at will put an end to the mission of its own minister, by recalling him, or by removing him or permitting his resignation from its service. The Instructions to the Diplomatic Officers of the United States, as of 1927, declared:

> A recall is usually accomplished at the pleasure of the President, during a session of the Senate, by sending to that body the nomination of the officer's successor. He is, however, expected to remain at his post until duly relieved. If circumstances require otherwise, the case must be governed by the special instructions of the Secretary of State.
>
> In any case, a diplomatic officer's official functions do not cease until he has received notification of the appointment of his successor, either by specific instructions from the Department of State or by the exhibition of his successor's commission.
>
> A diplomatic officer may be recalled while on leave of absence and his successor appointed. In such case, his incumbency, and with it his leave of absence, ceases on the receipt by him of official notification of the fact.[9]

According to the same instructions, it was said to be customary for the retiring representative to take formal leave and present his letter of recall, and to depart

---

See documents in For. Rel. 1917, Supplement 1, 585–610, concerning the return of diplomatic officers from their posts upon the severance of relations with certain countries.

On Oct. 10, 1935, the Ethiopian Government brought to an end the mission of Count Luigi Vinci-Gigliucci, Italian Minister at Addis Ababa, by giving him his passports and simultaneously demanding that he and his staff leave the country within a specified period. This action was taken subsequent to the initiation of war between the two countries. See *New York Sun*, Oct. 10, 1935. Upon the expiry of that period the minister declined to depart the country, barricading himself for a short time within his legation. Upon his leaving the legation, in the capacity of a private person, he was permitted to continue his sojourn in Ethiopia. See *New York Times*, Oct. 13, 1935.

[4] Respecting the death of Dr. Azpíroz, Mexican Ambassador, in 1905, and the removal of his remains to Mexico on an American warship, see For. Rel. 1905, 654–655.

[5] See abstract in Moore, Dig., I, 128, of an instruction of Feb. 27, 1795, of Mr. Randolph, Secy. of State, to Mr. Adams, Minister to the Netherlands, MS. Inst. to U. S. Ministers, II, 323, 324, regarding the contingency should the United Netherlands become a dependency of France.

[6] For. Rel. 1905, 612–616, 631–634, respecting the assumption of supervision by Japan in 1905, over Korean foreign and administrative affairs, and the withdrawal of the American Legation from Korea.

[7] Opinion of Mr. Cushing, Atty. Gen., 7 Ops. Attys. Gen., 582, Moore, Dig., IV, 472. Also Agency of Canadian Car & F. Co. *v.* Amer. Can Co., 253 Fed. 152.

[8] See Acts Falling Short of the Recognition of New Governments, *supra*, § 46.

[9] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. II, paragraphs 24–26.

Concerning the procedure to be followed upon the reception by the President of retiring plenipotentiary representatives, as approved by the President in 1927, see statement in Hackworth, Dig., IV, 444.

from the capital a few days prior to the arrival of his successor; that it sometimes happened, however, that the retiring representative did not receive his letter of recall from the Department of State in time to present it in person before his departure. It was declared that in such cases his successor, or if need be, after receiving special instructions to that effect, the chargé d'affaires *ad interim,* when there was one, would deliver the letter of recall in such manner as might be indicated to him by the Minister for Foreign Affairs.[10]

An American diplomatic officer is deemed to have the right to resign his office at pleasure; and to take effect, it is only necessary that the resignation should be received by the President to whom it should be tendered, although the letter tendering such resignation should be addressed to the Secretary of State.[11]

Upon the severing of diplomatic relations, a minister is commonly instructed to demand, simultaneously, his passports. He may himself, without instructions, demand them, in case the treatment accorded him is such as to render imperative, in his judgment, the ending of his mission.[12] Whether such demand is the means employed by the State of the minister to announce its determination to sever diplomatic relations, or is the consequence of a severance already effected, or is merely the process whereby the minister seeks to put an end to his mission, the diplomatic functions of the officer are not believed to be necessarily terminated or rendered inoperative until the receipt by him of the documents requested.[13]

[10] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. II–13.

That the functions of a minister of the United States at his post are not terminated by the appointment of a successor until the latter enters upon his duties, see opinion of Mr. Akerman, Attorney General, 13 Ops. Attys. Gen., 300, Moore, Dig., IV, 471.

The departure of Mr. Herrick, the American Ambassador to France, November, 1914, without presenting his letter of recall to the President of the French Republic at Bordeaux, was said to be justified on grounds of expediency arising from the exigencies of the war then in progress.

[11] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. II, paragraphs 19–20. According to 19: "This rigid construction is, however, not adhered to in practice in the case of diplomatic officers, and a conventional date is assigned when a resignation shall be deemed to take effect."

See, also, paragraphs 21–23 of the same instructions.

See, in this connection, United States *v.* Wright, 1 McLean 509. See also Foreign Service Regulations of the United States, II–7, as of January, 1941.

[12] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 8, 1856, MS. Inst. Austria, I, 117, Moore, Dig., IV, 565.

[13] Thus it is believed that the mission of Señor Polo de Bernabé, the Spanish Minister at Washington, who requested his passports of Secretary Sherman during the forenoon of April 20, 1898, was not ended until the latter, pursuant to the request, delivered those documents to the Minister. For. Rel. 1898, 765.

See, also, Sir M. de Bunsen, British Ambassador in Vienna, to Sir Edward Grey, Secy. for Foreign Affairs, Sept. 1, 1914, indicating the relations of the former with the Austro-Hungarian Ministry of Foreign Affairs, after his request for passports, Aug. 13, 1914, and prior to their delivery on the following day. Misc. No. 10 (1914), Cd. 7596.

Mr. Sleeper, American Chargé in Caracas, pursuant to instructions and incidental to the severing of diplomatic relations with Venezuela, requested his passports and a safe conduct, June 20, 1908. In response, Dr. Paúl, Venezuelan Minister for Foreign Affairs, replied on the same day: "As it is your honor's Government which has placed an end to your diplomatic functions in this country and as the Government of Venezuela has no cause for complaint respecting you personally, this Government will preserve you in the enjoyment of your diplomatic immunities and prerogatives until your embarkation in Puerto Cabello on the steamer *Marietta.* Not only for the reason above mentioned, that it is not the Government of Venezuela which bids you leave, but also as our actual situation with the United States is not that of war, in which case it would be proper to issue a safe conduct to the diplomatic agent crossing the territory, my Government does not consider it necessary or fitting to send

It may be observed that the communication of Secretary Lansing to the German Ambassador on February 3, 1917, informing the latter that all diplomatic relations between the United States and the German Empire were severed, announced the delivery also to the Ambassador of his passports.[14]

It may be observed that when by any process, such as subjugation or annexation, a State brings to an end the life of another, it duly proclaims through the diplomatic channel that the termination of the life of that other has been productive of the cessation of diplomatic relationships, and that the conducting of foreign relations in what pertains to the geographical area formerly comprising the territory of that other State will be thereafter undertaken by and through the foreign office of the absorbing State.[15] It is needless to add that through such affirmative action foreign States are formally advised of what has taken place, and the diplomatic missions of the obliterated State terminated.

## 4

## QUESTION OF PERSONAL ACCEPTABILITY

### a

**§ 422. A Minister Must Be Personally Acceptable. Refusal to Receive.** It is a general rule as widely observed to-day as in 1792, when it was enunciated as such by Mr. Jefferson, that "no nation has a right to keep an agent within the limits of another without the consent of that other." [1] While the consent to the reception of a diplomatic representative from a friendly State respecting the government of which no question arises, will not at the present time be withheld,[2] the State to which he is accredited, may, upon inquiry, withhold assurance of the personal acceptability of the particular individual chosen for the post.[3] In such event, it becomes impossible for him to discharge the duties of his office with advantage to his country.[4] As his personal acceptability is indis-

---

it to you for your journey to Puerto Cabello, passing as you do through civilized and cultured towns which know how to respect those prerogatives and immunities." By this statement Dr. Paúl disposed of the request of Mr. Sleeper for his passports as well as a safe conduct. For. Rel. 1908, 822 and 823. See Ministers Recalled or Not Received, *infra*, § 439.

[14] Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador, Feb. 3, 1917, For. Rel. 1917, Supplement 1, 106, 108. Also Mr. Grew, American Chargé d'Affaires, to Mr. Lansing, Secy. of State, April 8, 1917, with reference to the action of the Austro-Hungarian Ministry for Foreign Affairs, announcing to the former the severance of diplomatic relations between the United States and Austria-Hungary, and giving to him simultaneously his passports. American White Book, European War, IV, 445.

See also documents in Hackworth, Dig., IV, § 387.

[15] See communication from Dr. Dieckhoff, German Ambassador at Washington, to the Secy. of State, March 14, 1938, in relation to the absorption of Austria by Germany, Dept. of State Press Release, March 19, 1938, 374; also discussion by Turner Catledge in *New York Times*, March 15, 1938, p. 2.

§ 422. [1] Communication to Mr. Carmichael, Oct. 14, 1792, MS. Inst. Ministers, I, 201, Moore, Dig., IV, 473.

[2] *Compare*, however, the treatment accorded the American envoys to France in 1798, indicated in statement in Moore, Dig., IV, 475–477, and documents there cited.

[3] Mr. J. C. B. Davis, Acting Secy. of State, to Mr. Rublee, Chargé d'Affaires to Switzerland, No. 116, July 29, 1873, MS. Inst. Switzerland, I, 303, Moore, Dig., IV, 475.

[4] Mr. Monroe, Secy. of State, to Mr. Phillips, Oct. 26, 1816, 16 MS. Dom. Let. 340, Moore, Dig., IV, 473.

pensable to the success of his mission, a minister should not be pressed upon a State to which he is *persona non grata,* even though it does not formally decline to receive him. If for any reason there is a refusal to receive him, his own State is obliged to acquiesce; for refusal marks the exercise of a legal right.[5] This circumstance justifies the making of informal inquiry concerning the acceptability to a receiving State of a person whose appointment as the chief of a permanent diplomatic mission thereto is contemplated, as well as the expectation of an informal response on the part of that State indicative of its views. While engaging in this practice, which is described as that of *agréation,* and which is said to have become universal, "the United States has never, apparently, claimed it as a right or acknowledged it as a duty."[6]

A State is not obliged to accept or to permit to function as a part of, or in connection with, a foreign diplomatic mission within its domain, particular designated individuals, with or without diplomatic status, who are subordinate to the chief of the mission, and to whom it may find reason to object.[7] Again, a State may prescribe the conditions on which it will consent to the attachment to such mission of subordinates within particular categories.[8] The practice of *agréation* is not as yet, however, employed in relation to the matter.

## b

## Request for Recall. Dismissal.

### (1)

§ 423. **The Principle Involved.** A State has the right to demand the recall of a diplomatic officer accredited to itself who, for any reason, has become *persona non grata.*[1] A request suggesting such a fact serves in itself to impair his use-

[5] Clemente Case referred to by Mr. Adams, Secy. of State, to Mr. Thompson, Secy. of Navy, May 20, 1819, 17 MS. Dom. Let. 304, Moore, Dig., IV, 479; see, also, Keiley Case in 1885, and correspondence relative thereto in For. Rel. 1885, abstracted in Moore, Dig., IV, 480–484.

See Art. 8, Convention on Diplomatic Officers, adopted at Sixth International Conference of American States, at Habana, Feb. 20, 1928, published as Appendix 7 to Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J.,* XXVI, *Supplement,* Jan. and April, 1932, 175, 176.

[6] Jesse S. Reeves, Reporter, in Comment on Art. 9 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J.,* XXVI, *Supplement,* Jan. and April, 1932, 72–73.

See Arts. 9 and 10 of that convention, *id.,* 20–21.

[7] See Art. 8 and excerpts quoted in Comment, *id.,* 68–69, from decision of the Oberlandesgericht Darmstadt, 1926, *Zeit. Int.,* XXXIX, 284.

[8] See American Nationality as Obstacle to Reception, *infra,* § 425.

§ 423. [1] Mr. Van Buren, Secy. of State, to Mr. Poinsett, Minister to Mexico, Oct. 16 and 17, 1829, MS. Inst. Am. States, XIV, 141, 148, Moore, Dig., IV, 492; Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, No. 110, Nov. 16, 1871, respecting the case of Mr. Catacazy, Russian Minister, at Washington, S. Ex. Doc. 5, 42 Cong., 2 Sess., 12, Moore, Dig., IV, 502.

Declared Mr. Everett, Secy. of State, to Mr. Marcoleta, Nicaraguan Minister, Dec. 30, 1852, "the President can not consent that any condition whatever should be attached to the compliance of the Nicaraguan Government with a request warranted by the most familiar principles of the public law and the practice of civilized states. He has therefore directed Mr. Kerr to renew the request for your recall and the appointment of another minister, and in the meantime I am instructed to inform you that no communication can hereafter be re-

fulness, and renders, therefore, acquiescence expedient as well as imperative. More drastic action may doubtless also be taken without necessarily violating any international obligation towards the sending State. Thus the envoy may be dismissed and his expulsion effected. Ample excuse for dismissal may be apparent where there is reason to believe that the officer has abused his privileges in such a way as to render his continuous presence at his post a menace to the safety of the territorial sovereign.[2]

It may be suggested that a State should not, and that the United States does not, exercise these broad rights except for cause, when, for example, it has reason to believe that the conduct of the diplomatic officer has been gravely offensive.[3] While it spares no pains to assure itself of the connection of the officer with the conduct deemed reprehensible and charged against him,[4] it is not disposed to invite diplomatic discussion respecting the sufficiency of the reasons for requesting his recall.[5] The United States asserts that the reasonableness of such a request depends solely upon the judgment of the offended sovereign as to the culpability of the minister.[6]

On several occasions the United States has dismissed foreign diplomatic agents by formally declining to hold further intercourse with them.[7] Dismissal has usually been the consequence of failure on the part of the government accrediting the officer to relieve the situation by acceding promptly to the request for recall.[8] So long as personal impropriety of conduct rather than the execution of

---

ceived from you as the Nicaraguan envoy." MS. Notes to Central America, I, 37, Moore, Dig., IV, 498.

According to Art. 12 (2) of the Harvard Draft Code on Diplomatic Privileges and Immunities: "If a sending State refuses, or after a reasonable time fails, to recall a member of a mission whose recall has been requested by the receiving State, the receiving State may declare the functions of such person as a member of a mission to have been terminated."

[2] On Oct. 8, 1935, the League of Nations was informed that the Ethiopian Government had requested the Italian Minister at Addis Ababa and his staff to leave the country immediately. The reason given for this demand was the allegation that the Italian Legation had misused its radio station for the production of internal disorder. See Associated Press Despatch, Oct. 8, 1935, *New York Sun*, Oct. 8, 1935. On Oct. 9, 1935, the Italian Government protested to the League of Nations against the action of Ethiopia, challenging the sufficiency of its reasons. See Associated Press Despatch, Oct. 9, 1935, *New York Times*, Oct. 10, 1935. On Oct. 10, 1935, the Italian Minister at Addis Ababa was given his passports. It may be observed that the outbreak of hostilities between the two countries had taken place some days before the Ethiopian announcement was made at Geneva.

See documents in For. Rel. 1915, 1049–1056, concerning the expulsion of the Spanish Minister from Mexico in 1915, and the good offices of the United States in his behalf.

[3] Numerous instances are given in documents contained in Moore, Dig., IV, 484–508.

[4] See, for example, Mr. Gresham, Secy. of State, to Mr. Willis, Minister to Hawaii, Feb. 21, 1895, relative to the case of Mr. Thurston, Hawaiian Minister at Washington, For. Rel. 1895, II, 876; also Mr. Sherman, Secy. of State, to Mr. Woodford, Minister to Spain, Feb. 23, 1898, respecting the case of Señor de Lôme, Spanish Minister at Washington, For. Rel. 1898, 1018.

[5] See documents in the Marcoleta Case, Moore, Dig., IV, 497–499; also in the Segur Case, *id.*, IV, 500; Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, No. 110, Nov. 16, 1871, in the Catacazy Case, S. Ex. Doc. 5, 42 Cong., 2 Sess., 12, Moore, Dig., IV, 502.

[6] Mr. Phelps, Minister to Great Britain, to Lord Salisbury, Secy. for Foreign Affairs, Dec. 4, 1888, For. Rel. 1888, II, 1705–1706, Moore, Dig., IV, 544; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, No. 1054, Jan. 30, 1889, *citing* Calvo, III, 213, 4 ed., 1888, For. Rel. 1888, II, 1718, Moore, Dig., IV, 539, 546.

[7] "Papers relating to the case of Lord Sackville," For. Rel. 1888, II, Supp. A, 1667–1729, Moore, Dig., IV, 536–548. See, also, earlier instances given in Moore, Dig., IV, 508–536.

[8] This was not true, however, in the case of Mr. F. J. Jackson, British Minister at Washington, whose language in a communication to Mr. Smith, Secy. of State, Nov. 4, 1809, con-

offensive instructions has been the cause of dismissal, the United States has been unwilling to admit that such summary procedure should be regarded as tending to weaken the friendly relations between the States concerned.[9]

(2)

§ 424. **Cases in the United States.** The conduct of foreign diplomatic officers deemed by the United States to justify a request for recall or dismissal is worthy of observation. M. Genet, the French Minister, whose recall was requested in 1793, sought to arouse hostility against England, violated the neutrality of the United States, "expressed contempt for the opinions of the President, and questioned his authority."[1] The Marquis of Yrujo, the Spanish Minister, whose recall was sought in 1805, was charged with an attempt to tamper with the press.[2] Mr. F. J. Jackson, the British Minister, dismissed in 1809, grossly insinuated, according to the Secretary of State, that the Government of the United States was guilty of bad faith.[3] M. Poussin, the French Minister, was dismissed in 1849, by reason of the tone of his communications, which were regarded as disrespectful towards the Government.[4] Mr. Marcoleta, the Nicaraguan Minister, with whom Secretary Everett in 1852 declined to hold further official communication, was accused of violating the confidence with which a certain proposition with reference to Costa Rica and Nicaragua was shown to him, and of making ostentatiously offensive efforts to defeat negotiations relative to the same matter.[5] His alleged activity in violating the neutrality laws of the United States led to the dismissal, in 1856, of Mr. Crampton, the British Minister.[6] Similar reasons, which were not, however, stated, caused Secretary Seward to request, in 1863,

---

tained a gross insinuation that the Government of the United States possessed a knowledge that the instructions of the Minister's predecessor did not authorize an arrangement concluded by him with the United States, after Mr. Jackson had been distinctly and explicitly advised that the Government did not possess such knowledge. Am. State Pap., For. Rel., III, 317–319, Moore, Dig., IV, 512.

[9] Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, No. 1054, Jan. 30, 1889, For. Rel. 1888, II, 1718, Moore, Dig., IV, 539. In this despatch, Mr. Bayard distinguished the case in point, that of Lord Sackville, from Sir Henry Bulwer's sudden dismissal from the court of Madrid in 1848, declaring that "The objection of Spain was to the action of Lord Palmerston and presumptively of the ministry of Great Britain, of which Sir Henry Bulwer was but the channel of communication, and throughout the entire transaction Sir Henry Bulwer received the entire approval of his lordship. The offense of Lord Sackville consisted in personal misconduct, wholly inconsistent with his official duty and relations, of which no suggestion of approval by his Government has yet been intimated."

See, also, Case of Mr. de Reus, Minister Resident of the Netherlands at Caracas in 1908, For. Rel. 1909, 630–631; also Case of the Belgian and French Ministers at Caracas in 1895, mentioned in Moore, Dig., IV, 548–549.

See Non-Interference in Politics, *infra*, § 452.

§ 424. [1] Moore, Arbitrations, V, 4404–4412; Moore, Dig., IV, 485–487.

[2] Moore, Dig., IV, 508–511, and documents there cited.

[3] Am. State Pap., For. Rel., III, 299–323, especially Mr. Smith, Secy. of State, to Mr. Jackson, Nov. 8, 1809, *id.*, 318. See, also, Moore, Dig., IV, 511–530, and documents there cited.

[4] Statement in Moore, Dig., IV, 530–532, based on "MSS. Dept. of State."

[5] Mr. Everett, Secy. of State, to Mr. Kerr, Minister to Central America, No. 19, Jan. 5, 1853, MS. Inst. Am. St., XV, 152, Moore, Dig., IV, 498.

[6] Brit. and For. St. Pap., XLVII, 358–374, Moore, Dig., IV, 533–535. See, also, opinion of Mr. Cushing, Atty. Gen., Aug. 9, 1855, 7 Ops. Attys. Gen., 367, 388, Moore, Dig., IV, 535.

the recall of Mr. Segur, the Salvadorean Minister.[7] The complaint against Mr. Catacazy, the Russian Minister whose recall was requested in 1871, was due to his violent abuse and vilification of the owners of a claim preferred against Russia, his "publications abusive of the President," and his efforts to "obstruct, embarrass, and defeat" negotiations between the United States and Great Britain for the adjustment of their mutual differences.[8]

Lord Sackville, the British Minister, was dismissed in 1888, because of what President Cleveland described as "unpardonable conduct in his interference by advice and counsel with the suffrages of American citizens in the very crisis of the presidential election then near at hand, and also in his subsequent public declarations to justify his actions, superadding impugnment of the Executive and Senate."[9] The recall of Mr. Thurston, the Hawaiian Minister, in 1895, was due to his admitted activity in furnishing the press with matter criticizing the policy of the United States in regard to Hawaii.[10] It was proof of his authorship of a private letter published in a newspaper of New York, and derogatory to the character of President McKinley, that led to the request for the recall and resulted in the resignation of Señor de Lôme, the Spanish Minister, in 1898.[11]

In 1915, Mr. Dumba, the Austro-Hungarian Ambassador, admitted that he had proposed to his Government plans to instigate strikes in American manufacturing plants engaged in the production of munitions of war. This proposal, embodied in a letter, had been entrusted by the Ambassador to an American citizen, traveling to Europe under an American passport. On September 8, 1915, Secretary Lansing instructed the American Ambassador at Vienna to inform the Austro-Hungarian Government that by reason of the admitted purpose and intent of Mr. Dumba to conspire to cripple the legitimate industries of the people of the United States and to interrupt their legitimate trade, and by reason of the flagrant violation of international propriety in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary, the President deemed Mr. Dumba no longer acceptable to the Government of the United States as the Ambassador of His Imperial Majesty, and that that Government had no alternative but to request Mr. Dumba's recall.[12] The Austro-Hungarian Government acquiesced.

On December 4, 1915, the German Government was requested to withdraw immediately from their official connection with its embassy at Washington, Cap-

[7] Moore, Dig., IV, 500, and documents there cited.

[8] Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, Sept. 5, 1871, Senate Ex. Doc. No. 5, 42 Cong., 2 Sess., 5; Same to Same, Nov. 16, 1871, *id.*, 12, 17–18. See, also, statement of the case in Moore, Dig., IV, 501–503, and documents cited.

[9] President Cleveland, Annual Message, Dec. 3, 1888, For. Rel. 1888, I, xi, Moore, Dig., IV, 536, 537.

[10] Mr. Gresham, Secy. of State, to Mr. Willis, Minister to Hawaii, Feb. 21, 1895, For. Rel. 1895, II, 876, Moore, Dig., IV, 503.

[11] Mr. Sherman, Secy. of State, to Mr. Woodford, Minister to Spain, Feb. 23, 1898, For. Rel. 1898, 1018. See, also, Moore, Dig., IV, 507–508, and documents there cited.

[12] Communication of Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Sept. 8, 1915, For. Rel. 1915, Supplement, 933.

See documents in Moore, Dig., IV, 488–497, in relation to early cases where the recall of American diplomatic officers was requested.

tain Boy-Ed, Naval Attaché, and Captain von Papen, Military Attaché, because there had come to the knowledge of the Government of the United States facts and circumstances as to their connection "with the illegal and questionable acts of certain persons within the United States." [13] On December 10, the German Embassy announced the recall of both officers.[14]

There having come to the attention of the American Government in 1941 various facts and circumstances connecting the Italian naval attaché at Washington "with the commission by certain persons of acts in violation of the laws of the United States," his immediate withdrawal was requested, by direction of the President.[15]

c

**§ 425. American Nationality as Obstacle to Reception.** The right of a State to decline to receive one of its own citizens as the representative of another State is generally recognized, and has been asserted on several occasions by the Government of the United States. While insisting upon the right in some instances, it has been waived without prejudice in others.[1] Thus in 1880, Señor Comacho, a naturalized American citizen, born in Venezuela, was received by the United States as Chargé d'Affaires of Venezuela.[2] This case must be deemed exceptional, however, and limited as a precedent to the special circumstances connected with it.[3]

[13] Mr. Lansing, Secy. of State, to the German Ambassador, Dec. 4, 1915, For. Rel. 1915, Supplement, 948.

[14] See Mr. Lansing, Secy. of State, to the German Ambassador, Dec. 10, 1915, complaining of the failure of the German Government to comply promptly with the request made by the United States, *id.*, 951; also communication of same date, from the German Ambassador, announcing compliance, *id.*

Concerning the activities of these officers see House Report, Committee on For. Rel., accompanying text of proposed declaration of war, April, 1917, *Cong. Rec.*, LV, No. 1, 319, 320–321, J. B. Scott, Survey of Int. Relations between the United States and Germany, 1917, 505–509.

[15] Mr. Hull, Secy. of State, to the Italian Ambassador, April 2, 1941, Hackworth, Dig., IV, 452.

§ 425. [1] See Mr. Adee, Acting Secy. of State, to Mr. Russell, Minister to Venezuela, June 28, 1907, *citing* Moore, Dig., IV, 549–553, For. Rel. 1907, II, 1092–1093. See, also, Mr. Hay, Secy. of State, to the President, Jan. 22, 1900, S. Doc. 113, 56 Cong., 1 Sess., Moore, Dig., IV, 553; Mr. Fish, Secy. of State, to Mr. Schieffelin, June 6, 1874, MS. Notes to Liberia, I, 21, Moore, Dig., IV, 551.

According to an announcement of Mr. Bacon, Acting Secy. of State, to the Diplomatic Corps at Washington, Jan. 27, 1906, it was said that future diplomatic lists would contain the names of only such officers and attachés of foreign missions in the United States as were not citizens thereof.

"The fact that a person is a national of the receiving State would justify the latter in refusing to receive him." (Jesse S. Reeves, commenting, as Reporter, on Art. 8 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 70.)

[2] Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, April 27, 1880, MS. Inst. Venezuela, III, 99, Moore, Dig., IV, 552; Same to Mr. Comacho, April 20, 1880, MS. Notes to Venezuela, I, 197, Moore, Dig., IV, 552. See, also, Mr. Adee, Acting Secy. of State, to Mr. Russell, Minister to Venezuela, June 28, 1907, For. Rel. 1907, II, 1092, 1093, in which attention was called to the fact that notwithstanding Mr. Comacho's American naturalization, he was still regarded by Venezuela, in virtue of its laws, as a citizen of that State.

[3] On May 20, 1938, the Department of State declared that the Government of the United States "could not . . . agree to the appointment of an American citizen as a foreign Ambassador or Minister accredited to this Government." (Hackworth, Dig., IV, 452.)

The Department of State might not be disposed to object to the assignment to a diplomatic mission at Washington of American nationals without diplomatic status, if no diplomatic immunities were to be invoked in their behalf, and their names were not to appear in the Diplomatic List, and provided no provisions of the statutory law of the United States imposed an obstacle.

The Department of State has not hitherto been averse to having dealings with American citizens appointed by foreign States as plenipotentiaries for special service such as the negotiation of treaties.[4]

[4] Mr. Anson Burlingame, an American citizen, as envoy of China for the purpose of negotiating a treaty, was received by the President as a diplomatic representative in 1868, and with certain Chinese colleagues concluded a treaty with the United States the same year. Dip. Cor. 1868, I, 461–495, 601–604, Moore, Dig., IV, 550–551.

In 1902, Mr. Herbert W. Bowen, American Minister to Venezuela, was permitted by the United States to act as the representative of Venezuela in entering into negotiations for the adjustment of difficulties arising between that country and numerous other States, including the United States. Agreements with the United States concluded Feb. 7, 1903, and May 7, 1903, were signed at Washington by Mr. Bowen in behalf of Venezuela. Malloy's Treaties, II, 1870; also For. Rel. 1903, 788–805.

See, in this connection, Art. 11 of Harvard Draft Convention on Diplomatic Privileges and Immunities.

# TITLE D

# THE RIGHTS AND DUTIES OF MINISTERS

## 1

## RIGHT TO PROTECTION

### a

§ 426. **Of Person and Reputation.** Respect for the State which he represents demands that a minister shall at all times enjoy the right to fulfill his diplomatic function without hindrance or molestation. To that end it is essential that his person be afforded complete protection. This principle, for which deference has been expressed in varying forms, is solidly entrenched in the law of nations.[1] It serves to impose a heavy burden upon every State that is receptive of a diplomatic corps.[2] Accordingly, the statutory law of the United States subjects to grave penalties any one who in any manner "offers violence to the person of a public minister, in violation of the law of nations." [3] Proceedings against the ag-

§ 426. [1] Declared McKean, C. J., in Respublica *v.* De Longchamps: "The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." (1 Dall. 111, 116, Moore, Dig., IV, 622.)

See, also, President Fillmore, second Annual Message, Dec. 2, 1851, Richardson's Messages, V, 118; Ministers Recalled or Not Received, *infra*, § 439. See Charles Noble Gregory, "The Privileges of Ambassadors and Foreign Ministers," *Michigan Law Rev.*, III, 173.

[2] According to Art. 17 of the Harvard Draft Convention on Diplomatic Privileges and Immunities: "A receiving State shall protect a member of a mission and the members of his family from any interference with their security, peace, or dignity." (*Am. J.*, XXVI, *Supplement*, Jan. and April, 1932, 22.) See illuminating comment thereon by the Reporter, Jesse S. Reeves, in which attention is drawn to the contrasting form of Art. 14 of the Convention on Diplomatic Officers, adopted at the Sixth International Conference of American States at Habana, in 1928, and of corresponding provisions of certain other projects, *id.*, 90–97.

[3] Rev. Stat. § 4062, 22 U.S.C.A. § 251. On Jan. 6, 1915, one E. R. S. was indicted at Tacoma, Washington, for a violation of this statute, for having assaulted and offered violence to the person of Count von Bernstorff, the Imperial German Ambassador to the United States. To this indictment the defendant pleaded guilty, Jan. 15, 1915, and was sentenced without further proceedings. There was no written or published opinion in the case. For the facts concerning it, the author is indebted to Hon. Edward E. Cushman, U. S. District Judge, Western District of Washington, before whom the case arose. See, also, United States *v.* Ortega, 11 Wheat. 467.

See Arts. Ia and Ib of final protocol of agreement between China and the Powers, Sept. 7, 1901, respecting the appointment of Prince Tschun as Ambassador to convey to the Emperor of Germany an expression of regret for the assassination of Baron von Ketteler, the German Minister to China, in 1900, and the erection on the spot of the assassination of a commemorative monument worthy of the rank of the deceased, For. Rel. 1901, Append. 313, Moore, Dig., V, 518. Respecting the expiatory mission of Prince Tschun, see For. Rel. 1901, 187.

See For. Rel. 1912, 268–276, concerning an assault upon Mr. Gibson, American Chargé d'Affaires at Habana, Aug. 27, 1912, and the prosecution and conviction of the offender.

See also documents in Hackworth, Dig., IV, § 398.

gressor must be instituted on complaint under oath of the person assaulted, or of a witness to the assault.[4]

When strong antipathy towards the policies of a particular State arouses the feelings of the populace within the territory of another, the task of adequately protecting the diplomatic representative of the former accredited to the latter may demand the taking of special precautionary measures. The territorial sovereign must weigh the condition of the public mind in determining the character and extent of requisite precautions; and these may tax the full measure of its strength.[5]

On January 26, 1938, a Japanese soldier at Nanking did not hesitate to slap Mr. Allison, third secretary of the American Embassy at that place while engaged in the performance of his duties.[6] For this act, which aroused a sense of indignation in the United States, apologies were duly offered.[7]

A foreign minister is entitled to the same degree of protection for his reputation as for his person, and for like reasons. Hence it behooves the State to which he is accredited to shield him from insult as well as personal violence, and to prosecute with vigor him who attempts to defame him.[8]

According to the existing law, whoever within the jurisdiction of the United States falsely assumes or pretends to be a diplomatic or consular (or other) official of a foreign government, duly accredited as such to the Government of the United States, with intent to defraud such Government or any person, and takes upon himself to act as such, or in such pretended character demands or obtains, or attempts to obtain from any person or from such foreign government or from any officer thereof, any money, paper, document or other thing of value, subjects himself to fine or imprisonment, or both.[9]

b

§ 426A. **Of a Minister with Whose Country the Receiving State Becomes at War.** A State which embarks upon war finds itself under a special obligation towards a diplomatic officer (and his staff) accredited to itself by the enemy, and who may be within its domain upon the outbreak of the conflict.

[4] Mr. Frelinghuysen, Secy. of State, to Mr. Preston, Haitian Minister, July 10, 1883, MS. Notes to Haiti, I, 301, Moore, Dig., IV, 625.

See The State *v.* Acuna Araya, Costa Rica, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 243, where the commission of acts of violence against the person of a diplomatic officer, "being the logical and natural consequence of the situation brought about by the offended person himself," were not regarded by the court "as a violation of the diplomatic immunity," since the attitude assumed by the diplomatic officer "justified the reaction of the accused party."

[5] On a certain occasion in December, 1933, when the ambassador of a European State, whose policies in relation to a particular matter had aroused the antagonism of an element of the people resident on Manhattan Island, undertook to make a public address in New York City, the local authorities took extraordinary means to safeguard his person and protect him against insult.

[6] Dept. of State Press Release, Jan. 29, 1938, 178–181.

[7] *Id.*, 181.

[8] Opinion of Mr. Bradford, Atty. Gen., 1 Ops. Attys. Gen., 52, Moore, Dig., IV, 629; opinion of Mr. Lee, Atty. Gen., 1 Ops. Attys. Gen., 71, Moore, Dig., IV, 630; Count Vinci, Italian Chargé, to Mr. Hay, Secy. of State, June 20, 1899, For. Rel. 1899, 413, Moore, Dig., IV, 630.

[9] Act of June 15, 1917, Chap. 30, Title VIII, § 2, 40 Stat. 226.

That belligerent must make every endeavor not only to protect his person and property after that event, but also to safeguard, and to facilitate when possible, the departure of the officer from its territory.[1] A belligerent may in fact, however, if inclined to doubt the ease or success of the effort of its own diplomatic representative in leaving the territory of the State that has become its enemy, detain the diplomatic representative accredited by the enemy to itself until assured that its own officer is departing from enemy territory. Thus, upon the outbreak of war between the United Kingdom and Germany, in September, 1939, the German Government appeared to be unwilling to permit the withdrawal of the British Ambassador and his staff from German territory until the German diplomatic officers accredited to the United Kingdom should have left England, a circumstance which caused the British Government to prevent the departure from Gravesend of the Dutch steamer *Batavia IV,* which had been chartered to remove the German diplomatic party to Holland, until it was ascertained that an appropriate arrangement and procedure had been effected through the medium of the Netherland Government for the departure of the members of both missions from belligerent soil.[2]

It is not understood that the United States upon becoming a belligerent has as yet for any reason sought to detain within its territory after the outbreak of war the diplomatic representative accredited to itself by the State which became its enemy. Nevertheless, the obligation to endeavor to protect the person of such an individual may not be deemed to beget one also invariably to permit him immediately to depart the country, or to preclude the State from interning him temporarily under appropriate conditions.[3]

C

§ 427. **Of Domicile and Property. Archives.** All the reasons which establish the independence and inviolability of the *person* of a diplomatic officer, apply likewise to secure the immunities of his *house.* It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the State and all other nations.[1]

§ 426A. [1] According to Art. 5 of the Regulations on Diplomatic Immunities adopted by the Institute of International Law on Aug. 13, 1895: "It [the privilege of inviolability] shall hold good, even in time of war between the two Powers, for as long a time as is necessary for the minister to leave the country with his staff and his effects." (*Annuaire,* XIV, 241, J. B. Scott, Resolutions, 120.)

"It [inviolability] is not affected by the breaking out of war between his own country and that to which he is accredited. In such an event, it is the duty of the government to which he is accredited to take every precaution against insult or violence directed against him or any of the persons, whether belonging to his family or suite, covered by the right of inviolability, or against his residence or baggage, and to allow him to withdraw with his suite in all security. In case of need, special facilities should be afforded him, free of expense, and after his departure the embassy house and its contents should be respected." (Satow, 3 ed., § 320 )

See Garner, World War, I, 39–47. Also Sir Cecil Hurst, "*Les Immunités Diplomatiques,*" *Recueil des Cours,* 1926, II, 115, 231–236.

[2] See statement in *The Manchester Guardian Weekly,* Sept. 8, 1939, 192.

[3] [The problem was to tax the resourcefulness of the United States when it became a belligerent in World War II.]

§ 427. [1] The language of the paragraph in the text is that of McKean, C. J., in Respublica *v.* De Longchamps, 1 Dall. 111, 117.

An attack upon the house of a minister is equivalent to an attack upon his person.[2] Prior to or simultaneously with the outbreak of war, when the public mind is inflamed against a foreign State which is generally regarded as a probable enemy, it becomes necessary to take special precautions to guard the legation or embassy of that State from outrage. If it is subjected to violence, the duty of the territorial sovereign to make apology seems obvious.[3]

As a means of enabling the United States to respond to its international obligations in the premises, the Congress through a joint resolution approved February 15, 1938 declared:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the superintendent of police of the said District; or to congregate within five hundred feet of any such build-

---

See Art. 14 of convention on Diplomatic Officers adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 206.

See Francis Deák, "Immunity of a Foreign Mission's Premises from Local Jurisdiction," *Am. J.*, XXIII, 582.

[2] United States *v.* Hand, 2 Wash. C. C. 435, Moore, Dig., IV, 627, respecting an attack upon the house of the Russian Chargé in Philadelphia in 1810, and the indictment of a participant for assault upon the Chargé. See, also, Mr. Madison, Secy. of State, to Governor McKean, May 11, 1802, 14 MS. Dom. Let. 18, Moore, Dig., IV, 627.

[3] Sir E. Goschen, British Ambassador in Berlin, to Sir Edward Grey, Secretary of State for Foreign Affairs, Aug. 8, 1914, with respect to the mob violence directed against the British Embassy at Berlin, Aug. 4, 1914, and indicating the assurances of regret expressed by Herr von Jagow, German Secretary for Foreign Affairs, at what had occurred. Misc. No. 8 (1914), Cd. 7445.

Professor Reeves said in his Comment as Reporter on the second paragraph of Art. 3 of the Harvard Draft Convention on Diplomatic Privileges and Immunities: "There is another and a special duty of protecting the premises of a mission against certain acts threatened or of special protection which necessarily varies according to circumstances, and manifestly will be increased in time of political disturbance, or if violence against the premises of the mission is threatened. Protection against invasion of the premises of a mission or of a member of a mission means protection against any attempt to enter the premises against the will of the chief or other members of the mission. The duty, however, goes further than that. The receiving State is under a duty to protect the premises against any acts tending to interfere with the enjoyment or possession of such premises. The duty of the receiving State as to the personal protection and security of members of a mission is considered in Article 17. The special duty of protection of premises would include protection against crowds or mobs collected in the vicinity of the premises for the purpose of expressing abuse, contempt or even disapprobation of the sending State or of its mission, or of the members of a mission. A similar duty would seem to exist to protect such premises against so-called 'picketing,' this being an act tending to disturb the peace and dignity of the mission." (*Am. J., Supplement*, Jan. and April, 1932, XXVI, 56–57.)

ing or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.[4]

The obligation to protect the premises of a foreign diplomatic mission would seem to embrace a special duty to safeguard the confidential character of the archives thereof.[5] The burden resting upon the territorial sovereign in relation to both doubtless continues after the discontinuance of a mission, for whatsoever cause, and regardless of whether the custody of either has been taken over by the diplomatic representative of a third State.[6]

The invasion of the British Embassy at Petrograd in September, 1918, by so-called red guards, productive of the killing of a British officer therein and at a time when the embassy was under the protection of the Netherland Legation in that city, is illustrative of the lack of concern with which in seasons of unrest or political upheaval a State may in fact defy a legal obligation of long standing and general acceptation.[7] On May 4, 1936, with the collapse of governmental authority at Addis Ababa following the flight of Emperor Haile Selassie, the American Legation in that city was subjected to persistent attacks by bands of marauders, who were stoutly resisted by the Minister Resident, Mr. Engert, and other occupants of the mission. He and his associates were, however, obliged with the aid of a British convoy of Sikhs to evacuate the Legation and to take

[4] 52 Stat. 30, 22 U.S.C.A., § 255*a*.

According to § 2 of the same act, "the police court of the District of Columbia shall have jurisdiction of offenses committed in violation of this joint resolution; and any person convicted of violating any of the provisions of this joint resolution shall be punished by a fine not exceeding $100 or by imprisonment not exceeding sixty days, or both: *Provided, however,* That nothing contained in this joint resolution shall be construed to prohibit picketing, as a result of bona-fide labor disputes regarding the alteration, repair, or construction of either buildings or premises occupied, for business purposes, wholly or in part, by representatives of foreign governments." (52 Stat. 30, 22 U.S.C.A., § 255*b*.) The validity of the enactment was upheld in Frend *v.* United States, 100 F. (2d) 693.

[5] Art. 5 of the Harvard Draft Convention on Diplomatic Privileges and Immunities declares: "A receiving State shall protect the archives of a mission from any violation, and shall safeguard their confidential character, wherever such archives may be located within the territory of the receiving State, provided that notification of their location has been previously given to the receiving State."

[6] See Art. 7 of Harvard Draft Convention on Diplomatic Privileges and Immunities.

[7] See memorandum from Mr. Barclay, British Chargé d'Affaires *ad interim* at Washington, to the Secy. of State, Sept. 6, 1918, For. Rel. 1918, Russia, I, 665; Report from the Netherland Minister at Petrograd concerning conditions in that city, communicated by the British Foreign Office to the American Ambassador at London, Oct. 1, 1918, *id.*, 675.

According to Department of State Press Releases of Feb. 11 and 14, 1927, the American Minister at Lisbon reported that in the course of revolutionary disturbances in that city, the Legation premises had been "rather badly shot up," that the second secretary had been "shot at," that the wife of the minister had narrowly escaped death from a rifle shot, and that the minister had been obliged to remove his family from the Legation until it ceased to be within the range of fire.

On Sept. 3, 1939, the American Ambassador to Poland reported to the Dept. of State that on that date at Constanza, a German bomber in a power dive dropped six heavy bombs, one of which seriously damaged a villa adjacent to that of the American Ambassador, and to a lesser degree damaged that of the Ambassador; that an incendiary bomb struck in the grounds of the Ambassador's villa but failed to explode; that neither the Ambassador nor members of his family, all of whom were present in the villa at the time, were injured. Dept. of State Bulletin, Sept. 9, 1939, 234. See also reports from Ambassador Biddle, in Dept. of State Bulletin, Sept. 16, 1939, 249 and 250; and report from the American Chargé in Berlin, in Dept. of State Bulletin, Oct. 7, 1939, 345, concerning the destruction by aerial bombardment of the Ambassador's residence at Warsaw, as well as the Consulate General in that city.

refuge in the British Legation, until the arrival of Italian troops enabled them to return to and resume occupation of the American Legation.[8] If these cases accentuate the point that even at the present time the defense of the premises of a mission may under certain exigencies rest upon the shoulders of the occupants thereof, they are none the less examples of failure on the part of the territorial sovereign to perform an acknowledged international obligation.[9] In the situation at Addis Ababa, excuse for that failure might be sought if not found in the fact that the abandonment of governmental functions was caused by the approach of the military forces of an enemy. If that approach was the proximate cause of that abandonment, it may still be doubted whether responsibility for the consequences of the internationally illegal treatment sustained by the American and other legations in that city could fairly be imputed to the successful belligerent as a part of the price of its military achievement. If this be true, it necessarily follows that the territorial sovereign is not the guarantor of the safety or immunity from attack of the premises of diplomatic missions within its domain, and that the latter under circumstances that sometimes, if rarely, occur, must assume risks of exposure to treatment which the law of nations definitely proscribes.

d

§ 427A. **Removal of Diplomatic Mission from Territory under Control of State to Which It Is Accredited.** In seasons of war or civil strife, the protection of their persons as well as the proper performance of their functions, may justify the departure of diplomatic officers accredited to the territorial sovereign then engaged in conflict, to an area outside of its control, and even to the territory of a foreign State. No requirement of international law demands that those officers pursue a different course when for any reason the safety of their persons or property or the continued performance of their duties is jeopardized by maintaining a residence or official headquarters either at their normal posts or elsewhere within the territory of the receiving State.

The United States has claimed the benefit of this latitude on numerous occasions. In 1918, for example, the American Embassy at Petrograd was removed to Vologda, some three hundred and fifty miles distant therefrom; [1] and later that Embassy was removed from Vologda to Archangel.[2] In August, 1936, during the course of the civil war in Spain, the American Ambassador to that country, with others of the diplomatic corps accredited to Spain, went to

[8] See *New York Times*, May 5, 6 and 7, 1936. The complete evacuation of the Legation occurred early on May 5, 1936. Vice Consul Cramp returned with three associates later on that day, upon the arrival at Addis Ababa of Italian forces. There followed a renewed attack upon the Legation which necessitated his appeal for special protection by those forces which was duly accorded. The return of the Minister and his other associates took place early on May 6, 1936.

See also Dept. of State Press Releases, May 9, 1936, 405–414; *id.*, May 16, 1936, 441–449.

[9] Concerning the siege to which the several legations at Peking were subjected in 1900, see The Landing of Foreign Forces, *supra*, § 202; also, Intervention, Certain Minor Instances, *supra*, § 83.

§ 427A. [1] See For. Rel. 1918 (Russia), Vol. I, 382–403.

[2] *Id.*, 618–640.

Hendaye, France, and there remained throughout the remainder of the conflict.[3] Again, in September, 1939, Mr. Biddle, the American Ambassador to Poland, together with certain of his colleagues accredited by other States to Poland, went to, and made their headquarters in, Roumania.

## 2

## RIGHT OF OFFICIAL COMMUNICATION

### a

§ 428. **In General.** For the proper discharge of his duties and hence as a necessary incident of the right of legation, a diplomatic officer is entitled to correspond freely with his own government or with officials thereof in the State to which he is accredited.[1] Under normal conditions, as in seasons of peace, it is highly desirable that he be permitted to correspond also with the diplomatic agencies of his country in other States, especially with those located in areas not remote from his post,[2] with the diplomatic corps at the capital of the State to which he is accredited,[3] with the nationals of his country who may be within its domain,[4] and doubtless also with the agencies of some important international organizations, such, for example, as the Permanent Court of International Justice, or the League of Nations, or the Pan American Union. The general disposition of States to raise no obstacle has hastened the growth of a practice in this regard that may be expected ultimately to mark the existence of irrevocable concessions on the part of receiving States.[5]

As a means of exercising the privilege of correspondence, a diplomatic officer

[3] See Padelford, Spanish Civil Strife, Chap. V.

§ 428. [1] Mr. Fish, Secy. of State, to Baron Gerolt, Nov. 21, 1870, For. Rel. 1870, 196, Moore, Dig., IV, 699; Mr. Bayard, Secy. of State, to Mr. Peralta, Salvadorean Minister, April 25, 1885, MS. Notes to Costa Rica, II, 34, Moore, Dig., IV, 701; Mr. Hay, Secy. of State, to Mr. Goodnow, Consul at Shanghai, telegram, Aug. 1, 1900, For. Rel. 1900, 260, Moore, Dig., IV, 703.

"That a sending State may freely communicate with its mission without interference by the receiving State is fundamental to the maintenance of diplomatic intercourse and is a principle universally recognized." (Comment of the Reporter on Art. 14 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 81.)

[2] Thus the Department of State, as a matter of economy, has found it constantly expedient to instruct a mission, such as the Embassy at Paris or London, to transmit by telegraph to the American missions at certain other European capitals the texts of important telegraphic communications on matters of common interest.

[3] This privilege may be regarded at the present time as of utmost value as a means of enabling a diplomatic officer adequately to advise his government on matters of common concern to numerous other States as well as his own and that to which he is accredited.

[4] Thus, according to press despatches of July 6, 1935, the American Legation at Addis Ababa was employed by the United States to advise American nationals in Ethiopia to leave the country in view of the prospect of war between that State and Italy.

[5] Art. 14 of the Harvard Draft Convention on Diplomatic Privileges and Immunities covers these matters with fullness and precision, and the Comment thereon acknowledges with candor that it yields some privileges which are as yet conceded merely as a matter of comity.

*Cf.* the conservative provisions of Art. 20 of the project of the International Commission of American Jurists, of 1927, printed as Appendix 6 to Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 171, 173; Art. 15, of Convention on Diplomatic Officers, adopted at Habana, Feb. 20, 1928, at the Sixth International Conference of American States, Appendix 7, *id.,* 175, 176.

may avail himself of the usual modes of communication, such as the telegraph,[6] or the mails, or personal messengers.[7] Howsoever transmitted, his communications when so desired may be in cipher.[8] In time of war a belligerent State may, however, not unreasonably restrict the use of cipher by a foreign diplomatic officer to messages passing between his mission and his government.[9]

The Department of State has asserted that the right of correspondence should be available to an American diplomatic officer at his post in a State engaged in war to which the United States is not a party, and that, whether he is in a besieged place,[10] or in one rendered generally inaccessible by blockade.[11] A minister should, however, under such circumstances have unfailing regard for the safety of the State of his residence.[12] He should be scrupulous to ascertain that in the exercise of his rights, he is not also unwittingly opening a forbidden and unlawful channel of communication to outsiders.[13] Persistent abuse of his privileges would justify their curtailment.[14]

Even in seasons of peace, irregularities in the use of diplomatic pouches may occur. Thus on August 14, 1939, the French ambassador at Washington, in a note to the Acting Secretary of State acknowledged the receipt of a letter from the Department of State of August 11, 1939, containing the report of a federal grand jury in New York, which pointed out that on two occasions (in April, 1938, and in January, 1939), an American moving-picture photographer was

[6] Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, May 6, 1899, For. Rel. 1899, 579, Moore, Dig., IV, 703.

[7] Declared Mr. Seward, Secy. of State, in a communication to Mr. Burton, Minister to Colombia, No. 1, May 29, 1861: "The right to send despatches of a minister, secured by the law of nations, certainly involves the right to designate the messengers and the inviolability of his person when executing the commission." MS. Inst. Colombia, XVI, 1, Moore, Dig., IV, 695.

[8] Mr. Fish, Secy. of State, to Mr. Bancroft, Minister to Prussia, No. 264, Nov. 11, 1870, For. Rel. 1870, 195, Moore, Dig., IV, 697.

[9] Mr. W. H. Page, American Ambassador to Great Britain, to Secy. of State, telegram, Aug. 27, 1914, American White Book, European War, II, 72; Same to Same, Dec. 29, 1914, *id.*, II, 86; Acting Secy. of State, to Mr. Reinsch, American Minister to China, telegram, Jan. 2, 1915, *id.*, II, 86.

[10] See discussion between the United States and the North German Union respecting the correspondence of Mr. Washburne, American Minister at Paris, during the siege of that city in 1870, Moore, Dig., IV, 696–699. See, also, For. Rel. 1900, 259–264, respecting communication with the American Minister at Peking during the siege of the legations in that city in 1900, Moore, Dig., IV, 703–704.

[11] Mr. Fish, Secy. of State, to Mr. Kirk, No. 3, June 17, 1869, MS. Inst. Argentine Republic, XV, 317, Moore, Dig., IV, 696.

[12] Mr. Seward, Secy. of State, to Mr. Burton, Minister to Colombia, No. 1, May 29, 1861, MS. Inst. Colombia, XVI, 1, Moore, Dig., IV, 695.

[13] See, for example, Count Bismarck to Mr. Washburne, American Minister at Paris, Jan. 28, 1871, For. Rel. 1871, 136, Moore, Dig., IV, 699.

[14] This was virtually admitted by Mr. Fish, Secy. of State, in a communication to Mr. Bancroft, Minister to Prussia, No. 264, Nov. 11, 1870, For. Rel. 1870, 195, Moore, Dig., IV, 697–698.

With respect to the impropriety of conduct on the part of the Swedish Legation at Buenos Aires in sending, in 1917, as its own official messages addressed to its own Government, secret despatches of the German Chargé d'Affaires at Buenos Aires for transmission to his Government, and pertaining to the ruthless policy of Germany as a belligerent with respect to submarine warfare, see David Jayne Hill, "The Luxburg Secret Correspondence," *Am. J.*, XII, 135. See, also, Burton J. Hendrick, "The Zimmerman Telegram," The Life and Letters of Walter H. Page, 1925, Vol. III, Chap. XII.

See also Mr. White, Assist. Secy. of State, to the Ambassador to Peru, March 31, 1933. Hackworth, Dig., IV, 619.

able to use the French diplomatic pouch in order to bring films into the United States without paying customs duties. Declaring that there may have been ignorance of the American regulations or lack of surveillance on the part of certain of the French officials who handled the shipment by the pouch of the films in question, the Ambassador expressed his regrets, and gave assurance that not one of the officials in question "deliberately facilitated the usage of the diplomatic pouch by an American businessman in order to permit him to defraud the Federal customs." It was added that the French Government had taken all measures necessary to correct the irregularities which might have been committed in the use of the diplomatic pouch and to prevent their recurrence.[15]

Incidental to the right of official communication between a State and its representatives abroad, is the right to demand the inviolability of official correspondence.[16] The United States, when itself a belligerent as well as when a neutral, has steadfastly urged recognition of this principle.[17] In November, 1914, the Department of State initiated a proposal for the establishment of uniform regulations for the transmission of correspondence of American diplomatic and consular officers in belligerent territory. The plan, which proved acceptable to Austria-Hungary as well as to certain other Powers then at war, provided in part that official correspondence under seal of office between the Department and such officers should not be molested.[18]

On January 5, 1918, Secretary Lansing announced to the heads of diplomatic missions in Washington that the following regulations governing the censorship of mails entering and leaving the United States had been put in force:

1. Uncensored correspondence is permitted between embassies and legations and their respective governments, when under official seal.

2. Uncensored correspondence is permitted between embassies and legations in the United States and embassies and legations of the same power situated in other countries, when under official seal. The same applies to similar official correspondence in transit through the United States.

3. Although consular officials have no claim as such to uncensored use of the mails, this use will be granted out of courtesy and uncensored correspondence will be permitted between them and their governments, when under official seal. The extension of the privilege of exemption to consular officials shall be strictly confined to consuls *de carrière*.

4. Private letters addressed to chiefs of mission in the United States will not be subject to censorship.

[15] Dept. of State Bulletin, Aug. 19, 1939, 133.

[16] Mr. Seward, Secy. of State, to Lord Lyons, British Minister, April 5, 1862, Dip. Cor. 1862, 258, 259, Moore, Dig., IV, 712; Mr. Quincy, Acting Secy. of State, to Mr. Thompson, No. 56, March 25, 1893, For. Rel. 1893, 623; Mr. Gresham, Secy. of State, to Mr. Thompson, Minister to Turkey, No. 54, March 17, 1893, *id.*, 620, Moore, Dig., IV, 712.

See also documents in Hackworth, Dig., IV, 617–620.

[17] Instructions issued by the Secy. of the Navy, Aug. 18, 1862, to American Naval Officers, Moore, Dig., IV, 712. These instructions were attached as Appendix I to a communication of Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, For. Rel. 1915, Supplement, 578, 589.

[18] Concerning the details of the arrangement, see Consuls, Correspondence with Governmental Agencies of the Consul's State, *infra*, § 468.

See documents in Hackworth, Dig., IV, 625–629.

5. No private correspondence whatsoever of individuals or firms shall be forwarded to or from diplomatic or consular officers under official cover or seal. Personal correspondence of diplomatic and consular officials shall not contain letters forwarded in behalf of third persons.

Owing to the necessities of the military situation the Government of the United States is compelled to request the different governments interested to give written guarantee in this regard.[19]

On May 31, 1918, the British Government announced that inasmuch as communications of a personal and business nature had been exchanged through the media of diplomatic missions in Germany under neutral official covers, "thereby deceiving the Allied Governments," it was felt no longer possible to continue the practice of exempting from censorship such postal packets ("passing this country in transit which bear the address of a foreign government department or of the diplomatic representative of a foreign country in a third State") whenever there was reason to suspect that an abuse of the confidence of the British Government had been attempted. Accordingly, notice was given that thereafter locked bags would no longer be handled by the British postal administration.[20] In view of the circumstances set forth by the British Government as grounds for the adoption of its new regulations, the Government of the United States was indisposed to take exception to them as a war measure, but desired to make all due reservations as to its attitude when the conditions calling for the regulations should have passed.[21] Moreover, it announced, on August 29, 1918, that it was not then disposed to adopt the procedure suggested.[22]

In August, 1936, Mr. Wendelin, in charge of the American Embassy at Madrid, reported to the Department of State that an official letter addressed to the Embassy had been opened and censored. That officer immediately took the matter up with the Foreign Office, requesting that steps be taken without delay to prevent a repetition of this violation of diplomatic correspondence. He later reported that the Minister of State, in a formal note, expressed profound regret

[19] For. Rel. 1918, Supplement 1, Vol. II, 1755.

On the same date, the Secretary of State announced to the heads of diplomatic missions at Washington which represented countries aligned with the United States in the existing war certain exceptions to the new regulations. He said: "The transmissions of uncensored private mail of diplomatic officials of the Allies, to and from all countries, will be permitted, provided that mail originating with a diplomatic official bear the name and rank of the official, together with the official seal of the mission to which he is accredited, and provided that mail intended for a diplomatic official bear his name and official rank together with the name and address of the sender." (*Id.*, 1755.)

See, also, Circular Memorandum from the Acting Secy. of State, to the heads of diplomatic missions at Washington, July 25, 1917, For. Rel. 1917, Supplement 2, Vol. II, 1237.

See circular note of Sept. 8, 1918, from the Secy. of State to the chiefs of mission at Washington, representing neutral countries, embracing regulations that had been put in force governing the exchange of cablegrams in code or cipher, Hackworth, Dig., IV, 630; also circular note of like date addressed by him to the chiefs of mission of countries associated with the United States in the war, regarding regulations governing the exchange of cablegrams in code or cipher, *id.*, 631.

[20] Mr. Laughlin, American Chargé d'Affaires at London, to Mr. Lansing, Secy. of State, June 7, 1918, For. Rel. 1918, Supplement 1, Vol. II, 1757.

[21] Mr. Adee, for the Secy. of State, to Mr. Laughlin, July 17, 1918, *id.*, 1759.

[22] Mr. Lansing, Secy. of State, to Mr. Barclay, British Chargé d'Affaires at Washington, Aug. 29, 1918, *id.*, 1759.

for the violation of the Embassy correspondence, adding that he had requested the Ministry of Communications "to take all necessary measures in order that official, as well as personal, correspondence of diplomatic representatives accredited in Madrid be completely exempt from all censorship." [23]

b

§ 429. **Couriers and Bearers of Despatches.** A government, or its ministers abroad, may employ couriers or bearers of despatches for the transmission of official correspondence.[1] American diplomatic representatives are permitted to do so in case the mails are temporarily obstructed or deemed unsafe, or "an occasion arises to address the Department of State on subjects materially affecting the interests of the United States which might suffer from delay or reasonably apprehended interruption in the transmission of the despatch." [2] Couriers and bearers of despatches employed by a diplomatic representative in the service of his government are declared to be privileged persons, as far as it is necessary for their particular service, whether in the State to which the diplomatic representative is accredited, or in the territory of a third State with which the government they serve is at peace.[3] They are immune from arrest.[4] Under normal circumstances the right of a diplomatic officer to choose a person to act as a bearer of despatches is doubtless unlimited.[5] In time of war, however, a diplomatic officer representing a belligerent power in a neutral State would subject himself to grave criticism should he employ as a secret bearer of official despatches through the lines of the enemy, a national of that State and one protected by its passport.[6]

[23] Dept. of State Press Releases, Aug. 29, 1936, 189.

Instances of complaint by the American Government on account of the censoring of American diplomatic and consular mails by certain belligerent States in 1939 and 1940, are given in Hackworth, Dig., IV, 631–632.

§ 429. [1] Mr. Gresham, Secy. of State, to Mr. Thompson, telegram, April 1, 1893, For. Rel. 1893, 624, Moore, Dig., IV, 713; Mr. Bryan, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Nov. 25, 1914, For. Rel. 1914, Supplement, 542.

[2] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. VII–11.

[3] *Id.*, Chap. XVII–27. Also Foreign Service Regulations of the United States, III–1, note 5, as of January, 1941, Hackworth, Dig., IV, 621.

[4] Dana's Wheaton, § 243, Moore, Dig., IV, 713; Mr. Fish, Secy. of State, to Mr. Brent, Oct. 19, 1870, *citing* Calvo, 1868 ed., paragraph 240, page 350, For. Rel. 1870, 519, Moore, Dig., IV, 714; McNair's 4 ed. of Oppenheim, I, § 405.

[5] Mr. Fish, Secy. of State, to Mr. Freyre, Dec. 17, 1870, MS. Notes to Peru, I, 411, in which it was said, "No appointment in a foreign country of a person as courier under arrest, or liable to arrest, would be approved by this Department, especially if such appointment was in any way intended to screen the appointee from his liabilities under the municipal law." Moore, Dig., IV, 715, 716.

[6] Mr. Lansing, Secy. of State, to Mr. Penfield, American Ambassador to Austria-Hungary, Sept. 8, 1915, relative to the case of Mr. Dumba, Austro-Hungarian Ambassador at Washington, whose recall was requested by the United States, For. Rel. 1915, Supplement, 933.

"On July 13, 1917 the Department of State informed the heads of diplomatic missions at Washington that thereafter the Government of the United States would recognize as diplomatic couriers of foreign governments only persons regularly employed in the courier service of the foreign government concerned or their diplomatic and consular officers of career and that in all cases the right of search of the personal baggage and effects of couriers was reserved, except in the case of diplomatic officers." (Hackworth, Dig., IV, 621.)

## 3

## MISCELLANEOUS PRIVILEGES

### a

§ 430. **Display of National Flag.** The right of a public minister to display the flag of his country from his official residence would probably not be challenged at the present time by any State.[1] It has been declared by the Department of State that it is in most capitals customary to place an official shield above the principal entrance of the diplomatic representative's residence, or the offices of the mission, when these are separate from his residence, with a short flagstaff set above the shield, on which to display the flag of the United States on occasions of special ceremony. It is stated, however, that a mission "is not under the same necessity of displaying a coat of arms and raising a flag as a consulate." [2]

No local law purports to deter a foreign diplomatic officer from displaying at will the flag of his country in the territory of the United States.[3]

### b

§ 431. **Liberty of Worship.** That a foreign minister may within the precincts of his legation assert the right of worship for the benefit of himself, his staff and his fellow countrymen, irrespective of the contrasting views of the religious establishment of the State to which he is accredited, appears to be accepted doctrine.[1] It is important, however, that religious services should be conducted in such manner as not to offend the sensibilities of the local adherents of any differing persuasion.[2]

In a country such as the United States, where freedom of worship is safe-

§ 430. [1] Display of Foreign Flags, *supra*, § 212.

An Associated Press Despatch from Moscow, of Sept. 28, 1936, contained in the *New York Times*, Sept. 29, 1936, stated that the American Chargé d'Affaires *ad interim* at Moscow had become the only person in that city permitted to display the American flag, and that upon the arrival of a new American ambassador in that city, he, as the head of the American mission, would be the only individual permitted to make such display.

[2] Instructions to Diplomatic Officers of the United States, Sept., 1931, Chap. VI–1; *id.*, March 8, 1927, Chap. XVI–1.

It seems important to note that the communication of Mr. Knox, Secy. of State, to the Mexican Ambassador, June 21, 1912, For. Rel. 1912, 903, had reference to the display of the American flag by American consular officers in Mexico.

[3] *Compare* Mr. Clay, Secy. of State, to Mr. Obregon, Mexican Minister, Oct. 24, 1827, MS. Notes to Foreign Legations III, 393, Moore, Dig., IV, 554.

§ 431. [1] In the Printed Personal Instructions to Diplomatic Agents of the United States (1885), § 49, Moore, Dig., IV, 555, it was declared that "if any diplomatic agent should assert the right of worship, within his legation, for himself and those of his fellow-countrymen who profess the same faith as he does, he would be upheld, within the limits of the like privilege conceded in the country of his sojourn to other foreign legations." See Religious Freedom. In General, *supra*, § 215.

Also, Satow, Guide to Diplomatic Practice, 3 ed., §§ 405–406; Art. 20, Lord Phillimore's "Proposed Codification of the Law Regarding the Representation of States," Int. Law Association, Report, 34th Conference, 1926, 399.

[2] Mr. Seward, Secy. of State, to Mr. Crosby, Minister to Guatemala, June 19, 1862, MS. Inst. American States, XVI, 219, Moore, Dig., IV, 554. Also Art. X, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 242.

guarded by the Constitution, the exercise of the right accorded a foreign diplomatic officer by the law of nations meets with no obstacle.[3]

c

§ 432. **Transit.** The United States asserts that according to the law of nations a diplomatic officer is entitled to a right of transit to his post, by sea,[1] or through the national domain, whether land[2] or water,[3] of a State other than that to which he is accredited. It is not contended that this right embraces one of sojourn in such State,[4] or that the territorial sovereign, especially if it be engaged in war, may not prescribe the route of transit.[5] Nor is it claimed that the officer while within the territory of a third State is entitled to such jurisdictional immunities as he may justly demand while within that of the State to which he is accredited.[6] It is declared that transit free of customs duties is usually conceded by a third State through whose territories a diplomatic representative passes on his way to or from his post.[7]

The United States appears, however, itself to acknowledge no obligation to permit the transit through American territory of the diplomatic representative of a State whose government it has declined to recognize, especially when that representative is understood to hold political views of which the propagation in that territory might be regarded as detrimental to the public weal.[8]

[3] First Amendment to the Constitution.

§ 432. [1] Mr. Pickering, Secy. of State, to Mr. King, Minister to England, June 17, 1796, MS. Inst. United States Ministers, III, 178, Moore, Dig., IV, 559.

[2] See documents in Moore, Dig., IV, 557–558, concerning the case of Mr. Soulé, American Minister to Spain, who, in 1854, was detained by France while in that country *en route* to his post. It may be observed that his detention was not due to any desire on the part of France to prevent an envoy of the United States from crossing French territory, but with a view to preventing the sojourn on French soil of one whose continued presence there was deemed objectionable. Declares Mr. Moore: "With regard to the action of the French Government in detaining Mr. Soulé, it should be explained that Mr. Soulé, who was a native of France and a naturalized citizen of the United States, was currently reported to have made speeches adverse to the Government of Louis Napoleon and to have held communication with some of its adversaries."

[3] Mr. Seward, Secy. of State, to Mr. Webb, No. 180, Sept. 23, 1866, MS. Inst. Brazil, XVI, 153, Moore, Dig., IV, 560.

See Mr. Root, Secy. of State, to the Secy. of Commerce and Labor, March 16, 1906, Hackworth, Dig., IV, 460.

[4] The United States made no such contention in the Soulé case.

[5] See Mr. Hughes, Secy. of State, to the Minister to Panama, April 29, 1924, Hackworth, Dig., IV, 461.

[6] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. VII, 13. See Acquisition of American Nationality by Birth, by Right of Place, *supra*, §§ 343 and 344.

[7] *Id.* See Mr. Adee, Acting Secy. of State, to Mr. Clayton, Sept. 21, 1903, For. Rel. 1903, 664, where it was stated that the Secretary of Commerce and Labor had expressed opinion "that the action of administrative officers in collecting a head tax on account of the diplomatic and consular officers of foreign countries seeking admission into the United States is in error." In this case such a tax had been imposed upon a diplomatic officer of Japan returning to his country via El Paso and San Francisco, after a residence in Mexico as Chargé d'Affaires of Japan in that State.

[8] In 1926, the Department of State denied to Madame Kollontai, who was understood to have been appointed Soviet Minister to Mexico, a visa on her passport at Berlin, to enable her to enter the United States while in transit to Mexico. She was deemed to be inadmissible as an active and outstanding member of the Russian Communist Party, a member of the Third Congress of Communism International, and a member of the Soviet diplomatic service actively associated with the International Communist subversive movement. See Dept. of State, statement to the Press, Nov. 6, 192

While evidence is wanting that States generally have as yet agreed to yield their right of jurisdiction over diplomatic officers not accredited to them, it is not unreasonable to claim for such individuals freedom from petty annoyances, whether in the form of criminal prosecutions for minor offenses, or of civil suits of trivial importance.[9]

It may be observed that in December, 1916, the British and French Governments honored the application of that of the United States to grant a safe-conduct to Count Tarnowski who had been appointed Austro-Hungarian Ambassador to the United States, together with his suite, although at the time Great Britain and France were at war with the Dual Monarchy.[10] In support of its application, the American Government contended that the United States had "an undisputed right to maintain diplomatic relations through accredited representatives with any nation which it desires," and declared that it could not believe it to be the purpose of the British Government "to interfere with the exercise of this sovereign right." [11] One may well doubt, however, whether the right of the United States to maintain diplomatic relations with a particular foreign State engaged in war embraced also the right to be assured that a safe-conduct would be granted to the diplomatic representative of that State by its enemies, in order to enable him to make his way freely to neutral American territory where his mission was located.[12]

A belligerent State in issuing a safe-conduct through or within its territory

---

According to Art. 15 of the Harvard Draft Convention on Diplomatic Privileges and Immunities: "When a member of a mission, a member of his family, or a member of the administrative personnel is *en route* to or from his post in the receiving State, a third State shall permit his transit and shall accord to him during the transit such privileges and immunities as are necessary to facilitate his transit; provided that the third State has recognized the government of the sending State and is notified of the official character of such person." (*Am. J.*, XXVI, *Supplement*, Jan. and April, 1932, 22.)

[9] Hall, Higgins' 8 ed., § 99; McNair's 4 ed. of Oppenheim, I, § 398, pp. 638–640. *Compare* Dana's Wheaton, §§ 244–247, Moore, Dig., IV, 556; also Wilson *v.* Blanco, 4 New York Supp. 714, Moore, Dig., IV, 557; Holbrook *v.* Henderson, 4 Sandf. 619, Moore, Dig., IV, 557; Carbone *v.* Carbone, 206 N. Y. Supp. 40. See, also, Henry Fort-Dumanoir, in *Clunet*, XXXV, 766–771, and in response thereto, L. A. Tosi-Bellucci, *Sulle Immunità Diplomatiche*, Rome, 1908. For a discussion of the views of both writers, see James Barclay, in *Am. J.*, III, 1048–1051.

[10] See documents in For. Rel. 1916, Supplement, 806.

[11] Mr. Lansing, Secy. of State, to the American Ambassador at London, Nov. 28, 1916, *id.*, 805.

Declared the French Minister for Foreign Affairs in a note to the American Ambassador at Paris, of Nov. 27, 1916, contained in a communication from the Ambassador to Mr. Lansing, Secy. of State, Nov. 27, 1916: "As your excellency knows, it is a fundamental principle of international law in times of war that a belligerent has a right to intervene in the voyage of a neutral ship when it violates neutrality by aiding the interest of the enemy's national defense. When a diplomatic agent is sent by an enemy State to a neutral country and when in that neutral country the enemy State endeavors by every means, even felonious and criminal, to incite and to carry on there a hostile propaganda, to organize spying, to purchase supplies, it is manifest that the conveyance of such an agent would favor the interests of the national defense of the enemy more than the transportation of soldiers or contraband merchandise and would be of the greatest assistance to the enemy State. It is perfectly legitimate for an adversary to intervene and oppose such a voyage. Controversies which have heretofore arisen from the arrest at sea of certain persons have for the greater part been inspired either by political consideration of the moment or by conventional stipulations in treaties in force at the time." (*Id.*, 804.)

[12] See documents in For. Rel. 1917, Supplement I, 585–610, concerning the return of diplomatic officers from their posts upon the severance of relations between their countries.

to the party of a diplomatic representative of its enemy, may well reserve the right of search of baggage and other belongings.[13]

d

§ 432A. **Freedom of Movement in Territory of State to which Accredited.** A usage has grown up which seemingly reflects the common understanding of States that a foreign minister is entitled to freedom of movement in the territory of the country to which he is accredited.[1] Accordingly, restrictions of it must be regarded with disapproval, save under abnormal circumstances when, as in time of war, it is sought to prevent such an official from having access to particular places within that territory by reason of their special relation to the existing conflict. Hence, it occasioned surprise when on February 11, 1941, the Italian Government informed all foreign diplomats accredited to it that they were not to leave Rome without permission.[2] The novelty and comprehensiveness of the restriction, which far transcended a request that particular areas be not visited, likened the diplomats concerned to prisoners, and was hardly compatible with the treatment to be expected by the official guests of a nation. The soundness in point of law of the claim of the Italian Government called for the establishment by it of the fact that in each case where the freedom of movement of the foreign diplomatic officer might be sought to be checked, the restriction applied to him was a reasonable incident in the prosecution of the existing war, and was to be excused on the ground that the failure to apply it might jeopardize the safety of the State.

4

## JURISDICTIONAL IMMUNITIES

a

§ 433. **Early Practices.** Long before the Christian era the idea prevailed that the person of an envoy sent by one ruler to another should be inviolable. Because Hanun, King of the Ammonites, treated with contempt and ridicule the messengers of David, King of Israel, the latter waged war upon the former and overcame him.[1] The Persians in the time of Xerxes were possessed of the same idea, as were also the Greeks.[2] The Roman law gave recognition to it. "An

[13] See documents in Hackworth, Dig., IV, 464–465.

§ 432A. [1] "There appears to be general agreement as to the right of diplomatic agents, implied by this rule [of inviolability], to have complete freedom of movement and to have their persons and personalities respected by the authorities." (Memorandum of Swiss Federal Council, League of Nations Document C.196.M.70.1927.V. pp. 242, 243, quoted in Comment to Art. 17, of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J.*, XXVI, *Supplement,* 93.)

[2] See statement by Herbert L. Matthews, by telephone from Rome, in *New York Times,* Feb. 12, 1941, p. 1.

§ 433. [1] I Chron., XIX; II Samuel, X. See, also, T. A. Walker, Hist., I, 34.

[2] Robert Ward, History of the Law of Nations, Dublin, 1795, 298; also Phillimore, II, § 146, *citing,* W. Wachsmuth, *Jus Gentium quale obtinuit apud Græcos.*

assault upon an ambassador or herald was a violation of the *jus gentium*." [3] Upon the murderer of such a person the Salic Law imposed a penalty, and likewise the codes of the Alamanni, the Saxons, the Frisians and the Lombards.[4]

Permanent diplomatic missions began to be established by the Italian States during the fifteenth century, and before its close, by France and other powers of western Europe.[5] It may have been the safety accorded the person of an ambassador which made those missions possible; for his work was oftentimes of a character such as to imperil the life of one not specially protected. Influenced doubtless by the nature and theories of Venetian diplomacy of an earlier century, that of the sixteenth and seventeenth encouraged the fomentation of foreign conspiracy and rebellion through the instrumentality of public ministers. The question, therefore, frequently arose concerning the treatment to be accorded an ambassador who plotted against the life of the monarch to whom he was accredited, and whose very presence was a menace to the safety of the State. The early cases reveal a singular oneness of view.

John Leslie, Bishop of Ross, Ambassador of the deposed Mary, Queen of Scots, was, in 1571, found to have been an active participant in the plot which resulted in the execution of the Duke of Norfolk. Notwithstanding the opinion of eminent civilians, that according to the Roman law the Bishop might be punished, he was, nevertheless, merely banished from the Kingdom.[6] In 1584, Mendoza, the Spanish Ambassador at London, conspired to overthrow Queen Elizabeth. Her council followed the opinions of Albericus Gentilis, and of one Hottoman, who advised that an ambassador though a conspirator could not be lawfully put to death, but should be referred to his sovereign for punishment. Mendoza was accordingly compelled to depart the realm, while charges

[3] T. A. Walker, Hist., I, 45, *citing* T. Liv., IV, 17, 19, 32; VI, 19; IX, 10; XXI, 25; XXXIX, 25.

[4] David J. Hill, European Diplomacy, I, 39–40, *citing* Pertz, *Monumenta Germaniæ Historica; Lex Alamannorum,* XXX; *Lex Saxonum,* c. 7; *Lex Frisonum,* XVII, and Merkel's edition of *Lex Salica,* p. 96.

"The infidel was taught by his Koran the sacredness of embassies, though he sometimes interpreted the injunction as being applicable only to Mahometan nations [*citing* Miruss, s. 333; Merlin, Ministre Public, V, 31, and the Turk for a long time persisted in considering the European Ambassador as a tolerated spy in time of peace, and a hostage to be imprisoned at the breaking out of war. Lastly it should be observed, that even during the Middle Ages of violence and lawlessness in Europe, it was the principle of the Roman law, which afterwards took deep root in Christendom, that an injury done to an Ambassador should be treated by the Sovereign of the wrongdoer as a crime against the State." (Phillimore, II, §§ 150 and 151.)

[5] David J. Hill, European Diplomacy, II, 153–154, 308–310. The same writer declares that: "Although permanent missions became practically universal before the close of the sixteenth century, the expression '*Corps Diplomatique*' did not come into use until about the middle of the eighteenth." *Id.,* II, 310, Note 1.

See Montell Ogdon, Juridical Bases of Diplomatic Immunity, Washington, 1936.

[6] T. A. Walker, Hist., I, 176–179, *citing* Camden, Hist. of Elizabeth, II, 26 and 62. As to the misapplication of the Roman law upon which the civilians relied in declaring that the Bishop was subject to the jurisdiction of England, see Phillimore, II, § 148, *citing* Wicquefort, *L'Ambassadeur et ses Fonctions,* I, Chap. XXVII, also Ward, Hist., II, 312.

Declares Walker: "The English civilians were by no means alone in their view of the rights belonging by strict law to the local sovereign." (Hist., I, 179.) He adverts to the opinion of Henry IV of France, in Bruneau's Case, 1605, Hist. of Henry the Great, p. 318, and to the view of Coke, 4 Inst. 153, and to that of the King's Attorney in 1615, in the case of Roy *v.* Owen, 1 Rolle, 185.

were preferred against him in Spain.[7] Three years later the assassination of the Queen was the object of a conspiracy in which L'Aubespine, the French Ambassador, was a participant. It is declared that Burleigh reproached him with the design, but never thought of trying him, and "bade him beware how he committed Treason any more." [8]

In the reign of Henry IV of France, De Zuniga, the Spanish Ambassador, plotted with others to carry off to Spain Mlle. D'Entragues and her son by Henry. The King, upon the discovery of the plot, would not permit the ambassador to be punished.[9] In 1603, one of the suite of the Duc de Sully, then Marquis of Rosny, Ambassador at London, killed an Englishman in the course of a quarrel. The Duc, assembling a council of Frenchmen, condemned his attaché to death, but surrendered him to the English authorities. King James I pardoned him.[10] In 1618, Alphonso de la Cueva, Marquis de Bedmar, the Spanish Ambassador to Venice, was shown to have entered into a conspiracy to burn the city, murder the nobles and overturn the government. Nevertheless, the Senate merely sent him to Milan, and requested his recall by the King of Spain.[11] In the reign of James I, the Spanish Ambassadors, Inoyosa and Colonna, announced to the King that the Duke of Buckingham sought, with the aid of Parliament, to imprison and dethrone him. It is said that "both the Court and the Parliament deemed this a scandalous libel, but knew not how to proceed." Upon the advice of Sir Robert Cotton, complaint was made to the King of Spain, declares Ward, and the Ambassadors were allowed to depart, but without the usual presents.[12]

(1)

§ 434. **The Same.** The foregoing instances illustrate the significant fact that before the time of Grotius there had already developed usages which served on the one hand to exempt an ambassador from local jurisdiction, and on the other, to restrain him from the commission of crime.[1] Nations which had de-

[7] Robert Ward, Hist., II, 314, *citing* Camden, 296.
[8] *Id.*, II, 315, *citing* Camden, *ad an.* 1587.
[9] *Id.*, II, 315–316, *citing* Wicquefort, I, 392.
[10] Robert Ward, 316, *citing* Mém. de Sull. II, 191, 192.
[11] *Id.*, II, 316–317, *citing* St. Real., *Conjur. des Esp. Contr. Ven.*
[12] *Id.*, II, 317–318, *citing* Cotton's Remains, and Wicquefort, I, 393. Ward mentions other later cases, among them that of De Bass, Minister of France to Cromwell, in 1654 (II, 319); that of the Spanish Ambassador in the reign of Charles II (II, 319); that of the English Ambassador at Constantinople in 1646 (II, 319–320); that of Don Pantaleon Sa, brother of the Portuguese Ambassador to England in the time of Cromwell (II, 322–328). Sa was subjected to the local jurisdiction. Declares Ward: "All, therefore, that can fairly be drawn from the precedent, as to the decision of the then existing law of England is, that the suite of an ambassador, if they committed murder, were liable to be tried for it by the courts of the country" (II, 323–324). Mention is also made of the case of Gyllenburg, Swedish Ambassador at London, who, in 1717, was charged with being a participant in a conspiracy against the country and the crown, was arrested, and his cabinet broken into and searched (II, 329–330, *citing* Tindal, Contin. of Rap., and Bynkershoek, *De for. leg.*, c. 18).

See, also, Case of the Earl of Holdernesse, 1774, Phillimore, II, § 167, taken from Martens, C. C., II App. 479; also case of Van Hoey, 1746, Phillimore, II, § 168, taken from Martens, C. C., I, 311.

§ 434. [1] Grotius declared in his *De Jure Belli et Pacis*, published in 1625, that "by the common consent of nations" ambassadors are not bound by the civil law of the people among whom they live, "as being, by a certain fiction in the place of those who send them; and

veloped and accepted both customs, acquiesced in the continuance of each. States yielded the right of jurisdiction because the proper exercise of his functions necessitated the complete independence of the public minister, which could not otherwise be assured. They retained, however, the right to prevent his violation of their laws because the requirements of self-defense left no alternative. This circumstance was not without its effect upon the conduct of diplomacy. The existing practice reveals generally a complete abandonment of the early theories. At the present time the functions of a minister are not deemed to be curtailed by his respect for the local law; and his usefulness to his own country is increasingly regarded as dependent upon his possession of a reputation unblemished by any imputation of hostility or unfriendliness towards the State to which he is accredited.[2] As Secretary Hull declared, in the course of a statement made public on December 6, 1935:

> This Government has at all times impressed upon its own official representatives abroad that the privilege of diplomatic immunity does not presuppose the right to violate any of the laws or regulations, national or local, of the countries to which they are accredited; that, on the contrary, the privilege of such immunity imposes upon them the obligation of observing meticulously such laws and regulations.
>
> Such being the attitude and practice of this Government, I am unwilling to believe that other governments would condone any behavior inconsistent with such attitude and practice on the part of their representatives in this country.[3]

The foregoing words suggest the care to be taken by a diplomatic representative lest his conduct betray unconcern for the law of the State to which he is accredited, and so serve to impair his reputation when he attempts, however reasonably, to claim immunity from the local jurisdiction.

b

§ 435. **Exemption from Judicial Process.** "A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and cannot be sued, arrested or punished by the law of that country." [1]

---

by a similar fiction, they are, as it were, extra-territorium." The fiction was employed merely to illustrate the situation in which an ambassador appeared to find himself, rather than the reason for the exemption to be accorded him. If such an individual was guilty of a serious crime tending to produce public disorder, Grotius declared that he should be sent to his monarch with a demand for punishment or surrender; and that if the ambassador used force, he might undoubtedly be killed, not in the way of punishment but in the way of natural defense, "*non per modum pœnæ, sed per modum naturalis defensionis.*" (Whewell's Edition, Book II, Chap. XVIII, 5 and 7.)

[2] That the activities of Austro-Hungarian and German diplomatic officers in the United States in the year 1915 were based on a different theory, betokening a recrudescence of medieval doctrine, is not to be accepted as indicating that States generally are disposed to encourage departure from the principle stated in the text.

[3] Dept. of State Press Releases, Dec. 7, 1935, 498.

§ 435. [1] Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. VII, 1. See also Foreign Service Regulations of the United States, III — 1, as of January, 1941.

See discussion of the rational basis of immunity, contained in Charles Ozanam, *L'Im-*

This immunity is broadly recognized in relation generally to the conduct of the diplomatic actor, and regardless of its public or private aspect.[2] Nor is it affected by the enormity of the offense charged against the actor, a fact that was seemingly lost sight of by Secretary Lansing in 1916, in relation to the case of one Wolf von Igel, an attaché of the German Embassy entrusted with the continuance of the office of a former military attaché at New York, and whose name appeared on the Diplomatic List.[3]

Declared Secretary Hull, in the course of a statement made public on December 6, 1935:

> The immunity of duly accredited foreign diplomatic representatives and their staffs from arrest, detention, or molestation of any sort is a practice the necessity of which has for many centuries been universally recognized by

---

*munité de Jurisdiction des Agents Diplomatiques,* Paris, 1912, 35–60. Also, Giulio Diena, Report of Subcommittee on Diplomatic Privileges and Immunities, to Committee of Experts for the Progressive Codification of International Law, 1926, League of Nations Doc. No. C.196.M.70.1927.V, 78, published also in *Am. J., Supplement,* July and Oct., 1926, XX, 151; Lawrence Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," *New York University Law Review,* X, 170.

[2] "Diplomatic officers are exempt from all civil or criminal jurisdiction of the State to which they are accredited." (Art. 19 of Convention on Diplomatic Officers adopted at the Sixth International Conference of American States at Habana, Feb. 20, 1928, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, Appendix 11, 203, 207.)

See Art. 19 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* XXVI, Jan. and April, 1932, 23, and especially the Comment thereon, *id.,* 104–106, in which the Reporter, Professor Reeves, adverts to the protest of the French Ambassador at Rome, in 1924, as Dean of the Diplomatic Corps, on account of a decision by the Italian Court of Cassation affirming the view that diplomatic officers were immune from jurisdiction solely on account of acts committed by them in the exercise of their official functions. For the text of the protest see *Zeit. Int.,* XXXII, 474, note. *Cf.* case of Harrie Lurie *v.* Steinmann, Tribunal of Rome, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 246.

Concerning the arrest of the American Minister to Guatemala by a Guatemalan officer in 1917, and the release of the former, and apology by the Guatemalan Government, see For. Rel. 1917, 752–754.

Concerning the action of the diplomatic corps at Petrograd in 1918, for the release of the Rumanian Minister at that capital from arrest, see documents in For. Rel. 1918, Russia, I, 477–482.

See also numerous cases in Hackworth, Dig., IV, §§ 401 and 402.

[3] He said: "In the case of Von Igel, however, I do not think that your excellency's Government can legally claim for him diplomatic immunity since the nature of the crimes with which he is charged is so grave and since the crimes were committed before he was notified to the Department of State to be an attaché of your Embassy. Manifestly it would be contrary to the usage of nations and to the rules which govern their intercourse to permit diplomatic immunity to be thrown about a person in these circumstances in order to save him from the consequences of his act." (Communication to the German Ambassador, April 24, 1916, For. Rel. 1916, Supplement, 810.) *Cf.* communication of the latter to Secretary Lansing, May 27, 1916, *id.,* 812. In a note of June 16, 1916, *id.,* 813, Secretary Lansing declared that he had not reached a conclusion in regard to the immunity claimed in behalf of Mr. von Igel in respect to his further prosecution for the crimes with which he was charged, but hoped to be able shortly to inform the German Ambassador of the American Government's final decision in this part of the case. No further communication was, however, made to the Ambassador on this point. Mr. von Igel was still under indictment when he returned to Germany with other officials after the severance of diplomatic relations in February, 1917; but his bond was cancelled on February 13, leaving him paroled on his own recognizance. *Id.,* 814, note 2.

Concerning the complaint of Germany on account of the seizure of official papers belonging to the German Embassy at the time of the arrest of Mr. von Igel, see For. Rel. 1916, Supplement, 909–915.

civilized nations. It is furthermore a long-established principle of international law to which the American Government has since the earliest days of the Republic attached the greatest importance. This is evident from the fact that Federal legislation was enacted on this subject by the Congress in 1790 during the first administration of President Washington.

It should be obvious that the unhampered conduct of official relations between countries and the avoidance of friction and misunderstandings which may lead to serious consequences are dependent in large measure upon a strict observance of the law of nations regarding diplomatic immunity. If we are to be in a position to demand proper treatment of our own representatives abroad, we must accord such treatment to foreign representatives in this country, and this Government has no intention of departing from its obligations under international law in this respect.[4]

The courts are disposed to accept as conclusive of the fact of the diplomatic status of an individual claiming an exemption, the views thereon of the political department of their government.[5] The statutory law of the United States renders void the process whereby "the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached"; and it subjects to severe penalties him who sues out or executes such process.[6] Ignorance of the official character of a person entitled to diplomatic immunities does not excuse his ar-

[4] Dept. of State Press Releases, Nov. 7, 1935, 497, 498. Secretary Hull made the statement quoted in connection with the case of the arrest of Ghaffar Khan Djalal, the Iranian Minister to the United States, at Elkton, Maryland, Nov. 27, 1935, on which occasion he was handcuffed by local officers. The Secretary of State offered an apology.

[5] See Engelke *v.* Musmann, [1928] A. C. 433, and comment thereon in *Harv. Law Rev.*, XLII, 582. See, also, United States *v.* Liddle, Fed. Cas. No. 15,598.

See Case of one Chance, held on a minor offense at London, in August, 1918, in which the accused claimed immunity as an official of the American Embassy. There was introduced in the course of the prosecution a letter from Mr. Balfour, Foreign Secretary, to the effect that the name of the defendant had not been sent to the Foreign Office by the American Ambassador to indicate that he was a member of his staff, and so did not appear in the list of names of persons entitled to claim immunity from legal proceedings on the ground of diplomatic privilege, and that the name of a person entitled to such immunity on such ground must be on that list. *Jour. Comp. Leg.* (N. S.), XLI, Dec. 1918, 279.

[6] Rev. Stats. §§ 4063, 4064 and 4065. The last of the foregoing sections declared: "The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office."

Concerning what constitutes a violation of §§ 4063 and 4064, see Mr. Brewster, Atty. Gen., to Mr. Frelinghuysen, Secy. of State, July 3, 1883, MS. Misc. Let., Moore, Dig., IV, 640; Mr. Frelinghuysen, Secy. of State, to Mr. Preston, Haitian Minister, July 10, 1883, MS. Notes to Haiti, I, 301, Moore, Dig., IV, 640; United States *v.* Benner, 1 Baldwin, 234, Moore, Dig., IV, 641.

*Compare* the Act of Parliament of 7 Anne, c. 12 (1708), and concerning it Triquet et al. *v.* Bath, 3 Burrow, 1478, Heathfield *v.* Chilton, 4 Burrow, 2015; Parkinson *v.* Potter, L. R. 16 Q. B. Div. 152, and cases there cited; also Scott's Cases (1902 ed.), 189–197.

Rev. Stats. §§ 4063 and 4065 are subjected to slight modification in form as they appear in 22 U.S.C.A. as §§ 252 and 254, respectively.

rest.[7] Nor is knowledge of the law made an ingredient in an offense against his immunities.[8]

"While evidence is wanting that States generally have as yet agreed to yield rights of jurisdiction over diplomatic officers not accredited to them and passing through their territories," it has been declared to be "not unreasonable to claim for such individuals freedom from petty annoyance whether in the form of criminal prosecution for minor offenses or of civil suits of trivial importance." [9]

Except by the consent of his government, an American diplomatic officer cannot waive his privilege, for it is regarded as belonging to his office rather than to himself. It is not to be supposed, however, that such an officer would intentionally avail himself of "this right to evade just obligations." [10]

A minister may doubtless, without the knowledge and against the will of his government, by appealing to a local court, as in a case of contentious litigation involving his personal interests, subject himself to its jurisdiction.[11] "When a member of a mission or a member of his family institutes a proceeding in a court of the receiving State, the receiving State may exercise jurisdiction over such person for the purposes of that proceeding; in the absence of a renunciation or waiver of the immunity from execution, however, no execution may issue in consequence of that proceeding against him or against his property." [12] An American diplomatic officer is not, in the opinion of the Department of State, clothed with immunity to enable him to indulge with impunity in personal controversies, or to escape from liabilities to which he might otherwise be subjected.[13]

[7] Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, No. 873, Jan. 11, 1877, MS. Inst. France, XIX, 436, Moore, Dig., IV, 634.

See, however, the requirement of Rev. Stat. § 4065, 22 U.S.C.A. § 254, respecting the registration of a minister's servant.

[8] Mr. Fish, Secy. of State, to Mr. de Vaugelas, Chargé, Dec. 28, 1876, MS. Notes to France, IX, 173, Moore, Dig., IV, 635.

[9] See Mr. Hughes, Secy. of State, to the Minister to Panama, April 29, 1924, Hackworth, Dig., IV, 462. Also Estelle Carbone *v.* Carlos Carbone, Jr., 206 N.Y. Supp. 40.

[10] Instructions to Diplomatic officers of the United States, March 8, 1927, Chap. VII–1; also For. Service Regulations of U. S., III–1, as of Jan. 1941, Hackworth, Dig., IV, 543.

See, in this connection, *In re* Republic of Bolivia Exploration Syndicate, 30 L. T. Rep. (Ch. Div.) 78; also Note thereon in *Harv. Law R.* XXVII, 489; also Re Saurez, 117 L. T. R. (Ch. Div.) 239 and Note thereon in *Yale Law J.* XXVII, 392; Herman *v.* Apetz, 130 N.Y. Misc. 618, where the wife of a diplomatic officer was regarded as capable of waiving immunity from suit without the consent of the State in whose service her husband was engaged.

Declared Lord Hewart, C.J., in 1929, in Dickinson *v.* Del Solar, [1930] 1 K.B. 376, at 380: "Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent."

[11] Case of Mr. Jay, American Minister at Vienna, in 1873, Moore, Dig., IV, 635–638, and documents there cited.

[12] Art. 25 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* Jan. and April, 1932, 24. See Comment thereon, *id.,* 122.

[13] Mr. Fish, Secy. of State, to Mr. Jay, Minister to Austria-Hungary, No. 457, Dec. 29, 1874, MS. Inst. Austria, II, 289, 290, Moore, Dig., IV, 637, in which it was also said: "The assertion of these immunities should be reserved for more important and delicate occasions, and should never be made use of when the facts of the particular case can expose the envoy to the suspicion that private interest or a desire to escape personal or pecuniary

c

§ 436. **Giving of Testimony.** A diplomatic representative can not be compelled to testify, in the country of his sojourn, before any tribunal whatsoever. This right is regarded as appertaining to his office, not to his person, and is one of which he can not divest himself except by the consent of his government. Therefore, even if a diplomatic representative of the United States be called upon to give testimony under circumstances which do not concern the business of the mission, and which are of a nature to counsel him to respond in the interest of justice, he should not do so without the consent of the President, obtained through the Secretary of State.[1]

When a minister witnesses the commission of a criminal act in the State of his sojourn, as did Señor Comacho, the Venezuelan Minister, who was present at President Garfield's assassination, July 2, 1881, his government may instruct him to waive his rights and to appear as a witness in the case.[2] The United States has similarly permitted an American diplomatic officer to give his testimony on terms consistent with his representative dignity, indicating, however, that unless an interrogatory in open court should be deemed indispensable, a personal deposition at the Embassy would be preferable.[3]

The successful outcome of a civil proceeding initiated by a foreign minister may depend upon his readiness to testify. He should submit as a witness to the jurisdiction of the tribunal whose aid he invokes.[4] He should evince equal readiness to do so in case he endeavors to institute criminal proceedings against the perpetrator of a crime, of the commission of which the minister was the sole witness.[5]

---

liability is the motive which induced it." Also §§ 1 and 2, Art. XVI, of Rules adopted by the Institute of International Law, Aug. 13, 1895, *Annuaire,* XIV, 244.

§ 436. [1] The paragraph of the text reproduces Chap. VII–3, of Instructions to the Diplomatic Officers of the United States, March 8, 1927.

See Mr. Fish, Secy. of State, to Mr. Marsh, Minister to Italy, No. 547, Nov. 1, 1876, MS. Inst. Italy, II, 1, Moore, Dig., IV, 644; Mr. Gresham, Secy. of State, to Mr. Gray, Minister to Mexico, Jan. 12, 1894, For. Rel. 1894, 426, Moore, Dig., IV, 645. See, also, in this connection, Art. XVII of Rules adopted by the Institute of International Law, Aug. 13, 1895, *Annuaire,* XIV, 244.

According to Art. 21 of the Convention on Diplomatic Officers adopted at Habana, Feb. 20, 1928, by the Sixth International Conference of American States: "Persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the territorial courts."

[2] See statement of the District Atty. in calling Señor Comacho to the stand as a witness for the prosecution in the trial of Guiteau, Guiteau's Trial, I, 136, Moore, Dig., IV, 644. *Compare* refusal of the Government of the Netherlands in 1856, to permit its diplomatic representative to testify in the criminal courts of the United States, S. Ex. Doc. 21, 34 Cong., 3 Sess., Lawrence's Wheaton (1863), 393, 394, quoted in Moore, Dig., IV, 643–644.

[3] Telegram, of Mr. Adee, Acting Secy. of State, to Mr. Iddings, Secy. of the American Embassy at Rome, Aug. 1, 1901, For Rel. 1901, 302; Moore, Dig., IV, 646.

[4] Mr. Van Buren, Secy. of State, to Mr. Bille, Danish Chargé d'Affaires, Oct. 23, 1830 MS. Notes to For. Legs. IV, 312, Moore, Dig., IV, 642.

[5] Mr. Hunter, Acting Secy. of State, to Baron von Gerolt, Aug. 2, 1852, MS. Notes to German States, VI, 310, Moore, Dig., IV, 644; also Mr. Porter, Acting Secy. of State, to Mr. Gana, Chilean Minister, Jan. 3, 1887, MS. Notes to Chilean Legation, VI, 352, Moore, Dig., IV, 645; Mr. Wilson, Acting Secy. of State, to Mr. Morgan, Minister to Cuba, March 15, 1909, For Rel. 1909, 238.

See also documents in Hackworth Dig., IV, § 403.

In 1939, an American tribunal declared that "the immunity from testifying is something to be claimed by an Ambassador"; that "if he testifies voluntarily without the authorization of his Government, that is a matter between him and his Government," depriving him neither of his competency, nor of his credibility.[6]

d

§ 437. **Property.** "Premises, which are occupied by a diplomatic representative and members of his staff, either as offices or residences, the goods contained therein, and the records and archives of the misson are inviolable. They cannot be entered, searched, or detained by the local authorities even under process of law." [1] It is not believed that by merely entering into a contract for the rental of premises to be used for purposes connected with his mission a minister thereby waives the exemption of his belongings placed therein, so as to enable the lessor to attach the same, even though the local law creates by implication a lien in favor of the lessor in the case of a similar contract between private parties. A pledge of such belongings by the minister might serve, however, as Dana has pointed out, to operate as a waiver of the diplomatic privilege.[2]

If a diplomatic representative holds, in a foreign country, real or personal property in a personal as distinguished from an official capacity, such property is said to be subject to the local laws.[3]

In exercising jurisdiction with respect to such property the State to which he is accredited may, however, find itself hampered by the circumstance that the diplomatic officer cannot properly be subjected to suit in a personal action.[4] Hence when property belonging to such an officer in a personal capacity is made the object of litigation the question may well arise whether the acquisition or possession of the property by the diplomatic owner within the territory of the State where it is found has been permitted on condition that he waive any claim to immunity that would normally exempt him from the local jurisdiction, in

[6] Banco De Espana *v.* Federal Reserve Bank, 28 F. Supp. 958, 972.

§ 437. [1] Foreign Service Regulations of the United States, III–1, note 3, as of January, 1941, Hackworth, Dig., IV, 562. See, also, opinion of Mr. Toucey, Atty. Gen., 5 Ops. Attys. Gen. 69, Moore, Dig., IV, 646.

According to Art. 4 (2) of the Harvard Draft Convention on Diplomatic Privileges and Immunities: "A receiving State shall exempt from any form of attachment or execution the interest of a sending State in movable or immovable property owned, leased, or possessed by the sending State for the purposes of its mission." (*Am. J., Supplement,* XXVI, Jan. and April, 1932, 20.)

Art. 16 of the Convention on Diplomatic Privileges adopted at Habana, Feb. 20, 1928, by the Sixth International Conference of American States declares that "No judicial or administrative functionary or official of the State to which the diplomatic officer is accredited may enter the domicile of the latter, or of the mission, without his consent."

See Francis Deák, "Immunity of a Foreign Mission's Premises from Local Jurisdiction," *Am. J.,* XXIII, 582.

According to the Act of March 9, 1888, Chap. 30, 25 Stat. 45, 8 U.S.C.A. § 82, the "Act to restrict the ownership of real estate in the Territories to American citizens and so forth," approved March 3, 1887, was so amended as not to apply or operate in the District of Columbia, "so far as relates to the ownership of legations or the ownership of residences by representatives of foreign governments, or attachés thereof."

[2] Dana's Note, No. 130, Dana's Wheaton, respecting the Case of Mr. Wheaton, Minister to Prussia; also Dana's Wheaton, §§ 228–241, Moore, Dig., IV, 646–648.

[3] Foreign Service Regulations of the United States, III–1, note 4, as of January, 1941, Hackworth, Dig., IV, 555.

[4] See The Amazone [1939] P. 322.

so far as may be necessary to adjudicate with reference to claims against, or adverse interests in, that property.[5]

e

§ 438. **Persons Other than Heads of Missions.** The suite of a public minister embraces generally three distinct classes of individuals; first, his official staff, such as the secretaries and attachés of the mission; secondly, the members of his family, such as his wife and children; and thirdly, persons in his private service — his unofficial staff — such as his servants, his private secretary and the tutor or governess of his children.[1] Members of each class may also be members of the minister's household. The Department of State found occasion to declare in a communication to the German chargé at Washington, on July 16, 1926: "The immunity from criminal prosecution and civil process and from the obligation to testify is considered to apply to a foreign diplomatic representative, his secretaries, attachés, including military, naval and commercial attachés, employees, members of his household, including his family, and domestic servants. Employees or servants of diplomatic missions are entitled to the immunities in question regardless of their nationality with the exception of one case provided for in Section 4065 of the Revised Statutes — namely where process is founded upon a debt contracted before the employee or servant entered the service of the mission." [2] The immunity asserted in behalf of each individual is in a broad sense due to his dependence upon the minister, and to the effect upon the latter of the subjection of the former to the local laws.[3] The abrupt arrest and confinement of any one would clearly serve to interfere with the minister's free exercise of his functions.[4] Hence, it may be the method of asserting jurisdiction rather than the right of the territorial sovereign to do so, that gives rise to controversy.[5]

It is, however, worthy of observation that the claim for immunity from the local jurisdiction in behalf of a person himself possessed of diplomatic status, such as a counselor or secretary of embassy or legation, may be based on the fact of such possession, which suffices in itself to create a basis of exemption.[6]

[5] See *supra*, § 258.

§ 438. [1] See Satow, Guide to Diplomatic Practice, 3 ed., 1932, § 340. Oppenheim (McNair's 4 ed., I, § 401, pp. 641–642) regards as a distinct and fourth class, couriers who "are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations to guarantee the safety and secrecy of the despatches." See, also, Jean Roederer, *De l'application des immunités de l'ambassadeur au personnel de l'ambassade*. Paris, 1904.

[2] For. Rel. 1926, I, 548, 549. See also Foreign Service Regulations of the United States, III–1, as of January, 1941; also Note, *id.*

[3] "The privilege is not that of the servant, but of the ambassador. It is based on the assumption, that, by the arrest of any of his household retinue, the personal comfort and state of the ambassador might be affected." (Maule, J., in Taylor *v.* Best, 14 C. B. 487, 524.)

[4] See, for example, Mr. Evarts, Secy. of State, to Mr. Lowell, Minister to Spain, No. 132, Feb. 25, 1879, MS. Inst. Spain, XVIII, 370, Moore, Dig., IV, 660.

[5] Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, March 17, 1888, For. Rel. 1888, II, 1568, Moore, Dig., IV, 661.

[6] Mr. Day, Secy. of State, to Mr. Hitchcock, Minister to Russia, May 23, 1898, For Rel. 1898, 532, *quoting* Calvo in his Dictionary of International Law, to the effect that a *conseiller* "is clothed with a certain representative character; enjoys immunities of his own, independently of the ambassador, or of the chief of legation, but has no right to

The situation is otherwise when the claim is preferred in behalf of an individual who, regardless of the category to which he is assigned, is not deemed to be a diplomatic officer, and whose immunity from the local jurisdiction must, therefore, depend upon his relationship to one who is such an officer. The official staff of a mission is likely to embrace individuals of both types, and for both immunities are commonly sought and acknowledged.

A State may, however, not unreasonably decline to yield immunity to a secretary or other member of the official staff of a foreign mission who is one of its nationals, save on such terms as it prescribes.[7] The fact of declination should if possible be communicated to the sending State before the individual enters upon his duties.[8]

His wife, children, parents and other members of his family, such as his brothers and nieces, and possibly also his household guests, share the minister's exemption while they live with him; and likewise persons similarly connected with a secretary of the mission, share, under similar circumstances, the immunity accorded him upon whom they depend.[9]

The extent to which persons of the third class — those in the private service of a minister — receive the benefit of his immunity is not as yet fully disclosed by existing practice. It is not unreasonable for a State to decline to yield exemptions to a servant who is one of its own nationals.[10] Such a declination some-

---

any ceremonial." Vattel likewise regards the secretary of a mission as "enjoying in his own right the protection of the law of nations, and the immunities annexed to his office, independently of the ambassador."

[7] See Rev. Stats. § 4065, 22 U.S.C.A. § 254. See, also, in this connection, Opinion of Mr. Wirt, Atty. Gen., to Mr. Adams, Secy. of State, March 17, 1818, MS. Misc. Let., respecting the Case of Sarmiento, Moore, Dig., IV, 654.

Declared Mr. Grew, Under Secy. of State, to the Minister to Switzerland, Oct. 2, 1926: "It would seem from the foregoing that it is not definitely established that as a general principle of international law a chauffeur in the employ of a foreign Minister would, in a case where the chauffeur is a citizen or subject of the country of the Minister's sojourn, be entitled to claim immunity from the local jurisdiction. . . . In view of the lack of uniformity in the practice of States with respect to the granting of immunity from the local jurisdiction to the employees of missions who are nationals of the receiving State, claim to immunity can hardly be asserted as a general principle of international law. Any representation on the subject would more properly be made on the basis of reciprocity and comity between friendly States." (Hackworth, Dig., IV, 527, 528.)

[8] See situation referred to by Mr. Castle, Under Secy. of State, in communication to Minister Southard, Oct. 27, 1932, Hackworth, Dig., IV, 529.

[9] Art. XII, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 243. Also communication of R. Robin, in *Rev. Gén.*, XIV, 159, respecting the Case of Carlos Waddington, son of the Chargé d'Affaires of Chile at Brussels, who on Feb. 24, 1906, killed in that city the Secretary of the Chilean Legation. The father surrendered the son, who had taken refuge in the Legation, to the Belgian authorities, who withheld action until the Chilean Government also announced its consent to the waiver of any claim to immunity in behalf of the son. The latter was thereupon tried and acquitted. See, also, respecting this case, McNair's 4 ed. of Oppenheim, I, § 404. *Compare* the early Case of Don Pantaleon Sa, Ward, Hist., II, 322–328.

"The wife of a secretary of a foreign legation in this country is, while with him in his official capacity, subject in respect to her personal estate, to the laws of the country he represents." (Moore, Dig., IV, 652, *citing* Mr. Frelinghuysen, Secy. of State, to Mr. Lawrence, March 31, 1883, 146 MS. Dom. Let. 287, based upon Wheat., Int. Law, 300–1, Dana's ed., and 4 Phillimore, Int. Law., 122–123.)

[10] "A diplomatic representative should not request exemption for a native employee or servant who is claimed by the government of the foreign country for military service. This claim should, of course be properly presented." (Foreign Service Regulations of the United States, III–1, Note 2, as of January, 1941.)

times finds expression in the statutory laws of States.[11] Again, a State may make the enjoyment of immunity by a person attached to the unofficial staff of the minister dependent upon compliance with conditions which it prescribes.[12] If, however, it withholds the privilege, it should exercise care to assert the right of jurisdiction in a manner such as to cause the least possible embarrassment to the minister. The State should consult his convenience as to the time and place of the service of process.[13] Its officers should not be permitted to invade his house.[14]

A servant, or other member of the unofficial staff of a mission, who is not a national of the State of sojourn, appears to be increasingly regarded as sharing his master's immunity throughout the period of service; yet upon his discharge therefrom, to be subjected to the local law, and punishable, if need be, for criminal acts committed during the course of his employment.[15] This practice

---

See, also, Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, March 17, 1888, For. Rel. 1888, II, 1568, Moore, Dig., IV, 661; Case of Herrmann Tolk, For. Rel. 1907, I, 527–530; Mr. Evarts, Secy. of State, to Mr. Lowell, Minister to Spain, No. 132, Feb. 25, 1879, MS. Inst. Spain, XVIII, 370, Moore, Dig., IV, 660; par. 3, Art. I and Art. XV, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire,* XIV, 240 and 244; Case of the Chauffeur of the Secretary of the American Embassy at London, 1906, *Rev. Gén.,* XVI, 377, *citing Law Times,* 1906, p. 319; also F. Pujia, "*Immunità di Giurisdizione della Chauffeur al Servizio di un Agente diplomatico,*" in *Riv. Dir. Int.,* 1 ser., III, 343.

*Compare* Claim of the United States in 1905, respecting the immunity of the Dragoman of the American Legation at Constantinople, For. Rel. 1905, 881–882.

Declares Hall: "It is no doubt generally held that they [the servants of a minister] cannot be arrested on a criminal charge and that a civil suit cannot be brought against them, without the leave of their master, and that it rests in his discretion whether he will allow them to be dealt with by the local authorities, or whether he will reserve the case or action for trial in his own country. But in England, at any rate, this extent of immunity is not recognised. Under the statute of Anne, the privilege of exemption from being sued, possessed by the servant of an ambassador, is lost by 'the circumstance of trading'; and when the coachman of Mr. Gallatin, the United States minister in London, committed an assault outside the house occupied by the mission the local authorities claimed to exercise jurisdiction in the case. The English practice is exceptional; but it is not unreasonable." (Higgins' 8 ed., § 51.) Respecting the Case of Mr. Gallatin's coachman, see Moore, Dig., IV, 656–657, *quoting* Lawrence's Wheaton (ed. 1863), 1006, 1007.

[11] See Memorandum from Italian Ministry of Foreign Affairs, transmitted to Department of State, Oct. 16, 1930, *quoted* in Comment on Art. 19 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 103; also, statement *id.,* in relation to the Swiss law, *citing* League of Nations Doc. No. C.196.M.70.1927.V., 247.

[12] § 4065, Rev. Stat., 22 U.S.C.A. § 254.

It is highly desirable that, as Article 11 of the Harvard Draft Convention on Diplomatic Privileges and Immunities provides: "A sending State shall communicate to the receiving State, upon request of the latter, a list of the members of its mission, of their families, and of the administrative and service personnel."

[13] Mr. Clay, Secy. of State, to Mr. Ringgold, Marshal, Oct. 30, and Nov. 2, 1825, 21 MS. Dom. Let. 180, 181, Moore, Dig., IV, 656; Mr. Forsyth, Secy. of State, to Mr. Calderon de la Barca, Spanish Minister, Sept. 18, 1838, MS. Notes to Spanish Legation, VI, 34, Moore, Dig., IV, 658; Mr. Cass, Secy. of State, to Mr. Zegarra, Peruvian Minister, June 13, 1860, MS. Inst. Peru, I, 213, Moore, Dig., IV, 660; Mr. Root, Secy. of State, to Mr. Garrett, American Chargé at Berlin, June 10, 1908, For. Rel. 1907, I, 529.

[14] Mr. Brent, Chief Clerk, to Mr. Ringgold, U. S. Marshal, Dec. 10, 1825, 21 MS. Dom. Let. 210, Moore, Dig., IV, 656; Opinion of Mr. Randolph, Atty. Gen., June 26, 1792, 1 Ops. Attys. Gen. 26, Moore, Dig., IV, 653; Opinion of Mr. Lincoln, Atty. Gen., 1804, 1 Ops. Attys. Gen., 141, Moore, Dig., IV, 652. Also Dana's Wheaton, Dana's Note No. 129.

[15] Case of French servant of the Spanish Ambassador at Berlin, who was charged with assault upon a fellow servant, who was a German, and mentioned in a communication of Mr. Jackson, Chargé at Berlin, to Mr. Hay, Secy. of State, July 5, 1899, For. Rel. 1899, 318, Moore, Dig., IV, 662.

indicates that whenever interference with the minister is eliminated, the reason for the exemption ceases, and so justifies the assertion of jurisdiction by the territorial sovereign.[16]

Professor Reeves, in commenting in 1932, on Art. 19 of the Harvard Draft Convention on Diplomatic Privileges and Immunities declared that although some differences appear in the legislation of States as to the classes entitled to diplomatic immunity, "it is believed that the universal practice of States, in accordance with customary international law, is to grant such immunity to those named in the article, *i.e.*, to the members of a mission and their families; if the latter are not always given explicit mention in the texts, their immunity is none the less firmly established in practice." [17]

f

§ 439. **Ministers Recalled or Not Received.** Neither his diplomatic immunity nor his right to protection are withdrawn from a diplomatic representative by the bare suspension or termination of his function or mission. They continue for a reasonable time thereafter, pending his departure from the State to which he is accredited.[1] Inasmuch as they embrace exemptions from the local jurisdiction on account of acts of private as well as public aspect, the extension of the diplomatic immunity, permitting requisite time for departure from the country, should be applicable with respect to any conduct of the representative during the period of his official sojourn.[2] The provisions of numerous projected codes have revealed, however, a disposition to deny an extension of immunity after the termination of the diplomatic function with respect to acts committed prior to such termination, if they were unrelated to the exercise of that function.[3] It is common, in time of peace, to extend to a minister a liberal interval within which to quit the country.[4] If, however, he abuses the privilege by an

[16] See Memorandum Opinion by Judge Walter J. Casey, Police Court of the District of Columbia, in Case of District of Columbia *v.* Paris, 1939, *Am. J.*, XXXIII, 787.

[17] *Am. J., Supplement,* Jan. and April, 1932, XXVI, 103. He cites Art. 12, Cambridge Draft of the Institute of International Law, 1895; Project No. 22, American Institute of International Law, 1925; Art. 25, Draft of International Commission of Jurists, 1927; and Art. 2 of New York Draft of the Institute of International Law, 1929. He adverts to the narrower form of Art. 19 of the Habana Convention of 1928, on Diplomatic Officers.

§ 439. [1] Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, April 2, 1906, For. Rel. 1906, II, 1456; Dr. Paúl, Venezuelan Minister of Foreign Affairs, to Mr. Sleeper, American Chargé, June 20, 1908, For. Rel. 1908, 823; Mr. Adee, Acting Secy. of State, to Mr. Nabuco, Brazilian Ambassador, July 23, 1908, *id.*, 828. See, also, earlier cases of M. Pichon (1805), Moore, Dig., IV, 662, *citing* Dupont *v.* Pichon, 4 Dall. 321; and that of Mr. Barrozo, Portuguese Chargé at Washington (1829–1830), Moore, Dig., IV, 664–667.

[2] This is recognized in Art. 29 of the Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* XXVI, Jan. and April, 1932, 25. See Comment thereon, *id.,* 134, 137.

Also Sir Cecil Hurst, "*Les Immunités diplomatiques,*" *Recueil des Cours,* XII, 1926, II, 115, 238.

[3] See, for example, Art. 16, Resolution of the Institute of International Law Concerning Diplomatic Immunities, New York, 1929, *Annuaire,* XXXV, Vol. II, 307, 310; Arts. 20 and 22 of Convention on Diplomatic Officers, adopted at Habana, Feb. 20, 1928, at the Sixth International Conference of American States, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 207.

[4] Mr. Adams, Secy. of State, to Mr. d'Anduaga, Nov. 2, 1821, MS. Notes to For. Legs., III, 29, Moore, Dig., IV, 664.

undue lingering after his official functions are at an end, the State of his sojourn is justified in regarding his immunities as forfeited.[5]

Even though the termination of his mission is occasioned by war between his own State and that to which he is accredited, it is the duty of the latter to employ the means at its disposal to accord the minister and his retinue complete protection from every form of violence, as well as from marks of official discourtesy, and, also, to facilitate their departure from its territory by reasonable processes.[6]

When a minister is not received by reason of its failing to appear that he represents any lawful government of the State from which he comes, it has been declared that diplomatic privileges, if any, are accorded him as of courtesy rather than of right.[7] It may be doubted, therefore, whether he is entitled to claim exemption from the local jurisdiction, should occasion for its exercise in respect to him arise.

g

§ 440. **Taxation.** When a territorial sovereign permits the acquisition of immovable property within its domain by a foreign State for use as an embassy or legation, the former may be fairly deemed to relinquish the privilege of taxing that State, at least for general purposes, on account of its ownership of that property.[1] The extent of the implied concession is perhaps blurred by the tendency to cause some exemptions to be dependent upon assurances of reciprocal yieldings by the foreign State concerned.[2] Doubtless there is no legal obligation on the part of the taxing State to acquiesce in a reciprocal arrangement that would serve to curtail its existing privileges; and in the absence of

[5] Mr. Fish, Secy. of State, to Gen. Gorloff, Dec. 1, 1871, S. Ex. Doc. 5, 42 Cong., 2 Sess., 26–27, Moore, Dig., IV, 667.

[6] Sir E. Goschen, British Ambassador at Berlin, to Sir Edward Grey, British Foreign Secretary, Aug. 8, 1914, respecting the efforts of the German Government to protect the former while *en route* to the Dutch frontier after the outbreak of war, Misc. No. 8 (1914), Cd. 7445. *Compare* report of M. Cambon, French Ambassador at Berlin, to M. Doumergue, French Minister for Foreign Affairs, Aug. 6, 1914, narrating annoyances to which the former was subjected by German authorities in the course of his departure from Germany, upon the outbreak of the war, Misc. No. 15 (1914), p. 142, Cd. 7717.

[7] Mr. Cushing, Atty. Gen., to Mr. McKeon, Dec. 24, 1855, H. Ex. Doc. 103, 34 Cong., 1 Sess., 13; Same to Same, Dec. 27, 1855, *id.*, 14, Moore, Dig., IV, 668–669.

§ 440. [1] "No State undertakes to subject the property of another State used for diplomatic purposes to a property-tax *stricto sensu*." (Jesse S. Reeves, in commenting as Reporter, on Art. 4 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement*, Jan. and April, 1932, XXVI, 57.) See Art. 4, *id.*, 20.

See Art. 19 of Resolution of the Institute of International Law on Diplomatic Immunities, 1929, *Annuaire*, XXXV, Vol. II, 311; Art. 18 of Convention on Diplomatic Officers adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 207.

[2] Secretary Bayard declared in 1886, that the rule observed by the United States with respect to the taxation of property owned by a foreign government, and occupied as its mission, was to accord reciprocity in regard to exemptions from general taxation, but not to exempt specially such property from local assessments, such as water rent and the like, unless it was definitely understood that such taxes were also exempted by the foreign government upon property belonging to the United States and used for a like purpose by an American minister. See communication to Mr. Woolsey, April 15, 1886, 159 MS. Dom. Let. 622, Moore, Dig., IV, 670. Also Mr. Fish, Secy. of State, to Mr. Stumm, May 28, 1873, MS. Notes to Prussian Legation, VIII, 484, Moore, Dig., IV, 669; Mr. Seward, Secy. of State, to Mr. Wallach, July 5, 1867, MS. Dom. Let. 432, Moore, Dig., IV, 669.

such an arrangement such a State may in some quarters be not regarded as having given up the right to impose certain taxes, such as those for special assessments.[3] It may be observed that "property in the District of Columbia owned by foreign Governments for Embassy or Legation purposes is exempt from general and special taxes or assessments," [4] and also that property there located, and "owned by an Ambassador or Minister and used for Embassy or Legation purposes is exempt from general taxes but not from special assessments for improvements." [5] What the law of nations prescribes or permits in relation to the matter may not be obvious from the laws or regulations of particular States, especially where, as in the case of the United States, the exemption is broadly yielded. Nevertheless, general and habitual concessions of whatsoever origin, and howsoever applied in respect to reciprocity, are bound eventually to betoken irrevocable restraints upon the freedom of the territorial sovereign, and, conversely, to point to fresh and clearer implications to be derived from permitted acquisitions by public foreign entities. At the present time the exemption would appear to be acknowledged to embrace at least general taxes sought to be levied on the property as such, and for which payment may normally be exacted from a private owner.

A like exemption should, and probably would, to the same extent, be extended to any interest of a foreign State in premises used by it for embassy purposes of which it was not the owner, such, for example, as a leasehold.[6] Nevertheless, lack of ownership by a foreign State of the premises used by it for such purposes may serve to enable the territorial sovereign to tax one who is the private owner thereof on account of his interest therein, so long as the procedure employed in collecting the tax is not permitted to interfere with the full and unembarrassed use of the property for the diplomatic purposes to which it is being put.[7] The mere imposition of the tax with the resulting burden placed upon the owner to pay it, is normally a domestic matter, unrelated to the foreign diplomatic user or lessee until the invocation of particular penalties for non-payment breeds an attempt to effect attachment or execution. Such action should never be per-

[3] See Comment by the Reporter on Art. 4 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 58.

[4] Foreign Service Regulations of the United States, III–6, Note I (b), January, 1940, where it is declared that: "The payment of water rent is required in all cases, as this is not regarded as a tax but the sale of a commodity."

[5] *Id.*

[6] According to Art. 4 of the Harvard Draft Convention on Diplomatic Privileges and Immunities: "1. A receiving State shall not impose any taxes or charges, whether national or local, upon the interest of the sending State in movable or immovable property owned, leased, or possessed by the sending State for the purposes of its mission; provided that such exemption need not be extended to charges for special services or assessments for local improvements.

"2. A receiving State shall exempt from any form of attachment or execution the interest of a sending State in movable or immovable property owned, leased, or possessed by the sending State for the purposes of its mission."

[7] Declared Secretary Bayard, in a communication to Mr. Woolsey, April 15, 1886: "When a foreign legation occupies rented property in this country, the owner of the premises is not exempted from the payment of all lawful taxes." 159 MS. Dom. Let. 622, Moore, Dig., IV, 670.

See Mr. Castle, Assist. Secy. of State, to the Minister of the Irish Free State, March 15, 1929, Hackworth, Dig., IV, 578.

See Diplomatic Serial Instruction of the Dept. of State, No. 766, Nov. 9, 1928.

mitted, regardless of the ownership or lack of ownership of the premises by the interested foreign State, save under conditions leaving its mission wholly unmolested in its functioning and its dignity unimpaired. It may be impossible in the particular case to satisfy these conditions.[8]

(1)

§ 440A. **The Same.** The taxation of a diplomatic officer by reason of his ownership of, income from, or succession to, property within a variety of categories, is affected by two primary considerations: first, the constant obligation of the State to which he is accredited to refrain from interfering with the normal functioning of the officer, and secondly, the opportunities open to, and oftentimes seized by him to acquire and hold property within the domain of such State and elsewhere, as a source of private enrichment. The mere circumstance that property is owned by a diplomatic officer does not necessarily indicate that, at least when it is not employed for a public purpose associated with his mission, it is exempt from taxation, or that the owner is free from an obligation as such to pay taxes thereon.[1] Nor does the circumstance that he is normally exempt from the local jurisdiction, and may effectively thwart the attempt by judicial process to exact collection in a personal action against him, necessarily release him from duties that are incidental to ownership.[2] His power to evade them is not decisive of their existence.[3] On principle, therefore, the territorial sovereign may oftentimes reasonably claim that property not used for diplomatic purposes and fairly to be regarded as belonging within its domain, whether movable or immovable, and regardless of its possible incorporeal character, is not necessarily exempt from taxation as such in consequence of the diplomatic status of the owner, and that the mere imposition of a tax, when not accompanied by forcible efforts to effect collection, manifests no essential interference with the free and unmolested functioning of the officer. Taxing States are, however, at times disposed to yield a measure of their rights, and for reasons of mutual convenience to grant reciprocally exemptions in favor of the private personal property of diplomatic officers accredited to them, regardless of its incorporeal or corporeal character, or of the fact that accessions have been made within their respective territories, provided such property is not the product of, or associated with, some gainful occupation in which the owner is engaged.[4]

[8] See Francis Deák, "Immunity of a Foreign Mission's Premises from Local Jurisdiction," *Am. J.*, XXIII, 582, in relation to the treatment accorded the Hungarian Legation premises at Prague by the Courts of Czechoslovakia.

§ 440A. [1] This was acknowledged in Chap. VII–2, of the Instructions to the Diplomatic Officers of the United States, of March 8, 1927, in the following terms: "If a diplomatic representative holds, in a foreign country, real or personal property aside from that which pertains to him as a diplomatic representative, it is subject to the local laws."

According to Foreign Service Regulations of the United States: III–6, Note 2, January, 1940, "Diplomatic representatives of the United States are generally exempt from the payment of local taxes, except on personally owned property or businesses."

[2] See Comment of Reporter on Art. 22 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *id.*, 115.

[3] The obligations of a diplomatic officer to respect the laws of the State to which he is accredited are never dependent upon his freedom to evade them, or upon the inability of the territorial sovereign to punish him on account of his violation of them.

[4] "The members of foreign diplomatic missions and foreign consular officers in the District

The existing practice is variously, and at times inadequately, reflected in projected codes which in some cases purport to forbid the impositon of "personal" [5] or "direct" taxes,[6] seemingly referring thereby to property which is closely associated with the diplomatic owner, rather than by way of contrast to the situation where a person as such is made the direct objective of the exercise of the taxing power.[7] The description of the exemption is, perhaps, of less importance than an appreciation of the scope of what is conceded. It obviously does not embrace immovable property not employed for diplomatic purposes, the acquisition of which seems to be looked upon as subject to the right of the territorial sovereign to levy taxes thereon.[8]

In the course of its efforts to tax the succession to property of various categories fairly to be regarded as within its domain, the territorial sovereign would not appear to be obliged to yield an exemption with respect to various forms of property acquired therein and owned by an accredited diplomat, when not used for mission purposes. Except, however, in the case of immovable or other property employed for business or kindred purposes, it is not probable that the exemption would be withheld. There might be a disposition to conclude that the exemption should be extended and applied to such personal property as would itself be regarded as immune from taxation were the owner an accredited diplomatic officer.

In relation to the matter of income taxes, broad exemptions are increasingly

---

of Columbia are exempt in the District from the payment of personal property taxes on automobiles and other personal property, either tangible or intangible, owned by them. They are furnished identification tags and operator's permits for their automobiles without charge, provided the applications made therefor bear the seal of the mission and the seal of the Department of State. It is understood that automobiles bearing District of Columbia tags are permitted to enter the several States without additional tags. Members of foreign diplomatic missions in the United States and foreign consular officers stationed in the District of Columbia are accordingly not required to pay the fees ordinarily charged other owners of automobiles in this country." (Foreign Service Regulations of the United States, III–6, Note 1 (*b*), January, 1940.)

Concerning the privileges of employees of diplomatic missions in the United States, see Mr. Summerlin, Chief of Division of Protocol, Dept. of State, to Mr. Russell, Jan. 3, 1939, Hackworth, Dig., IV, 583.

[5] See Art. 11 of Resolution of the Institute of International Law, of 1895, *Annuaire,* XIV, 242, J. B. Scott, Resolutions, 122; Art. 18 of Convention on Diplomatic Officers, adopted by the Sixth International Conference of American States, at Habana, Feb. 20, 1928, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 207.

[6] See Art. 18 of Resolution on Diplomatic Immunities, adopted by the Institute of International Law, at New York, 1929, *Annuaire,* XXXV, Vol. II, 310.

Art. 22 of the Harvard Draft Convention on Diplomatic Privileges and Immunities proscribes the imposition of any taxes national or local "(*a*) upon the person of a member of a mission or of a member of his family; . . . (*d*) upon tangible movable property of a member of a mission unless used or employed in a business or profession, other than that of the mission, engaged in or practiced within the territory of the receiving State." No reference is made to intangible property as such.

[7] A personal tax is in a strict sense one whereby a State in consequence of the close relationship between itself and an individual, as through his possession of its nationality, essays primarily to tax him as an individual, regardless of the location or character of his property, and which it asserts the right to collect from any property of the individual which it finds within its reach. It is not believed that a foreign diplomatic officer should be called upon to pay a tax of such a character by the State to which he is accredited.

[8] There seems to be no disposition to acknowledge any legal obligation to exempt such property from taxation.

yielded. "Ambassadors and Ministers accredited to the United States and the members of their households, including secretaries, attachés, and servants who are not citizens of the United States, are exempted from the payment of Federal income tax upon their salaries, fees and wages, and upon the income derived by them from investments in the United States in stocks and bonds and from the interest on bank balances in the United States. The income derived from any business carried on by them in the United States would, however, be taxable." [9] In making so wide a concession, which does not, however, purport to embrace income derived directly from immovable property, the United States probably grants a broader immunity than the law of nations at the present time demands.[10] In so doing it may seek to encourage other powers to make reciprocal concessions of like scope, with the hope that the relevant law may ultimately shape itself accordingly. The extension of relevant immunities from taxation to the family of the diplomatic officer in whose favor they are acknowledged is normally a reasonable demand, and is a form of protection against improper interference with the latter in the performance of his public functions. Such an extension is in general widely accepted.[11]

From a foreign diplomatic officer not accredited to itself, and regardless of the place of his residence, a State may not unreasonably withhold all exemptions from taxation in relation to property within its limits of which he is the owner, or from which he derives an income, or to which he succeeds. The United States does not regard the possession by such an individual of diplomatic status, either as an envoy accredited to a third State, or as one who is *en disponibilité*, and available for, yet awaiting appointment to an appropriate post, as matters which limit its freedom.[12]

From federal excise taxes imposed by the statutory law on telegraph, tele-

[9] Foreign Service Regulations of the United States, III–6, Note 1 (*a*), January, 1940.

See Treasury Regulations 103 (1940: Income Tax) Sec. 19.116–1, Hackworth, Dig., IV, 566.

"The privileges and immunities granted foreign diplomatic officers are premised on the fact that such officers are the personal representatives of their sovereigns. There can be no doubt that Queen Marie is entitled to no less consideration than a foreign diplomatic officer of the highest rank, and that an endeavor to apply our laws to her in such a way as to interfere with either her person or property would be at variance with the practice of nations as well as with the provisions of our own statutes on the subject." (Mr. Kellogg, Secy. of State, to Mr. Mellon, Secy. of the Treasury, Nov. 3, 1926, Hackworth, Dig., II, 404.)

[10] A much narrower immunity is accorded in the Harvard Draft Convention on Diplomatic Privileges and Immunities, which forbids the imposition of taxes upon the salary of a member of a mission, or of a member of the administrative or service personnel, paid by the sending State; and upon the income, derived from sources outside the receiving State, of a member of a mission, or of a member of his family, or of a member of the administrative or service personnel not a national of the receiving State.

[11] See, for example, Art. 18 of Resolution of the Institute of International Law on Diplomatic Immunities, adopted at New York in 1929, *Annuaire*, XXXV, Vol. II, 310; Art. 22 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement*, Jan. and April, 1932, XXVI, 23.

See, also, in this connection, Mr. Jackson, Chargé at Berlin, to Mr. Hay, Secy. of State, April 13, 1901, For. Rel. 1901, 172, *citing* despatches of Mr. Coleman, Chargé, No. 182, of Oct. 7, 1890, and Mr. Phelps, Minister to Germany, No. 220, of Jan. 13, 1891, Moore, Dig., IV, 672.

See Macartney *v.* Garbutt, 24 Q. B. 368.

[12] For sake of mutual convenience interested States may, however, be disposed to make reciprocal concessions in such cases.

phone, radio and cable facilities; admissions, dues and initiation fees; transfers of stocks and bonds; conveyances; sales of produce for future delivery; passage tickets; foreign insurance policies; safe deposit boxes; checks; electrical energy and use of boats, the Department of State announced in 1932, that under the application of the principles of international law exempting from taxation ambassadors, ministers and other duly accredited diplomatic representatives of foreign governments, together with the members of their families living with them and the members of their households, including attachés, secretaries, clerks and servants who were not citizens of the United States, all such diplomatic representatives, together with such personnel were entitled to exemption.[13]

h

§ 441. **Customs Duties.** The Instructions to Diplomatic Officers of the United States of March 8, 1927, embraced the following statement:

> It is a common usage of international intercourse that to a diplomatic representative shall be conceded the privilege of importation of effects for his personal or official use, or for the use of his immediate family, without payment of customs duties thereon. The application of this privilege varies in different countries, and in some is restricted to the chief of mission. It is the duty of the representative to acquaint himself with the formalities and limitations prescribed in such case by the local law or regulations and to conform therewith. The privilege is one of usage and tradition, rather than of inherent right. The practice of the Government of the United States is to accord such privileges to chiefs of mission, and on a reciprocal basis to members of their staffs. In the case of mailed parcels, sealed or unsealed, addressed to a member of the family of the chief of mission, members of the diplomatic staff or families, customs inspection is insisted on, even where admission is granted free of duty.[1]

In the Foreign Service Regulations of the United States, as of January, 1941, it was, however, said that "customs courtesies are accorded by the United States to diplomatic representatives and consular officers on a reciprocal basis," no distinction being laid down in that regard between chiefs of mission and officers of lesser grades.[2] In those Regulations, as of January 1940, it was declared that

[13] The Secy. of State, to Chiefs of Mission in Washington, Oct. 12, 1932, Hackworth, Dig., IV, 570. See also Mr. Hanes, Acting Secy. of the Treasury, to the Secy. of State, Oct. 3, 1938, *id.*, 570, 571, where it was said: "The exemption also extends to the manufacturers' miscellaneous excise taxes where any such person is a party to a taxable transaction and it may be assumed that the burden of the tax would fall directly upon him. The exemption does not extend to cases where the person entitled to exemption is not a party to the taxable transaction, such as in the case of the purchase by a diplomatic representative of an automobile from a dealer."

See also Mr. Mills, Secy. of the Treasury, to Mr. Stimson, Secy. of State, Dec. 1, 1932, Hackworth, Dig., IV, 574; Mr. Messersmith, Assist. Secy. of State, to American Diplomatic Officers, Aug. 19, 1937, *id.* IV., 574.

§ 441. [1] Chap. VII–12.

See also Mr. Grew, for the Secy. of State, to the German Chargé at Washington, July 16, 1926, For. Rel. 1926, II, 548, 551.

*Cf.* Mr. Spaulding, Acting Secy. of the Treasury, No. 141, Dec. 22, 1902, Moore, Dig., IV, 677.

See also Hackworth, Dig., IV, § 410.

[2] III–5, citing executive order No. 8181, of June 22, 1939.

"where foreign governments are not disposed to grant to diplomatic and consular officers of the United States customs courtesies and privileges similar to those enjoyed by their representatives in the United States, this discrepancy should be brought to the attention of the foreign government by the diplomatic representative of the United States in that country, who may state that, if the foreign government is not disposed to grant the same exemptions and courtesies to our representatives abroad as are granted the representatives of the government concerned in the United States, the Government of the United States will, of necessity, have to reconsider its position in regard to such exemptions." [3] By such processes the practice of interested States may be expected ultimately to reveal a general sense of obligation to grant concessions, on a reciprocal basis, in favor of all classes of diplomatic officers and their families residing with them.

According to the Foreign Service Regulations of the United States, the baggage and effects of foreign diplomatic representatives and members of the official staff of a foreign mission are exempt from customs inspection. "The baggage and effects of foreign ambassadors, ministers, chargés d'affaires, diplomatic secretaries, and military, naval, and other attachés to foreign missions are admitted without formal entry by the customs of the United States." The following representatives of foreign governments, their families, suites, and servants are said to be entitled to the free entry of their baggage and effects:

(1) Ambassadors, ministers, chargés d'affaires, diplomatic secretaries, naval, military, and other attachés of embassies and legations, high commissioners, consular officers, and trade representatives, accredited or assigned to this Government or en route to or from other countries to which accredited.
(2) Other high officials of foreign governments and such distinguished foreign visitors as may be designated by the Department of State.[4]

If the baggage and effects of any of the persons so enumerated arrive "after him" they may be passed duty free upon satisfactory proof of ownership.[5]

With respect to the importation of merchandise by foreign representatives, the Foreign Service Regulations of the United States announce that "articles addressed to ambassadors, ministers, and chargés d'affaires representing governments in the United States shall be delivered to the addressees without submission to customs officers"; that "sealed and unsealed articles addressed to foreign representatives, other than chiefs of mission, shall be subject to usual customs treatment"; that "articles intended for the personal use of foreign diplomatic representatives, members and attachés of foreign missions, and members of their families may be admitted free of customs duty upon application to the Department of State in each instance"; that "a similar privilege may be accorded to foreign consular officers and other representatives of foreign governments, pro-

[3] *Id.*, Note 3.
[4] Foreign Service Regulations of the United States, III–5, Note 1, as of January, 1941, where it is announced that a request for the extension of the customs courtesies referred to in the text should be submitted to the Department of State through the appropriate foreign mission in Washington.
[5] *Id.*, (d).

vided that a treaty or a special agreement to this effect exists between the United States and the countries which they represent"; that "importations for the official use of foreign representatives are admitted free of duty and without customs inspection, provided the government of the foreign representative accords similar privileges to the United States." [6]

It may be observed that by an exchange of notes of October 11, 1940, the United States and Brazil agreed, on a basis of reciprocity, that the diplomatic and consular representatives of each country accredited to the other country, and the clerical personnel attached to their respective offices who were nationals of the United States and of Brazil, would be permitted to import, free from the payment of duties, articles for their personal use, if those individuals were not engaged in any other private occupation for gain, and if the article were not one the importation of which was prohibited by the laws of either contracting party.[7]

Exemptions from customs duties, however justly claimed by American diplomatic officers, are not believed to embrace also municipal *octroi* duties imposed in some foreign countries upon articles of consumption and those within divers other categories.[8] Such was, moreover, the view of the Department of State, in 1925, which, however, sought, and succeeded in obtaining an exemption in favor of the secretary of the mission at Belgrade from a municipal customs tax on an automobile taken by him from the United States to Yugoslavia, partly by showing that no corresponding exaction was made by American authority in the converse case.[9]

It should be obvious that a State is not obliged to permit a diplomatic officer accredited to itself to introduce into its territory articles of which the importation is forbidden, and that it may not illegally employ reasonable means to thwart their introduction.[10] The exercise of the full measure of its right may, however, prove to be a hardship to a resident diplomatic corps, when it involves the deprivation of its members of articles habitually consumed by them as a part of their normal diet. This circumstance impelled the United States, after the adoption of the Eighteenth Amendment to the Constitution, and the enactment of the National Prohibition Act of October 28, 1919,[11] with the authoritative

[6] Foreign Service Regulations of the United States, III–5, Note 2, as of January, 1940. See also Mr. Messersmith, Assist. Secy. of State, to American Diplomatic Officers, Aug. 19, 1937, Hackworth, Dig., IV, 589.

[7] Dept. of State Bulletin, Nov. 30, 1940, 482.

In 1936, the Treasury Dept. appeared to be of opinion that foreign diplomatic representatives would not be entitled to exemption from a so-called Callao port tax imposed in 1935 by Peruvian authority on steamship passages, freight, and baggage, and sought to be collected from members of the diplomatic corps at Lima. See Hackworth, Dig., IV, 593–594.

[8] See Mr. Olney, Secy. of State, to Mr. MacVeagh, No. 144, Jan. 20, 1896, MS. Inst. Italy, III, 102, Moore, Dig., IV, 676. See For. Rel. 1903, 661–664, respecting the erroneous collection of an alien head tax from the Japanese Chargé d'Affaires to Mexico, when entering the United States *en route* to Japan.

[9] See Mr. Grew, Acting Secy. of State, to Mr. Paddock, American Chargé d'Affaires *ad interim* at Belgrade, Sept. 8, 1925, Hackworth, Dig., IV, 596; Mr. Dodge, American Minister to Yugoslavia, to the Secy. of State, No. 2836, Oct. 15, 1925.

[10] See Art. 21 of Harvard Draft Convention on Diplomatic Privileges and Immunities, *Am. J., Supplement*, Jan. and April, 1932, XXVI, 23, and Comment thereon, *id.*, 113.

[11] 41 Stat. 305.

interpretation thereof by the Supreme Court,[12] to refrain from preventing accredited diplomatic officers from introducing, possessing and transporting, intoxicating liquors acquired for their own consumption.[13]

i

§ 442. **Police Regulations.** It has been observed that the right of the State to which he is accredited, to prevent a minister from committing a hostile act, was well understood in the time of Grotius.[1] This principle still has its applications.[2] A diplomatic officer is expected to observe local police regulations designed for the good order and safety of the public, such as those regulating traffic on the highway.[3] Immunity from punishment for the violation thereof by no means implies, "that actual coercion might not be employed in protecting the public from injury, as by running down persons in the street."[4] It is hardly to be anticipated, however, that a diplomatic officer accredited to the United States, if conscious of the nature of his mission and of the likelihood of rendering it abortive by contempt for law, would fail to take the customary precautions to respect regulations, or would intentionally give occasion to municipal authorities to hold him in restraint.

5

§ 443. **Asylum in Embassies and Legations.** The growth of international law has been contemporaneous with and dependent upon that also of the recognition of the supremacy of the territorial sovereign over a well-defined domain regarded as its own. That law by reason of its relation to this principle has waged persistent warfare against whatever has served to thwart it. One of its most persistent enemies was robust and mature even before the days of Grotius. With the

[12] See Cunard S.S. Co. *v.* Mellon, 262 U. S. 100.

[13] See Regulations 60, Relative to Intoxicating Liquors, approved March 14, 1924, 26 Treasury Decisions, Internal Revenue, 115, Feller and Hudson, Diplomatic and Consular Laws and Regulations, II, 1346.

See Mr. Hughes, Secy. of State, to Senator Fletcher, April 16, 1924, Hackworth, Dig., IV, 601.

See Lawrence Preuss, "Foreign Diplomats and the Prohibition Laws," *Michigan Law Rev.*, XXX, 333.

§ 442. [1] Jurisdictional Immunities, *supra*, §§ 433–434.

[2] Declares Professor Moore: "The theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he can not be punished for his failure to respect them. The punitive power of the State can not be directly enforced against him. It will hardly be denied, however, that it is his duty to respect the laws of the country in which he resides, and that he may in many conceivable cases be prevented from doing unlawful acts, for which, if he were allowed to commit them, he could not be punished. This distinction is peculiarly applicable to police regulations, made for the purpose of assuring the public health and safety." (Dig., IV, 678.)

See Chesney Hill, "Sanctions Constraining Diplomatic Representatives to Abide by the Local Law," *Am. J.*, XXV, 252.

[3] Mr. Hay, Secy. of State, to Mr. Wight, Feb. 17, 1900, 243 MS. Dom. Let. 104, Moore, Dig., IV, 679; Mr. Rives, Assist. Secy. of State, to Mr. Childs, June 21, 1888, 168 MS. Dom. Let. 651, Moore, Dig., IV, 678; Opinion of Mr. Knox, Atty. Gen., Jan. 2, 1902, 23 Ops. Attys. Gen., 608, Moore, Dig., IV, 679; Circular of Department of State, Jan. 17, 1903, concerning a coachman's badge for diplomatic carriages.

[4] Moore, Dig., IV, 678.

See also Mr. Welles, Acting Secy. of State, to Mr. E. G. Buckland, Aug. 7, 1939, Hackworth, Dig. IV, 603.

establishment of permanent missions, ambassadors took under their protection large numbers of persons, oftentimes of the worst character, to whom was thereby afforded an asylum.[1] The early practice whereby an ambassador possessed a so-called *franchise des quartiers,* covering a certain area in the city of his abode, offered opportunity for the establishment of a veritable colony of refugees, dangerous to the safety of the State whose laws they defied.[2] Thus an inevitable conflict ensued; the issue was never in doubt so long as society was convinced that the maintenance of justice demanded respect in fact as well as theory for the supremacy of each State within its own domain. The practice, nevertheless, died slowly. It did not completely disappear from Europe until late in the nineteenth century. While it never existed in the United States, traces possibly still linger in parts of Spanish America.[3]

The granting of asylum was merely the abuse of a custom in itself not unreasonable, and of very early origin. The principle that called for the inviolability of the person of an ambassador necessitated also the inviolability of his house. He could not exercise his functions freely and independently unless the latter were exempt from local jurisdiction. Hence there was general acquiescence that both should enjoy immunity. To this extent the existing usage was accepted without resistance, and remains to-day unchallenged. The nature of the exemption was not, however, always clearly understood; while the phrase employed to describe it — extraterritoriality — led to confusion of thought.[4]

The ground occupied by an embassy is not in fact the territory of the foreign State to which the premises belong through possession or ownership.[5] The lawfulness or unlawfulness of acts there committed is determined by the territorial sovereign. If an attaché commits an offense within the precincts of an embassy, his immunity from prosecution is not because he has not violated the local law, but rather for the reason that the individual is exempt from prosecution. If a person not so exempt, or whose immunity is waived, similarly commits a crime therein, the territorial sovereign, if it secures custody of the offender, may subject him to prosecution, even though its criminal code normally does not contemplate

§ 443. [1] Attention is called to the valuable commentary on the "Right of Asylum"; "Early Diplomatic Privileges and their Decadence"; "Survivals of Asylum in Europe"; and "Diplomatic Asylum in International Law," in Moore, Dig., II, 755–770, 775–781; also "Asylum in Legations and Consulates," by the same author, New York, 1892, reprinted from *Pol. Sc. Quar.,* VII, nos. 1, 2 and 3.

[2] "The privileges accorded to ambassadors led to many scandalous abuses in former times, none of them greater than those which arose out of the inviolability of their residences, or what was technically known as the *franchise de l'hôtel.* Whole quarters of populous cities — Rome, Venice, Madrid, and Frankfort, during the assembly for the election of the emperor — were taken possession of by foreign ministers under this guise. By the simple expedient of placing the arms of their sovereigns over the doors of as many houses as they thought proper to hire, and letting them out as asylums for offenders against the laws of the countries in which they dwelt, enormous profits were realised." (Lorimer's Institutes, I, 250.)

[3] See extended statement by Mr. Hackworth in his Digest, II, 621.

See also documents in Moore, Dig., II, 781–841, indicating the practice in various Spanish-American States, and the relation of the United States thereto; also Instructions to Diplomatic Officers of the United States (1897), § 51; Barry Gilbert, "The Practice of Asylum in Legations and Consulates of the United States," *Am. J.,* III, 562; Sir E. Satow, Diplomatic Practice, 3 ed., Chap. XX.

[4] Exemptions from jurisdiction, in General, *supra,* § 244–245.

[5] Dana's Wheaton, Dana's Note No. 129. *Cf.,* however, *In re* Zoltán Sz, Supreme Court of Hungary, 1928, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 252.

the punishment of one who commits an offense outside of the national domain.[6] It is not believed, therefore, that an ambassador himself possesses the right to exercise jurisdiction, contrary to the will of the State of his sojourn, even within his embassy with respect to acts there committed.[7] Nor is there apparent at the present time any tendency on the part of States to acquiesce in his exercise of it.

Should a public minister endeavor to afford asylum within his official residence to fugitives from local justice, the territorial sovereign might with reason employ coercive measures to check the continuance of the abuse of the diplomatic privilege. The premises might be surrounded by a cordon of police and means of egress and ingress effectually blocked.[8]

It is not believed that at the present time within the domain of any State duly maintaining exclusive control thereof and administering justice therein, a foreign diplomatic representative should endeavor to resist the demand of local authorities for the surrender, for purposes of prosecution, of any person charged with crime, who is not, by reason of some connection with the mission, to be deemed exempt from the jurisdiction of the State.

The Department of State has made it clear that the United States does not recognize a right of asylum.[9] "On the contrary, the Government of the United

[6] Case of Nitchencoff, a Russian subject who committed an assault on one de Balsh, in the house of the Russian Ambassador in Paris, Moore, Dig., II, 778, *citing Solic. Journal,* X, 56, Nov. 18, 1865; also Mr. Jackson, Chargé at Berlin, to Mr. Hay, Secy. of State, July 5, 1899, concerning the prosecution by German authorities of a former servant of French nationality of the Spanish Ambassador at Berlin, on a charge of assault, committed within the embassy, For. Rel. 1899, 318, Moore, Dig., II, 778–779. In this case it was held that the court had jurisdiction.

[7] "Heffter states the law as it exists at the present day, when he says that it is only in Turkey and other non-Christian States that foreign ministers are invested with the right to decide upon disputes among their countrymen or even among the members of their suites. This view is entirely accepted by Lawrence, who, in his invaluable edition of Wheaton, says that the proposition in the latter's text 'seems to have been transferred from one elementary treatise to another without due examination.'" (Prof. Moore, in Dig., II, 777, *citing* Lawrence's Wheaton, ed. 1863, note 133.) See, also, Hall, 6 ed., 177, note 1. *Compare* the early Case of the Duc de Sully, Ward, Hist., II, 316.

[8] See case of the arrest and detention by the Chinese Legation at London of a Chinese person named Sim Yat Sen, in 1887, and the steps taken by the British Government to obtain his release, Moore, Dig., IV, 555, based upon a despatch from London in the New York *Evening Post* of Oct. 23, 1896, and also quoting a public letter of Professor Holland respecting the case in the New York *Sun* of Nov. 8, 1896. Also the well-known case of the Duke of Ripperda, a Spanish Minister of Foreign Affairs, who, in 1726, took refuge in the British Embassy at Madrid, and whose seizure was nevertheless there effected by Spanish officers, Martens, *Causes Célèbres,* I, 174–209, Moore, Dig., II, 765–766; also the case of Springer, a native of Russia living in Sweden, who after conviction for crime escaped from prison and took refuge in the British Embassy at Stockholm, and whose surrender was obtained by coercive measures on the part of Sweden, Martens, *Causes Célèbres,* I, 326–358, Moore, Dig., II, 766.

[9] Mr. Root, Secy. of State, in a communication to Mr. Furniss, Minister to Haiti, April 11, 1908, declared: "I have to say that previous instructions have made it clear that this Government does not recognize the so-called right of asylum. Recent conditions prevented that policy from being carried out with regard to refugees who were then actually under shelter.

"Now that the American legation and consulates have been cleared of refugees, you will make it distinctly known that no more Haitian refugees will be admitted to shelter by you or your subordinates and that no pretext will be afforded for reawakening the question of asylum so far as the Government of the United States is concerned." (For. Rel. 1908, 435.) See, also, Raymond Robin, "*Le droit d'asile dans les légations et ses consulats étrangers et les négociations pour sa suppression en Haïti,*" *Rev. Gén.,* XV, 461.

See, also, Mr. Knox, Secy. of State, to the American Chargé d'Affaires at Peking, Nov. 10, 1911, For. Rel. 1912, 174; Mr. Wilson, Acting Secy. of State, to the Secy. of the Navy,

States has strongly disapproved of the principle of asylum as such and has declined to recognize or subscribe to it as a part of international law." [10] According to an Executive Order of June 22, 1939, "a diplomatic representative or consular officer may not extend asylum to persons outside of his official or personal household." [11]

An Executive Order of December 2, 1932, in relation to "Unsanctioned Asylum," which has been incorporated in the Instructions to Diplomatic Officers of the United States,[12] sets forth the position of the Department of State in the following terms:

> Recent political disturbances in certain countries, together with the resultant requests for shelter in diplomatic missions by individuals whose personal safety was believed to be in danger, suggests the advisability of again stating this Government's position with respect to the granting of asylum in American embassies and legations.
>
> Immunity from local jurisdiction is granted foreign embassies and legations to enable the foreign representatives and their suites to enjoy the fullest opportunity to represent the interests of their states. The fundamental principle of legation is that it should yield entire respect to the exclusive jurisdiction of the territorial government in all matters not within the purposes of the mission. The affording of asylum is not within the purposes of a diplomatic mission.[13]
>
> The limited practice of legation asylum, which varies in the few states permitting it according to the nature of the emergency, the attitude of the government, the state of the public mind, the character of the fugitives, the nature of the offenses, and the legation in which asylum is sought, is in derogation of the local jurisdiction. It is but a permissive local custom

---

Oct. 23, 1912, For. Rel. 1912, 860; Mr. Polk, Acting Secy. of State, to Mr. Reinsch, Minister to China, July 21, 1917, For. Rel. 1917, 88; also, Mr. Reinsch to the Secy. of State, Aug. 9, 1917, *id.*, 90, 94.

Mr. Maginnis, American Minister at La Paz, informed the Department of State, July 16, 1920, that in the course of the revolution in Bolivia, all the Legations at La Paz, except the French and Chilean, had harbored refugees. Dept. of State, statement for the Press, July 19, 1920, No. 4. See, also, statement of July 15, 1920, No. 2, stating that the American Legation reported that President Guerra and certain others had taken refuge in the Legation.

See documents in For. Rel. 1916, Supplement, 825–829, concerning the asylum accorded in 1916, to the British vice consul at Sofia.

[10] Statement in Hackworth, Dig., II, 622, where it is added: "It has, however, on occasion sanctioned the granting of temporary refuge by American diplomatic and consular missions and by American public vessels when the affording of such refuge seemed to be necessary for the preservation of human life."

[11] Foreign Service Regulations of the United States, Section III–4 (Executive Order of June 22, 1939), Hackworth, Dig., II, 623.

[12] Chap. VII, § 6. This superseded the corresponding provisions of the Instructions of March 8, 1927. It is contained in a footnote in Hackworth, Dig., II, 623.

[13] See, also, Mr. Hughes, Secy. of State, to the American Embassy at Santiago, Chile, Jan. 27, 1925. In this communication it was declared that "the Government of the United States respects the principle that a sovereign State enjoys the exclusive right to control and administer justice within its territory, and hence that it should not be resisted or thwarted by an American diplomatic officer when its authorities demand the surrender for purposes of prosecution of any person charged with crime who is not, by reason of some connection with the mission, to be deemed exempt from the local jurisdiction." (Hackworth, Dig., II, 628.)

See also some special situations noted in documents in Hackworth, Dig., II, § 195.

practiced in a limited number of states where unstable political and social conditions are recurrent.

There is no law of asylum of general application in international law. Hence, where the asylum is practiced, it is not a right of the legate state but rather a custom invoked or consented to by the territorial government in times of political instability. While the practice is recognized in most of the Latin American countries, and was the subject of a convention signed at Habana at the Sixth Pan American Conference in 1928, it has never existed in the United States and has never been recognized as a right which could be claimed by refugees or granted by diplomatic missions. The custom is justified publicly on humanitarian grounds, but in practice it is used primarily for the personal protection of conspirators planning a *coup d'état* or for the government fearing or experiencing one.

American diplomatic officers will be guided by these considerations and will bear in mind that the Government of the United States can not countenance the affording of protection to other than uninvited fugitives whose lives are in imminent danger from mob violence; that such protection may continue only so long as such imminent danger continues; that asylum must be refused to persons fleeing from the pursuit of the legitimate agents of the local government, and in case such persons have been admitted they must be either surrendered or dismissed from the embassy or legation.[14]

The extension of refuge to persons on purely humanitarian grounds when their lives were in imminent danger from mob or other violence during the period when danger continued has frequently been accorded by American diplomatic missions without the disapproval of the Department of State.[15] The beneficiaries of such action have, moreover, sometimes been foreign governmental officials and their families.[16]

The Delegation of the United States, in signing at Habana on February 20, 1928, a Convention on Asylum, as it was incorporated in the Final Act of the

[14] In the course of his communication to the American Embassy at Santiago, Chile, of Jan. 27, 1925, Secretary Hughes declared that while the Department of State had at times approved of the yielding by an American diplomatic officer of temporary shelter to an individual when the safety of his life was threatened as by mob violence in a country where conditions of great disorder prevailed, the significance of such an exceptional situation should not be misconstrued. It was based, he said, upon the theory that disorderly conditions had so impaired the power or disposition of the local authorities to administer justice as to render inapplicable for the time being the principle to which he had adverted concerning the exclusive right of the territorial sovereign to administer justice within its domain. An American diplomatic officer should, therefore, he declared, exercise utmost discretion in determining whether such extraordinary conditions existed throughout the period during which shelter was sought or granted, or whether, on the contrary, any shelter which he was asked to accord was designed to thwart the common exercise of jurisdiction by the territorial sovereign. That a refugee was sought by his political enemies for an essentially political offense, would not, he said, bring the cause within the exception noted, at least if such an offense were one made punishable by the local law, and if there was no reason to believe that the right accorded an accused person for purposes of defense would not be respected. It may be observed that the yielding by the American Ambassador at Santiago, of the "hospitality" of his mission to a former President of that Republic who through a military *coup d'état* had suddenly been forced to abandon his office as such, inspired this instruction. (Hackworth, Dig., II, 628–629.)

[15] See Foreign Service Regulations of the United States, Sec. III–4, note 1, as of January, 1941.

[16] See instances set forth in Hackworth, Dig., II, 624–632.

Sixth International Conference of American States, established "an explicit reservation, placing on record that the United States does not recognize or subscribe to as part of international law, the so-called doctrine of asylum." [17] The Convention has not as yet been ratified by the United States. Nor did the United States accept the Convention on Political Asylum concluded at the Seventh International Conference of American States at Montevideo, December 26, 1933.[18]

Shortly after the outbreak of the revolution in Spain in 1936, numerous refugees sought shelter from violence in various diplomatic missions. The occasion inspired the Department of State to declare that while it was of course anxious to render every possible help to representatives of Latin American and other countries it could not throw open the doors of the Embassy so as further to jeopardize the safety and means of protection for American nationals. In extreme circumstances, however, where the immediate question of life was at stake, it was said that the Embassy should of course extend such protection "as the limitations of the Embassy permit." [19] Somewhat later, the Department was informed that "large numbers of Spaniards were receiving asylum in various embassies and legations and that in some cases this practice had given rise to friction between the Diplomatic Missions and the Spanish Government"; that the Spanish Minister of State in a communication of October 13, 1936, to the Dean of the Diplomatic Corps, announced that Spain had respected the right of asylum "through a spirit of tolerance and not because it is obligated to do so," and that due to the "notorious abuses" to which the practice had given rise the Spanish Government "finds itself compelled to terminate the attitude of extraordinary tolerance adopted by it up to the present with respect to the

[17] Sixth International Conference of American States, Final Act, Habana, 1928, 170. Also in this connection, documents in Hackworth, Dig., II, § 196.

Art. 6 of the Harvard Draft Convention on Diplomatic Privileges and Immunities happily lays down the injunction against asylum in the following broad and simple terms: "A sending State shall not permit the premises occupied or used by its mission or by a member of its mission to be used as a place of asylum for fugitives from justice." *Am. J., Supplement,* Jan. and April, 1932, XXVI, 20. See comment by the Reporter, *id.,* 62–66.

According to Article 8 of the consular convention between the United States and Cuba of April 22, 1926: "Consular offices shall not be used as places of asylum. Consular officers are under the obligation of surrendering to the proper local authorities, which may claim them, persons prosecuted for crime in accordance with the domestic laws of the country which receives them, who have taken refuge in the building occupied by the consular offices." (U. S. Treaty Vol. IV, 4050.)

[18] It was declared at Montevideo, upon the appending of the signatures of various plenipotentiaries: "Since the United States of America does not recognize or subscribe to, as part of international law, the doctrine of asylum, the delegation of the United States of America refrains from signing the present Convention on Political Asylum." (Report of the Delegates of the United States of America to the Seventh International Conference of American States, Montevideo, Uruguay, December 3–26, 1933, Dept. of State, Conference Series No. 19, Washington, 1934, Appendix 17.)

See Project of Convention on the Right of Asylum, together with note of the Argentine Ministry to the Foreign Diplomatic Representatives, July 27, 1937, and commentary by Carlos Saavedra Lamas, published by the Argentine Ministry of Foreign Affairs and Worship, Buenos Aires, 1937.

See also *Institut de Droit International (Septième Commission), L'Asile en Droit International public (à l'exclusion de l'asile neutre), rapport définitif* by A. Raestad, Brussels, 1939.

[19] The statement in the text is taken from that in Hackworth, Dig., II, 632, citing among other documents, Mr. Hull, Secy. of State, to Mr. Wendelin, telegram 70, Aug. 5, 1936.

practice of the right of asylum, reserving to itself the right to proceed against the abuses already committed as the high interests of the Republic may require in each case." The Department of State approved of the action of the American Chargé d'Affaires in informing the Dean of the Corps that, with reference to a proposed joint reply protesting against the stand of the Spanish Government, there was no justification for including the United States, inasmuch as no Spanish nationals had been given asylum in its Embassy.[20]

§ 443A. **Mission Premises as a Place of Refuge in a Bombarded Area.** When the premises of a foreign diplomatic mission happen to be in an area where the safety of human life is jeopardized by such aerial bombardments as are incidental to the operations of a civil war there in progress, those premises may reasonably be employed as a place of refuge for the nationals of the State to which the mission belongs, whether or not officially associated therewith, and possibly also for their dependents and servants of other nationalities. Thus, when in November, 1936, Madrid was being subjected to aerial bombardment by the so-called Revolutionists under General Franco, the American Embassy in that city became a haven of refuge for a colony of some 138 persons, embracing American and other nationals. These occupants during the period of their sojourn were subjected to a control and discipline organized under the supervision of the American Military Attaché.[1] The sheltering of these persons was not designed to be the means of withholding fugitives from the local justice, or to constitute participation in the conflict for the reins of government. If some non-American non-combatants were beneficiaries of the protection that was accorded, it was due to their connection with the Embassy or with American nationals who became the temporary inmates or guests thereof.

## 6

## THE FUNCTIONS OF A DIPLOMATIC OFFICER

### a

§ 444. **In General.** The function of a diplomatic officer is to promote the good relations between his own State and that to which he is accredited.[1] His useful-

[20] Again, the statement in the text is taken from that in Hackworth, Dig., II, 632, and documents there cited.

See also statement in Hackworth, Dig., II, 630, concerning the refuge taken in the legation compound at Addis Ababa by some 700 natives in February, 1937.

§ 443A. [1] See Associated Press despatch as published in *New York Herald-Tribune,* Nov. 13, 1936, p. 2.

Concerning the use of the American Embassy at Madrid as a place of refuge primarily for American citizens during the summer, and again in the autumn of 1936, see Dept. of State Press Releases, July 25, 1936, 70, 72, 77, 82, 85, 89; *id.,* Aug. 1, 1936, 100; *id.,* Aug. 8, 1936, 125, 130; *id.,* Aug. 15, 1936, 139, 144; *id.,* Aug. 22, 1936, 170, 173; *id.,* Aug. 29, 1936, 188; *id.,* Sept. 5, 1936, 206; *id.,* Sept. 19, 1936, 239; *id.,* Oct. 24, 1936, 342; *id.,* Nov. 7, 1936, 353; *id.,* Nov. 14, 1936, 389; *id.,* Nov. 21, 1936, 408; *id.,* Nov. 28, 1936, 412.

§ 444. [1] According to the Foreign Service Regulations of the United States, II–1, (b), as of

ness ceases, therefore, if for any reason he becomes *persona non grata* to the government of the latter, or in case enmity between the two countries banishes the desire for friendship and terminates diplomatic relations.

In the fulfillment of his mission an envoy finds that his duties generally possess a threefold aspect. They concern, primarily, what pertains directly to his own country as a whole, such as the negotiation of treaties or the fostering of its political interests. They relate, secondly, to the welfare of private individuals, commonly and chiefly that of his own countrymen, who are within the State of his sojourn. They have to do, thirdly, with the special and technical requirements peculiar to his diplomatic office.

b

§ 445. **Representation in Behalf of His State as a Whole.** In the promotion of friendly relations, it is the duty of a minister to make himself familiar with any misapprehension, especially in official places, respecting the attitude of his own State in regard to matters concerning that to which he is accredited. To banish needless causes of friction must be his constant endeavor. To that end he should be alert to ascertain and make known to his government the exact position of the State to which he is accredited with respect to any matters giving rise to controversy with his own country.[1] In so doing he should strive to reflect with accuracy the nature of both official and popular opinion, and to gauge with certainty the temper of each. He should, moreover, endeavor to ascertain, if possible, the reactions to be anticipated in the country of his sojourn in consequence of recourse by his own State to projected policies of major import; and he should incidentally strive to enable his country to know when the assertion by it of particular pretensions against that to which he is accredited would be inexpedient or ill-timed. Conversely, if through contemplated legislation or other acts that State appears to be about to disregard the terms of an agreement already concluded with his country, it becomes the duty of the diplomatic representative to make the latter aware of the fact, and to prepare himself, accordingly, to lodge formal protest.

In time of war the diplomatic representative of a belligerent power accredited

---

January, 1941: "Diplomatic officers shall perform the following functions within the countries to which they are accredited:

(1) Establish and maintain friendly relations between the Government and people of the United States and the government and people of the country to which they are accredited;

(2) Keep the Government of the United States informed regarding political and economic developments abroad, particularly those affecting its interests;

(3) Extend protection to American citizens and promote just American interests in every proper manner;

(4) Interpret faithfully the viewpoint of the American Government in any question at issue."

See, also, Fauchille, 8 ed., §§ 681–683; also Henrique C. R. Lisboa, *Les fonctions diplomatiques en temps de paix,* Santiago de Chile, 1908; F. Van Dyne, Our Foreign Service, 92–93, 103–105; Charlemagne Tower, Essays Political and Historical, 1914, 55–57.

§ 445. [1] Instructions of Mr. Hay, Secy. of State, to Mr. Beaupré, Minister to Colombia, No. 15, June 2, 1903, For. Rel. 1903, 145.

See also Foreign Service Regulations of the United States, Chap. XIV on "Protection and Promotion of American Economic Interests," as of January, 1941.

to a neutral State finds the performance of such duties highly burdensome. He is obliged not only to advise his government concerning the nature of official complaints in consequence of its conduct as a belligerent, but also to inform it with candor as to the extent and significance of popular opposition which such conduct may be producing in the country of his sojourn.[2] His success in interpreting and reporting such foreign opinion may have large significance, and may even be the means of enabling his country to deter the neutral power from changing its status and embarking upon the conflict as its enemy. Moreover, in the converse situation, when the diplomatic officer finds himself the representative of a neutral State accredited to a belligerent power, it is believed to be his duty, as in any other situation, to make clear to the latter the views set forth in instructions from his government for communication to it, without the expression of any personal views calculated to weaken the effect thereof.[3]

It is the constant duty of a diplomatic representative to watch political and economic or other movements in the State of his official sojourn, and to observe intelligently whatsoever significance they possess in relation to his own. Such conduct is not to be deemed necessarily adverse to the welfare of the country to which he is accredited.[4] The stability of amicable relations between States depends, in large degree, upon the completeness with which their problems and aspirations are mutually understood and respected. Should, however, such an officer employ improper means to gain a knowledge of local policies, his conduct, if known, would serve to impair his usefulness, and possibly lead to a demand for his recall, or even to his dismissal.[5]

To negotiate treaties becomes oftentimes the duty of a diplomatic officer. However complete his instructions and however closely he may be in communication with his government, he should possess exact knowledge not only of the nature of and reasons for what he demands, but also of the probable effect of compliance upon the other contracting party. With its existing conventional arrangements dealing with the same matter, he should have familiarity; and, likewise, with whatsoever arguments it may have opposed to similar demands made by other States. Technical skill in the drafting of public agreements, clear understanding of the sense in which particular terms are employed, and a readiness to avoid the use of expressions likely to result in divergent constructions, are vital to the success of a minister who is burdened with such a task.[6]

[2] It may be doubted whether, in the experience of the United States since its Declaration of Independence, any minister representing it as a belligerent at the capital of a neutral State has responded with greater fidelity and success to the complicated obligations incidental to his office, than did the late Charles Francis Adams as American Minister to Great Britain in the days of the Civil War. See, in this connection, The Education of Henry Adams, (by himself), Boston, 1918, Chaps. VIII and IX.

[3] See Viscount Grey of Fallodon, Twenty-Five Years, 1892–1916, New York, 1925, II, 110.

[4] See McNair's 4 ed. of Oppenheim, I, § 380; Fauchille, 8 ed., § 682.

[5] EXTRADITION. Concerning the duties of diplomatic officers in relation to the extradition of fugitives from justice, see Extradition, Requisition, *supra*, § 324; Authentication of Documentary Evidence of the Demanding Government, *supra*, § 335.

Also Foreign Service Regulations of the United States, X–1 and X–2, as of January, 1941.

[6] See Foreign Service Regulations of the United States, Chap. XI, in relation to "Negotiation of Treaties," as of January, 1941.

See *supra*, § 407.

c

## Representation of His Countrymen

(1)

§ 446. **Protection.** A diplomatic officer is, in a broad sense, the representative of his countrymen in the State of his sojourn. In so far as their protection necessitates interposition with the Foreign Office or Department of State, he is their national spokesman.[1] The Foreign Service Regulations of the United States declare that the officers of that Service shall protect the rights and interests of the United States in its international, agricultural, commercial, and financial relations. In pursuance of that duty, they are instructed to guard against the infringement of rights of American citizens in matters relating to commerce and navigation which are based on custom, international law, or treaty; to observe, report on, and, whenever possible, endeavor to remove discriminations against American agricultural, commercial, and industrial interests in other countries; and to protect the national commercial reputation of the United States.[2]

In earlier instructions the Department of State expressed the view that the powers and duties of American diplomatic officers in regard to their fellow citizens depended in a large measure upon the municipal law of the United States; that no civil or criminal jurisdiction could be exercised by such officers over their countrymen without express authority by law or by treaty stipulation with the State in which they resided; and they were cautioned not to enter into any contentions that could be avoided, either with their countrymen or with the subjects or authorities of the country. They were instructed to use every endeavor to settle in an amicable manner all disputes in which their countrymen might be concerned, but to take no part in litigation between citizens. It was declared that such officers should "countenance and protect" their countrymen before the authorities of the country in all cases in which they might be injured or oppressed, but that their efforts should not be extended to those who had been willfully guilty of an infraction of the local laws, "it being incumbent upon citizens of the United States to observe the laws of the country where they may be."[3]

The Department of State has not, however, intimated that American diplo-

§ 446. [1] Mr. Fish, Secy. of State, to Mr. Mantilla, Spanish Minister, Feb. 16, 1875, MS. Notes to Spain, IX, 345, Moore, Dig., IV, 694.

JUDICIAL FUNCTIONS. Concerning the judicial functions of American diplomatic officers in certain oriental and other countries, see Extraterritorial Jurisdiction, Legislation of the United States, *supra*, § 264.

[2] XIV–1, as of January, 1941. In Note 1, appended thereto it is said: "Officers of the Foreign Service shall become thoroughly familiar with the rights of American citizens relating to commerce and navigation which have been secured to them either through international law, or custom, or by treaty, in the country of the officer's assignment. When rights of this nature are infringed in the officer's district, he shall, provided he is authorized to do so either by treaty, local usage, or by virtue of his official position, protest to the local authorities against such infraction, and shall immediately submit a report in the premises to the Department of State and to the officer of the mission, or supervisory consulate general having charge of trade protection work."

See also *id.*, XIV–2, Concerning Promotion of American Interests.

[3] Instructions to the Diplomatic Officers of the United States, March 8, 1927, Chap. XI–1.

matic officers should, in the course of endeavoring to protect American nationals, have recourse to procedure that pertains to the consular rather than the diplomatic branch of the service, as by direct interposition with officials outside of the Foreign Office.[4] It is not believed that a diplomatic officer accredited to the United States could, in the converse situation, properly discuss with local officials the grievances of his countrymen, or make interposition in their behalf save through the instrumentality of the Department of State.[5]

(2)

§ 447. **Support of Private Interests.** A State may as a matter of domestic policy utilize both its diplomatic and consular representatives in order to further its agricultural and commercial interests. The United States employs its Foreign Service Officers for that purpose. Accordingly, elaborate instructions set forth the methods by which they are to promote those interests.[1] The work of promotion is quite distinct from that involved where interposition of such officers is sought, and at times employed, in relation to claims against the State to which the individual is accredited.[2]

(3)

§ 448. **Presentations at Court.** If any of his countrymen are to be presented at the court of the State of his sojourn, the diplomatic representative is the medium of presentation. Unwilling to encourage invidious social distinctions, and reluctant also to burden unduly an American diplomatic officer, the Department of State leaves to his personal discretion the choice of persons to be presented, subjecting, however, the exercise of this social privilege to the custom and wishes of the local court.[1]

[4] See, for example, Art. VIII, Consular Convention with Germany, of Dec. 11, 1871, Malloy's Treaties, I, 552; Art. XXI, treaty with Germany of Dec. 8, 1923, U. S. Treaty Series, No. 725.

[5] See Secretary of State as Organ of Correspondence, *supra*, § 410.

§ 447. [1] See Foreign Service Regulations of the United States, XIV–2, as of January, 1941.

[2] Instruction to Diplomatic Officers of the United States, as of September, 1931, Chap. XI–8, contained in substance the following statement: "The interposition of American diplomatic representatives is often asked by their countrymen to aid in the collection of claims against the government to which they are accredited. If the claim is founded in contract, they must not intervene without specific instructions to do so. If it is founded in tort, they will, as a rule, in like manner seek previous instructions before intervening, unless the person of the claimant be assailed or there be pressing necessity for action in his behalf before they can communicate with the Department of State; in which event they will communicate in full the reasons for their action."

See also documents in Hackworth, Dig., IV, § 391.

§ 448. [1] Mr. Bayard, Secy. of State, to Mr. Magee, No. 120, Jan. 12, 1889, MS. Inst. Sweden and Norway, XV, 189, Moore, Dig., IV, 572; Mr. Olney, Secy. of State, to Mr. Johnson, March 6, 1896, 208 MS. Dom. Let. 358, Moore, Dig., IV, 572; Mr. Seward, Secy. of State, to Mr. Dayton, Feb. 3, 1862, S. Ex. Doc. 19, 37 Cong., 2 Sess., Moore, Dig., IV, 570.

In Instructions to the Diplomatic Officers of the United States, as of September, 1931, Chap. XI–12, it was said: "The chief of mission must necessarily be sponsor for the persons presented and, having before him the names of all Americans seeking presentation, is best acquainted with the qualifications of the applicants to meet the conditions and terms prescribed by the particular court."

See also Foreign Service Regulations of the United States, XX–7, as of January, 1941.

d

## Good Offices for Third States or Their Nationals

(1)

§ 449. **In Countries where Diplomatic Representation Is Lacking.** American diplomatic and consular officers may, upon request and with the approval of the Department of State, temporarily assume the representation of foreign interests. They are not, however, permitted to perform any duty for a foreign government which involves the acceptance of an office. "Except in an extreme emergency," such officers are not to assume such representation unless instructed to do so by the Department of State, or have requested and received in advance the approval of the Department. Both the foreign government in interest and the foreign government to which the officer is accredited or assigned must consent to the arrangement before such officer can assume representation. Either government may, moreover, withdraw its consent at any time. Representation is said to be "only in an unofficial capacity." The status of the American diplomatic or consular officer is that of an agent, responsible to the foreign government for services performed in its behalf. "That government in turn must assume all responsibility for such services." The American officer finds himself forbidden to accept appointment as the fiduciary of a foreign State, or to perform duties detrimental to American interests, or to present claims on behalf of the nationals of the country he is representing "against the government to which he is accredited or assigned." American diplomatic and consular officers are said to be custodians of the property of foreign missions or consulates in their charge. They are instructed to conserve such property so far as possible, and to protest to the authorities of the government where they are accredited or assigned against "any interference on the part of private individuals or officials." As a means of protection, "the flag of the United States may be raised over the building of a foreign mission or consulate, but this should not be done except with the consent of the authorities of the local government." Any correspondence with either foreign government concerned must be conducted through the appropriate mission of the United States. The function of representing a foreign interest is said to attach to the office rather than to the officer.[1]

§ 449. [1] The paragraph in the text is taken from Foreign Service Regulations of the United States, XII–3, and notes appended thereto, as of January, 1941.

See also documents in Hackworth, Dig., IV, § 396.

See Art. 6 of Convention on Diplomatic Officers, adopted by the Sixth International Conference of American States, at Habana, Feb. 20, 1928, Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 205.

See documents in For. Rel. 1914, 174–180, concerning the representation of Chinese interests by American diplomatic and consular officers in Costa Rica; documents in For. Rel. 1915, 1119–1121, concerning the protection by the American Legation at Managua of Chinese citizens residing in Nicaragua; also, documents in For. Rel. 1913, 1105–1139; and *id.*, 1915, 1262–1274, concerning the protection of Chinese interests in Panama through the good offices of the American Legation, in 1913 and 1915; also, documents, *id.*, 1918, 397–400, concerning the protection in 1918, of Chinese interests in the Dominican Republic and Haiti by American diplomatic and consular officers.

An American diplomatic officer who has accepted such a function is expected to examine with care such complaints as are laid before him, and to exercise discretion as to their treatment. It is said that no case requiring formal or informal negotiation with the government to which he is accredited should be taken up unless with knowledge that such interposition is requested by the government of the State of which the complainant is a national, "permitted by the United States, and acquiesced in by the local government." [2]

Even when not without diplomatic representation at the capital of another State, third powers have on occasion, when disturbed conditions prevailed within the territory of that other, requested the United States to protect through its available naval forces in proximity thereto, such nationals of the requesting States as might be in peril and without means of safety other than those feared to be inadequately afforded by the territorial sovereign. The United States has at times been disposed to respond favorably to such requests by issuing appropriate instructions to American naval commanders.[3]

(2)

§ 450. **Nationals of Belligerent States.** When by reason of war diplomatic relations between two States are terminated, the diplomatic representative of a third and neutral State is commonly called upon to protect the interests of nationals of the one belligerent within the domain of that other to which he is accredited.[1] Such was the case in the course of World War I,[2] and also after the subsequent World War broke out in 1939. In the later conflict representation of foreign interests by American diplomatic and consular officers was authorized by the Department of State and was assumed with respect to numerous countries.[3]

[2] Mr. Bacon, Acting Secy. of State, to Mr. Jackson, Minister to Greece (No. 146 Greek Series), March 13, 1907, For. Rel. 1907, I, 583. Declared Mr. Loomis, Acting Secy. of State, to Mr. Combs, Minister to Guatemala, in the course of a communication of March 16, 1903: "In making representations in behalf of any aggrieved Chinese subjects who may seek the legation's interposition you should, by way of good offices, endeavor to secure for them the same degree of protection from tort as you could demand of right for an American citizen similarly circumstanced. Your discretion does not extend to the presentation of claims. If any such are preferred by Chinese subjects you will report them to the Department, which will bring them to the knowledge of the Chinese Government." (For. Rel. 1903, 573.) With respect to the presentation by the American Minister at Caracas of certain claims of Italian subjects, see Mr. Fish, Secy. of State, to Baron Blanc, Feb. 1, 1876, MS. Notes to Italy, VII, 281, Moore, Dig., IV, 591.

[3] See, for example, documents in For. Rel. 1914, 261–264, in relation to the protection of British interests in the Dominican Republic in 1914; also, documents in For. Rel. 1914, 838–866, concerning the protection of British subjects and interests in Mexico in 1913 and 1914, especially memorandum from the British Embassy to the Department of State, Nov. 17, 1914, *id.*, 865, and Mr. Lansing, Acting Secy. of State, to the Secy. of the Navy, Nov. 19, 1914, *id.*, 866.

§ 450. [1] Upon the severing of diplomatic relations, even though war does not ensue, the good offices of the minister of a third State are similarly invoked. See, for example, the course followed by the United States in 1908, upon the termination of its diplomatic relations with Venezuela, For. Rel. 1908, 820–830.

See documents in For. Rel. 1914, 636–648, concerning the representation of American interests in Mexico by the Brazilian Legation at Mexico City, upon the severance of diplomatic relations between the United States and Mexico, in 1914; also, documents, *id.*, 668–690.

[2] See discussion in Garner, World War, I, 53–55.

[3] See list of instances in Dept. of State Bulletin, Aug. 17, 1940, 113; also previous list, *id.*, May 18, 1940, 543.

An American diplomatic officer when assuming the function of a protector of belligerent interests acts unofficially. His duties call for the exercise of sound judgment, personal courage, and the utmost care to avoid the danger of weakening the neutral relationship of his own country towards either belligerent.[4] He may be burdened with the task of securing permission for and otherwise facilitating the departure of belligerent nationals from the territory belonging to the State of his sojourn.[5] He may render assistance also to their departing minister and his staff in quitting the country.[6]

On such occasions there is also entrusted to the officer protection of the archives and other property of the belligerent State whose nationals are placed within his care.[7] It may request him to display his national flag over the building of its embassy or legation, should the necessity or desirability of the display of such an emblem become apparent.[8] A diplomatic officer whose good offices are so invoked by a belligerent government may also be clothed by it with special authority to conclude in its behalf a protocol of peace.[9] As long as a state of war continues, notwithstanding a suspension of hostilities, the belligerent State to which the neutral officer is accredited, may, with reason, deem it preferable that diplomatic communications with the enemy continue to be made through him rather than through a consular officer of the enemy acting as an unofficial agent.[10]

While it remained a neutral in the course of World War I, heavy burdens

---

See in this connection Mr. Messersmith, Assist. Secy. of State, to American Diplomatic and Consular Officers, Dec. 16, 1939, Hackworth, Dig., IV, 501; Mr. Welles, Acting Secy. of State, to the Legation in Bern, April 30, 1940, *id.*, 502.

See also Foreign Service Regulations of the United States, XII–3, Note 8, as of January, 1941.

[4] Mr. Gresham, Secy. of State, to Mr. Denby, Jr., Chargé at Peking, Aug. 29, 1894, For. Rel. 1894, 106, Moore, Dig., IV, 601.

Respecting the case of Japanese spies in China during the Chino-Japanese War in 1894, see documents in Moore, Dig., IV, 606–611, especially Mr. Gresham, Secy. of State, to Mr. Denby, Jr., Chargé in China, Oct. 30, 1894, For. Rel. 1894, 119.

[5] Respecting the protection by the American Ambassador in Russia of Japanese interests in that Empire during the Russo-Japanese War, see For. Rel. 1904, 430–436, 714–722; *id.*, 1905, 830.

[6] See Sir E. Goschen, British Ambassador at Berlin, to Sir Edward Gray, British Foreign Secretary, Aug. 8, 1914, regarding the assistance rendered the latter by his American colleague, Mr. Gerard, upon the outbreak of the war in 1914, Misc. No. 8 (1914), Cd. 7445. See, also, Sir L. Mallet, British Ambassador at Constantinople, to Sir Edward Grey, British Foreign Secretary, Nov. 20, 1914, respecting the assistance rendered the latter by his American colleague, Mr. Morgenthau, Misc., No. 14 (1914), Cd. 7716.

See, also, documents in For. Rel. 1917, Supplement 1, 585–610, concerning the return of diplomatic officers from their posts upon the severance of relations between their countries and the United States.

[7] See M. Cambon, French Ambassador at Washington, to Mr. Sherman, Secy. of State, April 22, 1898, respecting the protection of Spanish interests in the United States, by the French Ambassador and the Austro-Hungarian Minister during the Spanish-American War, For. Rel. 1898, 785, Moore, Dig., IV, 612.

[8] Mr. Adee, Acting Secy. of State, to Mr. Nabuco, Brazilian Ambassador at Washington, July 10, 1908, For. Rel. 1908, 826.

[9] "On August 12, 1898, there was signed by the Secretary of State on behalf of the United States and by the Ambassador of France at Washington on behalf of Spain a Protocol of Agreement preliminary to the final establishment of peace between the United States and Spain." (For. Rel. 1898, 800.)

[10] Mr. Moore, Acting Secy. of State, to M. Cambon, French Ambassador, Aug. 19, 1898, For. Rel. 1898, 803, Moore, Dig., IV, 613.

were imposed upon American diplomatic officers accredited to belligerent powers.

On August 17, 1914, instructions to American diplomatic and consular officers entrusted with the interests of belligerent States set forth the views of the Department of State in the following terms:

> Your position, therefore, is that of the representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity. In your interposition in behalf of the subjects or citizens of one of the belligerents you should use every care so that it will be regarded, not as an act of partisanship, but as a friendly office performed in accordance with the wishes of both parties. You should especially avoid any action which might compromise the United States as a neutral or affect the amicable relations between it and the country to which you are accredited. While you are thus exercising these unofficial functions with impartiality and discretion, you will, nevertheless, examine all complaints, which may be laid in behalf of foreign subjects or citizens under your protection, and give to them such assistance and make such representations to the authorities of the country to which you are accredited as may seem to be appropriate in accordance with these special instructions and the standing instructions of the Department.
>
> In conclusion the Department anticipates that in some cases questions may arise regarding your authority over the buildings and other property of the foreign mission or consulate in your charge. You are advised, therefore, that your function in this respect is merely that of a custodian of the property and archives of the unrepresented government. Any interference on the part of private persons or officials with such property should be the subject of an unofficial representation or protest to the authorities of the government which is, by the rules of international law, charged with the security of diplomatic and consular premises and archives of foreign governments. If in connection with these duties you are requested or it appears desirable as a means of protection to raise the flag of the United States over the building of a foreign mission or consulate, you will bear in mind that this should not be done except with the consent of the authorities of the government to which you are accredited, and in strict compliance with the laws of the land.[11]

[11] For. Rel. 1914, Supplement, 740, 741.

See, also, in this connection, documents, *id.*, 731–750; *id.*, 750–756, concerning the activities of the United States in regard to prisoners of war and interned civilians; *id.*, 780–791, concerning special efforts in behalf of British and French nationals in Turkey; also, For. Rel. 1916, Supplement, 815–825, concerning the representation of belligerent governments in enemy countries, and especially Mr. Polk, Acting Secy. of State, to Mr. Penfield, American Ambassador to Austria-Hungary, March 20, 1916, *id.*, 819.

In 1915, the Swiss Government urged that of the United States, which had at the request of the former undertaken to accord protection to Swiss nationals in Turkey through the American Embassy at Constantinople, to take the position that "Swiss citizens under American protection in Turkey be assimilated with the citizens of the United States as the Swiss protected by Germany and France have always been assimilated with the nationals of those countries." (Mr. Ritter, Minister of Switzerland, to the Secy. of State, May 29, 1915, For. Rel. 1915, 1298.) In a communication of June 2, 1915, *id.*, 1299, the Department of State advised the Swiss Minister of its inability to take such a stand, and in so doing, referred to circular instructions to American diplomatic and consular officers of June 16, 1871, and Dec. 15, 1871. It declared, however, that the American Ambassador at Constantinople had been instructed to use his good offices to afford Swiss citizens in Turkey ample protection.

In harmony with these instructions the endeavor of American diplomatic and consular officers to safeguard and watch over the interests of nationals of belligerents at war with Germany and her allies was scrupulously and vigorously undertaken; and if American officers failed on occasion to effect restraint of ruthless conduct, the United States experienced as a nation satisfaction in the sense that the trust confided to its representatives was, in the estimation of the States which imposed it, faithfully performed.[12]

When, in 1917, the United States itself became a belligerent in World War I, it sought and obtained necessary representation in enemy territory through the agency of diplomatic officials of Spain, which retained its neutral status throughout the conflict.[13]

e

## Miscellaneous Restrictions Imposed upon a Diplomatic Officer by His Own State

(1)

§ 451. **Residence and Continuance of Mission.** In numerous ways a State may restrict the conduct of its diplomatic officers for the purpose of preserving and increasing their usefulness. Its regulations may be designed both to subserve domestic policies and to facilitate the performance of obligations due to foreign States. "An American diplomatic representative may establish a temporary residence at a place other than the seat of mission, provided that such residence is within the confines of the country to which he is accredited and at a point convenient to the mission, and provided that the office of the mission is opened daily by a secretary thereof. He shall report to the Department the location of such residence and the dates of his departure thereto and return therefrom." [1]

While reliance is placed upon his judgment and discretion regarding the course to follow in case he is apprehensive of danger to his person, a minister is not expected to quit the country to which he is accredited "without the most unequivocal necessity." [2] Nor is he permitted to break off diplomatic relations main-

[12] See, in this connection, James W. Gerard, My Four Years in Germany, New York, 1917, especially Chap. X (concerning prisoners of war); Hugh Gibson, A Journal from Our Legation in Belgium, New York, 1917 (especially 344–360, in relation to Miss Edith Cavell); Brand Whitlock, Belgium: A Personal Narrative, New York, 1919, I, 370–379, II, 81–110 (in relation to Miss Cavell).

[13] See For. Rel. 1917, Supplement 1, 610–628.

Concerning the withdrawal of the American Minister to Belgium and relief workers from Belgium in 1917, together with the transfer of relief work to Netherland subjects, see For. Rel. 1917, Supplement 1, 628–673.

Upon the severance by Turkey of diplomatic relations with the United States in April, 1917, the Swedish Legation at Constantinople took charge of American interests in that country. See Mr. Elkus, American Ambassador formerly in Turkey, to the Secy. of State, June 10, 1917, For. Rel. 1917, Supplement 1, 604.

§ 451. [1] Foreign Service Regulations of the United States, IV–9, as of January, 1941.

Concerning leaves of absence, see 22 U.S.C.A. § 17A; also Foreign Service Regulations of the United States, IV–11, as of January, 1941.

Concerning residence at the Capital by foreign diplomatic officers accredited to the United States, see documents in Hackworth, Dig., IV, § 389.

[2] Mr. Randolph, Secy. of State, to Mr. Adams, Minister to the Netherlands, Feb. 27, 1795, MS. Inst. U. S. Ministers, II, 323, Moore, Dig., IV, 565.

tained through his mission without the authority of his government, except possibly when subjected to grave personal indignity, and that under circumstances when he can reasonably assume that the Government of the United States would approve of his conduct.[3] At the present time the ability of an American diplomatic representative, under almost all circumstances, to communicate speedily with the Department of State by telegraph or otherwise, obviates the necessity of his taking such summary action without specific instructions.

(2)

§ 452. **Non-Interference in Politics. Speeches. Presents.** Officers of the Foreign Service of the United States are enjoined not to allude in public speeches to disputes between governments, to active political issues in the United States or elsewhere, or to any matters pending in any Foreign Service establishment. It is said, moreover, that such officers should avoid making public speeches "when that can be done without exciting ill-feeling in a community in which an officer resides." [1] Such officers are forbidden to participate in any manner in political matters of the country to which they are accredited or assigned; and they are cautioned to refrain from expressing "harsh or disagreeable opinions upon local political questions or other controversial subjects." [2]

It has been said that the "plain duty of the diplomatic agents of the United States is scrupulously to abstain from interfering in the domestic policies of the countries where they reside." [3] The failure to respect this obligation has led to the recall or censure of American diplomatic officers; [4] and neglect in this regard has led to the dismissal or recall of diplomatic officers accredited to the United States.[5] If legislative or other action proposed by the State of his sojourn is deemed to be hostile to the rights of his own country, objections on the part of the officer should be confined to appropriate representations to the Secretary of State or Minister for Foreign Affairs.[6]

A minister may be in fact instructed by his government to participate to a degree in political affairs; and American diplomatic officers have at times been the recipients of instructions in such a sense.[7] In such a situation the impro-

[3] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 8, 1856, MS. Inst. Austria, I, 117, Moore, Dig., IV, 565.

§ 452. [1] Foreign Service Regulations of the United States, I–14, and Note 1, as of January, 1941.

[2] *Id.*, I–15, as of January, 1941, and Note 2, quoting Section 9 (a) of Act of Aug. 2, 1939, 18 U.S.C.A. Supp. § 61 h, relative to pernicious political activities.

See comment by the Secretary of State, March 21, 1940, on an address made by the American Minister to Canada, at Toronto, March 19, 1940, Dept. of State, Bulletin, March 21, 1940, 324.

See also resolution adopted at the Second Meeting of the Ministers of Foreign Affairs of the American Republics at Habana, 1940, Hackworth, Dig., IV, 474.

[3] Communication of Mr. Buchanan, Secy. of State, to Mr. Shields, Aug. 7, 1848, MS. Inst. Venezuela, I, 73, Moore, Dig., IV, 573; see, also, Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, Nov. 16, 1871, Senate Ex. Doc. No. 5, 42 Cong., 2 Sess., 12.

[4] See Case of Mr. Schuyler, Moore, Dig., IV, 573–574, and documents there cited.

[5] See Request for Recall, Dismissal, *supra*, § 424.

[6] See Secretary of State as Organ of Correspondence, *supra*, § 410.

[7] In a communication to Mr. Beaupré, American Minister to Colombia, June 2, 1903, regarding the ratification by Colombia of a convention in relation to the Panama Canal, Mr. Hay, Secy. of State, declared in part: "You should, when the time seems opportune, in

priety, if any, of the course of action which the minister obediently pursues is to be attributed to his government rather than to himself.[8] The circumstance, however, that his action is the faithful execution of a specific instruction rather than a personal indiscretion neither authorized nor sought to be condoned, may be carefully concealed; and if it is, the minister bears the brunt of the charge of wrongdoing.

Unless otherwise authorized by the Department of State, an officer of the Foreign Service is instructed to refrain from joining social organizations if membership therein would affiliate the officer with any particular faction of the community in which he is stationed.[9] Officers of that service are forbidden to make any allusion in their public or private correspondence with persons other than the proper officials of the United States, to the public affairs of any foreign government, whether political or otherwise, or to political issues arising in the United States.[10] They are not, moreover, except in unusual circumstances, to conduct private correspondence with officers of the Department of State upon topics relating to official business.[11]

Officers (as well as employees) of the American Foreign Service are prohibited

---

so far as you discreetly and properly may, exert your influence in favor of ratification. It is also expected that you will know what hostile influences, if any, are at work against the ratification of the treaty, and whether or not there is opposition to it from European sources. The situation is seemingly a grave one, but the Department has confidence that you will rise to the full measure of its requirements." (For. Rel. 1903, 146.) Also Same to Same, telegram, June 9, 1903, *id.*, 146. See, also, Intervention, Haiti, *supra*, § 82A.

[8] "That a government will resent attacks made upon its minister on account of his faithful execution of his instructions, see Mr. Hay, Secy. of State, to Señor Blanco, March 23, 1901, MS. Notes to Venezuelan Legation, II, 53." (Moore, Dig., IV, 536.)

The abrupt dismissal of Mr. Russell, American Minister at Caracas, by a note of the Venezuelan Minister for Foreign Affairs, Jan. 28, 1877, was resented by Mr. Evarts, Secy. of State, inasmuch as such action was without explanation and not preceded by any request for the recall of the Minister. Mr. Evarts announced to the Venezuelan Minister at Washington that unless a satisfactory explanation were forthcoming, "the dignity of this Government will require that your relations with it shall also terminate, and your passports will be sent to you accordingly." The note of dismissal was withdrawn and cancelled. Later Mr. Russell, upon being advised through official channels that he was *persona non grata* at Caracas, resigned. It was the substance of an official despatch from Mr. Russell to the Secretary of State, later communicated to the House of Representatives in response to a resolution, and duly printed, that gave offense to the Venezuelan Government. The publication of matter necessary for Mr. Russell to communicate to the Department of State, and yet which when known at Caracas was calculated to render the writer thereafter unacceptable, rather than any impropriety of conduct on his part, served to end his usefulness as a diplomatic representative in Venezuela. Documents in Moore, Dig., IV, 535–537, and statement based thereon.

[9] Foreign Service Regulations of the United States, I–16, as of January, 1941.

[10] *Id.*, I–17, as of January, 1941, citing Act of June 17, 1874, 18 Stat. 77.

[11] *Id.*, I–18, as of January, 1941.

ENGAGING IN BUSINESS: PRACTICE OF LAW. According to § 7, Chap. 3, Act of Feb. 5, 1915, 38 Stat. 807: "No ambassador, minister, minister resident, diplomatic agent, or secretary in the Diplomatic Service of any grade or class shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as an agent for any such person to, from, or within the country or countries to which he or the chief of his mission, as the case may be, is accredited, either in his own name or in the name or through the agency of any other person, nor shall he, in such country or countries, practice as a lawyer for compensation or be interested in the fees or compensation of any lawyer so practicing." See in this connection Foreign Service Regulations of the United States, I–19, as of January, 1941.

See Art. 24 of Harvard Draft Convention on Diplomatic Privileges and Immunities, in respect to "Engaging in Business or Profession," *Am. J., Supplement,* Jan. and April, 1932, XXVI, 24.

from accepting, under any circumstances, "any present, decoration, medal, order, or testimonial that may be tendered to them by any foreign sovereign, head of State, or foreign government." [12] Such individuals are moreover enjoined not to accept gratuities or gifts in any form from persons or organizations who may in any way be affected by the performance of their official duties.[13]

(3)

§ 453. **Marriages.** It is not unusual for Americans abroad to ask permission to have a marriage ceremony performed in the embassy or legation in the presence of the diplomatic representative. There is no objection to compliance by an American diplomatic officer with such a request, nor is there any obligation on his part to accede to it. Whenever an application is made for the use of an American embassy or legation for such a purpose, it is said to be the duty of the diplomatic representative to inquire whether the parties may lawfully marry according to the laws of the country in which the embassy or legation is situated, and also whether the proper steps have been taken to enable the marriage ceremony to be legally performed according to such laws. If either of these inquiries be answered in the negative, it is declared to be his duty to inform the applicants that he cannot permit the ceremony at the embassy or legation, as there may be serious doubts respecting its validity.[1]

A diplomatic representative of the United States is not empowered to act as an official witness at a marriage ceremony.[2] When American citizens make a request to a diplomatic representative for the presence of an official witness at a marriage ceremony in accordance with the provisions of the statutes, the latter is instructed to inform such applicants "that only consular officers are empowered to perform such functions and he shall give them an opportunity to have such officer present, if they so desire." [3] It should be observed that Foreign Service officers of the United States are forbidden to celebrate marriages.[4]

[12] Foreign Service Regulations of the United States, I–23, as of January, 1941, citing the Constitution, Art. I, Sec. 9, cl. 8; Act of June 17, 1874, 18 Stat. 77.

[13] *Id.*, citing executive order of April 18, 1940.

See also documents in Hackworth, Dig., IV, § 395.

§ 453. [1] See Foreign Service Regulations of the United States, XIII–1, Note 1, as of June, 1939.

*Cf.* Instructions to American Diplomatic Officers (1897), § 177, Moore, Dig., II, 514, reprinted in Instructions of March 8, 1927, XVI–8.

See Mr. Bryan, Secy. of State, to Ambassador Willard, May 6, 1914, Hackworth, Dig., II, 374.

[2] Foreign Service Regulations of the United States, XIII–2, as of June, 1939.

[3] *Id.*, Note 1.

[4] *Id.*, XIII–1, citing executive order of April 11, 1939.

# TITLE E

## OFFICIAL NEGOTIATIONS

### 1

§ 454. **The Diplomatic Channel.** In negotiations between States, official correspondence, save where the heads of States or governments themselves interpose, should doubtless be confined on both sides to the diplomatic channel.[1] In 1815, Secretary Monroe declared that the Department of State can receive no communication from subjects of another country on international matters, except through the minister of such country.[2] Conversely, it has been announced that "no officer, civil, military, or naval, can properly carry on an official correspondence with a foreign government, except through the Department of State, or its diplomatic representative at the seat of such government." [3]

While the Department of State has declared that "all usage and precedent make it entirely competent and proper" for a government to present a diplomatic claim against another, either through the ambassador thereof or through the ambassador of the former at the capital of the latter, at least one European State has announced that as a matter of principle and according to prevailing practice, it "receives complaints or suggestions from friendly governments only when they are presented by the diplomatic representatives of such governments accredited to it." [4]

It may be observed that the diplomatic agencies of the United States are not open for the presentation of memorials of its citizens to foreign governments, especially when such documents deal with questions of national or international policy not affecting the United States, and even in cases when the rights or interests of American citizens are concerned.[5]

§ 454. [1] See The Secretary of State as Organ of Correspondence, *supra*, § 410, with special reference to occasions when the President of the United States holds direct communication with the heads of foreign States or with the ambassadors thereof. Also Ambassadorial Privileges, *infra*, § 459; Communications through Non-Governmental Channels, *supra*, § 409.

[2] The language of the text is that contained in Moore, Dig., IV, 693, *citing* Mr. Monroe, Secy. of State, to Admiral Cochrane, April 5, 1815, MS. Notes to Foreign Legations, II, 80.

[3] Communication of Mr. Fish, Secy. of State, to Mr. Wines, Jan. 25, 1872, 92 MS. Dom. Let. 299, Moore, Dig., IV, 691. Also Mr. Olney, Secy. of State, to the Secy. of the Navy, Jan. 2, 1896, respecting certain letters from Admiral Selfridge, U. S. N., to local Turkish officials, For. Rel. 1895, II, 1440, Moore, Dig., IV, 620; Mr. Hill, Acting Secy. of State, to Mr. Finch, Minister to Uruguay, No. 180, Jan. 7, 1901, MS. Inst. Uruguay, II, 71, Moore, Dig., IV, 622.

[4] Mr. Olney, Secy. of State, to Baron von Thielmann, German Ambassador, Oct. 7, 1895, For. Rel. 1895, I, 480, 481; Baron von Thielmann to Mr. Olney, Oct. 14, 1895, *id.*, I, 486, Moore, Dig., IV, 692–693.

[5] Mr. Gresham, Secy. of State, to Mr. Garrett, April 2, 1895, 201 MS. Dom. Let. 361, *citing* Instruction to Mr. Runyon, American Ambassador at Berlin, Nov. 22, 1893, Moore, Dig., IV, 694. In the latter it was declared that, "It is a very general rule among governments that the individual's privilege to memorialize the crown is to be availed of directly, not through a

2

§ 455. **Language. Tone. Style.** It is the custom of diplomatic intercourse for the representative of a State, whether himself a minister for foreign affairs or a diplomatic officer, to address communications in his own tongue to the foreign government or representative thereof with which he corresponds.[1] Accordingly the United States directs its diplomatic officers to employ the English language.[2] It is said, however, that when desirable the English text may be accompanied by a translation in the language of the country, which must be specifically designated "unofficial translation." [3] It is also said that "when memoranda of interviews, protocols of conferences, and similar documents are drawn up in English and a foreign language, the principle of the 'alternat' should be observed." [4]

That the tone of diplomatic correspondence should always be courteous must be obvious. Discourteous expressions betraying truculence or couched in arrogant terms necessarily arouse the sensibilities of governments to which they are addressed, and hence serve to foment disputes which, as Secretary Bayard once declared, "it is the prerogative and aim of diplomacy to avert." [5] Thus the sincerity of the opposing party should not be questioned, nor its integrity impeached,[6] unless it becomes apparent that failure to do so may be construed as attributable to improper motives. Nothing, however, need ever deter a government or its representative from evincing entire candor in diplomatic discussion, or from setting forth and protesting against national grievances with absolute frankness. Nevertheless, in so doing, the careful maintenance of a conciliatory attitude is none the less valuable as a means either of preventing a suspension of negotiations or of obtaining desired redress.

It is not without significance, however, that American diplomatic correspondence with English-speaking countries, in relation to controversial matters, betrays at times a bluntness of tone, and a vigor of expression which is less

---

diplomatic channel, and a tender through the latter course may be and frequently is declined."

See, also, Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Nov. 20, 1875, MS. Inst. Haiti, II, 66, Moore, Dig., IV, 692.

According to Foreign Service Regulations of the United States: "Officers of the Foreign Service shall not act as transmitting agents for gifts or communications from citizens, subjects, or organizations in foreign countries to the President of the United States or to Federal, State, or municipal officials; or for gifts or communications from citizens or organizations in the United States to the heads of foreign States or other officials in foreign countries." (I–24, as of January, 1941.)

§ 455. [1] Mr. Frelinghuysen, Secy. of State, to Mr. Robeson, Feb. 28, 1882, MS. Inst. Barbary Powers, XVI, 80, Moore, Dig., IV, 705.

[2] See Foreign Service Regulations of the United States, XII–1, as of January, 1941, with appended notes.

[3] *Id.*, note I (a).

"The Minister to Rumania was instructed by the Department of State in 1910 that his Legation might continue to correspond in French with the various Foreign Offices, this being the recognized language of communication between the Foreign Offices in Rumania, Serbia, and Bulgaria." (Hackworth, Dig., IV, 613.)

[4] Foreign Service Regulations of the United States, XII–1, as of January, 1941, note 2.

[5] *Id.*, note 1, (b). See Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, July 31, 1885, MS. Inst. Mexico, XXI, 347, Moore, Dig., IV, 708.

[6] Mr. Forsyth, Secy. of State, to Mr. Livingston, Minister to France, March 5, 1835, Brit. and For. State Pap., XXIII, 1319, Moore, Dig., IV, 707.

frequently manifested in that with other countries, and which is seemingly withheld from communications with States of Latin America. The fact may be attributable to a consciousness that English-speaking countries are not likely to misconstrue utterances addressed to them in their own tongue, or to take offense at statements which, however critical of conduct of the addressee, reveal no design to arouse sensibilities. This circumstance breeds a candor and directness in the tone of Anglo-American communications which is of no small aid in removing misconceptions and in producing ultimate accord.

In oral discussions the heads of foreign offices are not inclined to exercise the same restraint in utterance that they or their subordinates might be expected to observe in written communications. Under normal circumstances courtesy of tone and amiability of spirit commonly pervade their diplomatic conversations. Strongest reasons of policy usually forbid any other course.[7] If, however, the exigencies of the hour are deemed so to require, a minister for foreign affairs or a secretary of State may feel no obligation to refrain from stating in harsh and poignant terms how the conduct of another State is or may be regarded by his own, to what extent that conduct seemingly manifests a violation of international law or the breach of a treaty, and the response which his own country may be disposed to make when the facts are brought home to it. His freedom and bluntness of statement may be accentuated if in the particular case discussions are confidential and not in themselves likely to inflame opinion in the foreign country concerned, or to arouse opposition to it in his own. Persons responsible for the control of foreign affairs of the States which they represent, and aware of the primary importance of the maintenance of amicable relationships, are accordingly conscious of the fact that they must oftentimes fight many of their diplomatic battles alone, unaided or unopposed by a popular opinion at home or abroad, which it might be highly unwise to arouse or invoke. Hence the weapons employed in their frequently unwitnessed oral conflicts are not listed in the books or restricted in kind.

3

§ 456. **Publication.** A State may not unreasonably publish correspondence with its own diplomatic or other agents abroad without deferring to the judgment of any foreign country the affairs of which form the subject of discussion.[1] In so

[7] Vexed by the tone and character of the complaint uttered by Paul Dzialin, the Polish ambassador, at a reception arranged for him on July 26, 1597, Queen Elizabeth is reported to have declared in the course of an impromptu response given in Latin: "And as for you, although I perceive you have read many books to fortify your arguments in this case, yet I am fain to believe you have not lighted upon the chapter that prescribeth the forms to be used between kings and princes. Were it not for the place you hold, to have so publicly thrown an imputation upon our justice, which as yet never failed, we would answer that audacity of yours in another style." (Edward P. Cheyney, "International Law Under Queen Elizabeth," *English Hist. Rev.*, XX, 659, 667.)

See documents in The Lansing Papers (1914–1920), I, 68–75, respecting the great displeasure of President Wilson with a published interview given by the Turkish Ambassador to the United States in September, 1914, and with the tone of his note of explanation.

§ 456. [1] Mr. Adee, Acting Secy. of State, to Baron von Thielmann, German Ambassador, No. 27, Aug. 14, 1895, MS. Notes to Germany, XI, 483, Moore, Dig., IV, 724; Mr. Seward, Secy. of State, to Mr. Adams, Minister to Great Britain, No. 859, March 23, 1864, MS. Inst. Great Britain, XIX, 214, Moore, Dig., IV, 718.

doing care should be taken, however, to guard from publication such expression of personal views of an officer as might, if known, expose him to criticism in the country of his official residence.[2] Reflections upon the commercial operations or character of the inhabitants of a foreign State should not be given circulation.[3]

In one sense the propriety of making public an instruction to a diplomatic officer intended for communication to a foreign government, and prior to its receipt by the latter, may be questioned, especially when the document embodies a complaint in relation to the conduct of such government. It may be doubted, however, whether any rule of international law forbids publication at such a time.

In 1895, the Department of State announced in a communication to the German Ambassador, that the Government "was fully aware of the practice to submit to foreign governments [before publication] official international correspondence, exchanged with it upon matters requiring confidence and reserve."[4] American diplomatic officers are instructed that under no circumstances should any public or official paper be published without the express consent of the Department of State.[5]

[2] Mr. Davis, Acting Secy. of State, to Mr. Sargent, May 23, 1883, MS. Inst. Germany, XVII, 269, Moore, Dig., IV, 721.

[3] Mr. Blaine, Secy. of State, to Mr. Snowden, Minister to Greece, No. 26, March 8, 1890, For. Rel. 1889, 483, Moore, Dig., IV, 722.

Declared Mr. Adee, Acting Secy. of State, in a communication to Baron von Thielmann, German Ambassador, No. 27, Aug. 14, 1895: "I am indisposed to question the propriety of excluding, as your note seems to contemplate, from official publications of this character statements or criticisms which, however legitimate, or made necessary in the performance of the writer's duty, might appear offensive to a foreign government or be calculated to wound the sensibilities of a friendly people." (MS. Notes to Germany, XI, 483, Moore, Dig., IV, 724.)

[4] *Id.*

[5] See Foreign Service Regulations of the United States, I–17, as of January, 1941.

# TITLE F

## CEREMONIAL

### 1

§ 457. **Observance of Formalities.** The intercourse of States has led to the general acceptance of certain conventionalities incidental to the maintenance of diplomatic relations. Upon its admission to membership in the family of nations, a new State is expected to conduct its foreign affairs in conformity with accepted usage. Observance of such formalities as have received widespread and habitual recognition is found to be an aid rather than a detriment to effective diplomacy, without betokening, in the case of a republic, the slightest loosening of attachment to democratic principles upon which it may be founded.[1]

The United States, like other Powers, is not reluctant to send a special embassy to attend the coronation of a king,[2] or the funeral of an emperor.[3] Nor does the Department of State at the present time forbid American diplomatic officers to wear upon suitable occasions an appropriate court costume in accordance with the local usage.[4] On the other hand, the United States wisely de-

§ 457. [1] See Instructions to Diplomatic Officers of the United States, March 8, 1927, Chap. II–14, respecting conformity to ceremonial usage.

[2] For. Rel. 1902, 498, respecting a special embassy to the coronation of King Edward VII, of Great Britain, in 1902; also For. Rel. 1906, II, 1344–1347, respecting a special embassy to attend the celebration of the wedding of the King of Spain to Princess Victoria Eugenia of Battenberg, in 1906.

In 1930, the President appointed a special ambassador to attend the ceremonies incident to the coronation of His Imperial Majesty Haile Selassie the First, Emperor of Ethiopia. See Department of State Press Releases, Aug. 16, 1930, 95, and Nov. 1, 1930, 291.

[3] For. Rel. 1909, 215–219, respecting the appointment of Minister Rockhill as special ambassador to attend the funeral of the Emperor of China in 1909.

[4] Mr. Adee, Acting Secy. of State, to Mr. Tower, Ambassador to Russia, No. 87, Sept. 15, 1899, MS. Inst. Russia, XVIII, 224, Moore, Dig., IV, 772, relied upon by Mr. Bacon, Acting Secy. of State, in an instruction to Mr. O'Brien, Minister to Denmark, March 9, 1906, For. Rel. 1906, I, 527. Mr. Adee declared that the Department of State had always distinguished between a uniform and a court dress conforming to local custom; the former serving to indicate a branch of public service to which the bearer belonged and also the rank or grade held by him therein, the latter denoting no public office or function.

See, also, Rev. Stat. § 1688, prohibiting officers of the several grades in the diplomatic service of the United States from wearing "any uniform or official costume not previously authorized by Congress"; also Rev. Stat. § 1226, authorizing officers who have served during the rebellion as volunteers in the Army of the United States and have been honorably mustered out of the volunteer service, to bear the official title, and, upon occasions of ceremony, to wear the uniform of the highest grade they have held by brevet or other commissions in the volunteer service. Respecting the statutory requirements, see Instructions to the Diplomatic Officers of the United States (1897), §§ 66 and 67. See, also, Foreign Service Regulations of the United States, I–27, as of January, 1941.

Concerning earlier controversies respecting diplomatic dress, see documents in Moore, Dig., IV, 761–771; John W. Foster, The Practice of Diplomacy, 130–158; F. Van Dyne, Our Foreign Service, 86–89.

Concerning certain other aspects of social intercourse, see documents in Moore, Dig., IV, 747–761.

Also Act of June 3, 1916, Chap. 134, § 125, 39 Stat. 216.

clines to yield to any formality the observance of which might imply an admission of inferiority on its part.[5] For officers of its government, at home or abroad, it counts upon such manifestation of respect as is commonly accorded those of foreign States in like stations. While not itself disposed to emphasize formality, the United States is careful, when such issues are raised, to attach such significance to them as its own dignity and independence appear, in the particular case, to require.[6]

2

§ 458. **Rules of Precedence.** For sake of convenience and uniformity in determining the relative rank and precedence of diplomatic representatives, the Department of State has, as is elsewhere noted,[1] adopted and prescribed the seven rules of the Congress of Vienna, found in the protocol of the session of March 9, 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of November 21, 1818. The diplomatic representatives of the United States fall within the four grades of Ambassador, Minister Plenipotentiary, Minister Resident, and Chargé d'Affaires.[2] The order of precedence is: "(a) Ambassadors extraordinary and plenipotentiary; (b) envoys extraordinary and ministers plenipotentiary; (c) ministers resident; (d) chargés d'affaires *ad hoc;* (e) chargés d'affaires *ad interim.* Diplomatic representatives take precedence in their respective classes according to the date of the official notification of their arrival." [3]

On the occasion of the official assembling of the diplomatic corps accredited to the United States, as at receptions given in their honor at the White House, the Department of State is scrupulous to cause the observance of the foregoing rules of precedence, as being in conformity with a practice commonly prevailing at other capitals.[4]

As the United States has accredited no diplomatic representative to the Vatican since the Government of the States of the Church ceased to exist,[5] or since

[5] See, for example, Instructions of Mr. Webster, Secy. of State, to Mr. Cushing, Minister to China, May 8, 1843, 6 Webster's Works, 467, 469, Moore, Dig., V, 416; also President Buchanan, Annual Message, Dec. 19, 1859, respecting the failure of Mr. Ward, Minister to China, to obtain an audience with the Emperor by reason of a refusal to submit to the "humiliating ceremonies required by the etiquette of this strange people in approaching their sovereign." (Richardson's Messages, V, 559, Moore, Dig., IV, 773.)

[6] Declared Mr. Jefferson, Secy. of State, to M. Genet, French Minister, Dec. 9, 1793, "No government can disregard formalities more than ours. But when formalities are attacked, with a view to change principles, and to introduce an entire independence of foreign agents on the nation with whom they reside, it becomes material to defend formalities." (4 Jefferson's Works, Washington's ed., 90, 92, Moore, Dig., IV, 728.)

§ 458. [1] See Classification of Diplomatic Officers, *supra,* § 411.

[2] Foreign Service Regulations of the United States, II–2, as of January, 1941.

[3] *Id.,* II–5, note 4.

See also Mr. Hay, Secy. of State, to Mr. Sampson, Minister to Ecuador, No. 131, Feb. 17, 1900, MS. Inst. Ecuador, II, 22, Moore, Dig., IV, 732.

[4] The Department of State has declared that "according to present practice in Washington in both diplomatic and American houses, foreign ministers plenipotentiary precede the Undersecretary of State who, in turn, precedes American ambassadors and ministers at home on leave or in retirement." (Hackworth, Dig., IV, 633, citing Mr. Hull, Secy. of State, to the Embassy at Tokyo, March 6, 1937.)

See also documents in Hackworth, Dig., IV, § 420.

[5] Mr. Uhl, Acting Secy. of State, to Mr. Dunbar, Sept. 10, 1894, 198 MS. Dom. Let. 525, Moore, Dig., IV, 735.

the coming into being of the State of the City of the Vatican in 1929,[6] and during that period has had no envoy accredited to it by the Pope, occasion for the according at Washington of honorary precedence to a papal nuncio has not arisen.[7]

It should be observed, however, that the President of the United States may in fact seek to have direct intercourse with the Pope for the exchange of views on political matters, and may accordingly, as did President Roosevelt in 1939, send a personal representative to confer with him.[8]

3

§ 459. **Ambassadorial Privileges.** As a consequence of his being the personal representative of his sovereign, or, in the case of a republic, of the whole people of his country, an ambassador is accorded special distinction. Regarded as the equal of the head of the State to which he is accredited, there is asserted in his behalf the right to be treated accordingly. Thus it has been declared that the foreign ambassadors at Washington assert the right, when present at official ceremonies conducted by the Government of the United States, to come next to the President, thus outranking the Secretary of State and other members of the cabinet, and all other officials of government — executive, legislative, and judicial; that this claim the Department of State in principle concedes except as to the Vice-President; and that the ambassadors have, as a courtesy, yielded precedence to the Vice-President.[1]

An American ambassador at his post is said to outrank every other American citizen who may be there, except the President, and to receive in fact "honors similar to those which are due to a Chief of State when he is present." [2]

The right of access to the head of the State to which he is accredited, and that without delay, gives to an ambassador the opportunity to exercise his diplomatic functions with a facility not possessed by an officer of lesser rank. Thus in case

[6] See The State of the City of the Vatican, *supra*, §10B.

[7] See Mr. Hughes, Secy. of State, to Mr. Cunliffe-Owen, April 21, 1924, Hackworth, Dig., IV, 637.

[8] See letter from President Roosevelt to the Pope, Dec. 23, 1939, Dept. of State Bulletin, Dec. 23, 1939, 711; also announcement of like date that the President had appointed Mr. Myron C. Taylor as his representative to take up questions "arising out of the abnormal world situation" with the Pope, *id.*

See *supra* § 416.

§ 459. [1] Statement in Moore, Dig., IV, 740, approved by the Hon. A. A. Adee, Second Assistant Secretary of State. The practice remains unchanged.

Respecting the rank of diplomatic representatives, and deploring the use by the United States of the ambassadorial grade, see John W. Foster, The Practice of Diplomacy, 15–33.

[2] Charlemagne Tower, Essays Political and Historical, 63.

President Wilson, during his sojourn in Europe in 1918 and 1919, in the course of his official mission to participate in the negotiation of a treaty of peace, outranked any diplomatic representative of his country accredited to the States which he visited. On the occasion of his visit to the United States in the Autumn of 1919, the Prince of Wales was doubtless deemed to outrank Lord Grey, the British Ambassador designate (who on account of the illness of the President had been unable to present his letter of credence).

When the head of a government or a minister of foreign affairs visits a foreign State for official diplomatic negotiations with those in control thereof, he may be fairly regarded as outranking, during the period of his sojourn, the ambassadorial representative of his country accredited thereto.

of national emergency he may be of special usefulness to his own country.[3] It may be doubted whether the United States could at the present time adequately conduct its relations with the more important States to which it accredits ambassadors, through the medium of representatives of a lower grade.

Without suggesting that the retention of a system accentuating the difference in grades of diplomatic officers is desirable or should be perpetuated, it is merely sought to be emphasized that the United States cannot, in the conducting of its foreign affairs, afford normally to be represented at a foreign capital by an officer from whom there may be reasonably withheld privileges invariably yielded to persons there accredited who are possessed of higher diplomatic rank. Under special circumstances, the Government of the United States may, however, deem it expedient to forego the use of persons of ambassadorial rank in diplomatic relations with a particular country, finding it preferable and temporarily satisfactory to utilize officers of lower grade.

[3] Declares Charlemagne Tower, in his Essays Political and Historical: "The Government has in its ambassador a representative whose position is recognized abroad with the highest distinction; whose communications take precedence of all others in international affairs; who speaks with authority; who must be heard without delay, and through whom the interests of the nation may be immediately and effectively safeguarded or the instructions of the President through the Department of State may be instantly carried out." (66.)

See also documents in Hackworth, Dig., IV, 394-396.

# *PART IV*

# Consuls[1]

§ 460. [1] See generally, Hackworth, Dig., IV, Chap. XV; Consular Regulations of the United States as of Jan. 11, 1932, with subsequent continuations and as exemplified in Foreign Service Regulations of the United States; documents in Moore, Dig., V, 2–154; A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries, edited by A. H. Feller and Manley O. Hudson, 2 vols., Washington, 1933; Harvard Draft Convention on The Legal Position and Functions of Consuls, Quincy Wright, Reporter, with Comment and Appendices, *Am. J.*, XXVI, *Supplement*, Jan. and April, 1932, 189; Convention on Consular Agents, adopted by the Sixth International Conference of American States, Feb. 20, 1928, U. S. Treaty Vol. IV, 4738.

See bibliographical material in Fauchille, 8 ed., § 733; Clunet, *Tables Générales*, I, 445–448, 452–457, 874–878; Ellery C. Stowell, *Le Consul*, Paris, 1909, 319–345; Irvin Stewart, Consular Privileges and Immunities, New York, 1926, 202–210; A. de Lapradelle and J.-P. Niboyet, *Répertoire de Droit International*, V, 35–36; J. Irizarry y Puente, *Traité sur Les Fonctions Internationales des Consuls, traduit par* C. Schlegel, Paris, 1937.

See Proceedings of the Institute of International Law, *Annuaire*, XI, 348–394, XII, 275–281, XIII, 179–194, XV, 272–309, embodying Resolutions adopted Sept. 26, 1896, respecting Consular Immunities; Project No. VIII of Inter-American Commission of Jurists, Consuls, 1927, *Am. J.*, XXII, *Special Supplement*, Jan. 1928, 255; M. Guerrero and M. Mastny, Report of Sub-Committee on the Legal Position and Functions of Consuls, to Committee of Experts for the Progressive Codification of International Law, 1927, League of Nations Doc. No. C.202.M.76.1927.V, published also in *Am. J.*, XXII, *Special Supplement*, Jan. 1928, 105.

See, also, generally, Marcello Arduino, *Consoli, Consolati e diritto Consolare*, Milan, 1908; Fauchille, 8 ed., §§ 733–791; Calvo, 5 ed., III, §§ 1368–1450, pp. 215–282; Wilbur J. Carr, "The American Consular Service," *Am. J.*, I, 891; A. de Clercq and C. de Vallat, *Guides pratiques des consulats*, 5 ed., Paris, 1898, *Formulaires des chancelleries diplomatiques et consulaires*, 7 ed., Paris, 1909; Encyc. Brit., 11 ed., "Consul," VII, 20; John W. Foster, The Practice of Diplomacy, 1906, 216–242; Hall, Higgins' 8 ed., § 105; Foreign Powers and Jurisdiction of the British Crown, 4 ed., Oxford, 1895; Hershey, revised ed., 58–59, 416–424, with bibliography; Baron A. Heyking, A Practical Guide for Russian Consular Officers, London, 1904; Chester Lloyd Jones, The Consular Service of the United States, 1906; Camille Jordan, "*Les Consuls dans les pays paisant partie de la communauté internationale*," *Rev. Droit Int., 2 sér.*, VIII, 479 and 717; B. W. von König, *Handbuch des deutschen Konsularwesens*, 7 ed., Berlin, 1909; Ernest Lehr, "*De l'Organisation et des Attributions du Corps Consulaire des États-Unis d'Amérique*," *Rev. Droit Int., 2 sér.*, XIV, 5; Ernest Ludwig, Consular Treaty Rights, Akron, 1913; Malfatti di Monte Tretto, *Handbuch des Österreichisch ungarischen Konsularwesens*, 2 ed., Vienna, 1904; *Manuel diplomatique et consulaire*, published under the direction of the Minister of Foreign Affairs of Belgium, 1901–1905; R. Monnet, *Manuel diplomatique et consulaire*, 3 ed., Paris, 1910; Lauterpacht's 5 ed. of Oppenheim, I, §§ 418–442; Phillimore, II, §§ 243–276, 235–251; Julien Pillaut, *Manuel de droit consulaire*, Paris, 1910; Eugene Schuyler, American Diplomacy, 1895, 41–104; Georges Salles, *L'Institution des Consulats*, Paris, 1898; Stockton, Outlines, §§ 102–109; Ellery C. Stowell, *Le Consul*, Paris, 1909; Consular Cases and Opinions, Washington, 1909; Luigi Testa, *Le voci del servizio diplomatico-consolare italiano e straniero*, 3 ed., Rome, 1912; Frederick Van Dyne, Our Foreign Service, Rochester, 1909; G. G. Wilson, 2 ed., Chap. VI; Woolsey, 6 ed., §§ 99–100; Ph. Zorn, *Die Konsulargesetzgebung des deutschen Reiches*, 2 ed., Berlin, 1901.

See, also, Pierre Bouffanais, *Les Consuls en Temps de Guerres et de Troubles*, Paris, 1933; W. J. Carr, "The Duties of Consuls," Bulletin, Pan American Union, LV, 366; Baron Alphonse Heyking, "*La Théorie et la Pratique des Services Consulaires*," *Recueil des Cours*, 1930, IV, 811; Julius I. Puente, The Foreign Consul, His Juridical Status in the United States, Chicago, 1926; "Amenability of Foreign Consuls to Judicial Process in the United States," *Univ. Penn. Law Rev.*, LXXVII, 447; "The Nature of the Consular Establishment," *id.*, LXXVIII, 321; "The Legal Status of Foreign Consuls in Latin America," *Columbia Law Rev.*, XXX, 281; "Extraterritorial Powers of the Consular Office," *Calif. Law Rev.*, XIX, 111; Irvin Stewart. "The Public Character of Consuls," *Southwestern Political and Social Science Quarterly*, VI, No. 2; Consular Privileges and Immunities, New York, 1926; "American Treaty Provisions Relating to Consular Privileges and Immunities," *Am. J.*, XX, 81; "Consular Privileges and Immunities under the Treaties of Friendship, Commerce and Consular Rights," *Am. J.*, XXI, 257.

# TITLE A

§ 460. **Classes and Titles.** In the case of the United States, the term "consular officers" is said to include "consuls general, consuls, Foreign Service officers commissioned as vice consuls, language officers, vice consuls, and consular agents." [2]

Consular agents are described as "Consular officers subordinate to principal Consular officers exercising the powers vested in them and performing the duties prescribed for them by the President at points or places different from those at which such principals are located." [3] According to the statutory law, the word "consul" is "understood to mean any person invested by the United States with, and exercising, the functions of Consul General, Consul or Vice Consul." [4]

By reason of the requirements of the Constitution, the Department of State has always held that no one can be lawfully appointed to a position in the American consular service who is already holding office under some other government, and that the acceptance of such office from the latter serves to vacate the appointment by the United States.[5] Under special circumstances permission has, however, been given an American consular officer to exercise his good offices temporarily in behalf of the nationals of a foreign State itself unable for the time being to secure adequate consular representation in the country of his sojourn.[6]

[2] Foreign Service Regulations of the United States, II–8, January, 1941. This Statement was based upon the Act of Congress of Feb. 15, 1915, 38 Stat. 806, 22 U.S.C. § 51. By that Act, the offices of vice consul general, deputy consul general, and deputy consul were abolished.

By the Act of April 5, 1906, Chap. 1366, § 3, 34 Stat. 100, "The grade of commercial agent" was abolished.

By the Act of Feb. 23, 1931, section 14, 46 Stat. 1207, 22 U.S.C.A. § 10, the grade of "consular assistant" was abolished.

By section 17 of the Act of Feb. 23, 1931, the provisions of section 4 of the Act of April 5, 1906, relative to the powers, duties, and prerogatives of consuls general at large were made applicable to the Foreign Service officers detailed for the purpose of inspection, who, under the direction of the Secretary of State, were to inspect in a substantially uniform manner the work of the diplomatic and consular offices, 22 U.S.C.A. § 9. See also Foreign Service Regulations of the United States, I–10, and notes, January, 1941.

"Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*), or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*). Consuls of the first kind, who are so-called professional consuls and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint Consuls of both kinds according to the importance of the consular districts. But there is a general tendency with most States to appoint professional consuls for important districts." Lauterpacht's 5 ed. of Oppenheim, I, § 420. Also Art. I, declaration of the Institute of International Law, respecting consular immunities, Sept. 26, 1896, *Annuaire*, XV, 304.

[3] Foreign Service Regulations of the United States, I–1, (*a*) (4), January, 1941, *citing* Act of Feb. 5, 1915, 38 Stat. 806, 22 U.S.C. § 51.

[4] 22 U.S.C. § 178.

[5] Mr. Bacon, Acting Secy. of State, to Mr. Brun, Danish Minister, May 7, 1906, For. Rel. 1906, I, 534; Constitution, Art. 1, Section 9, paragraph 8.

[6] Correspondence with the German Embassy at Washington, in 1909, For. Rel. 1909, 265–268, in which the Department of State, in the absence of precedent, hesitated to ask the requisite authority of Congress that an American consular agent in Syria be permitted to act

In the more recent treaties of the United States the term "consular officers" is employed as a sufficient reference to the several categories of persons for whose exercise of the consular function arrangement is made.[7] In the Harvard Draft Convention on the Legal Position and Functions of Consuls, the term "consul" is employed to refer to "a person entitled to exercise consular functions as an agent of a State in the territory of another State." [8]

---

also as a German vice-consul. Pending the appointment by Germany of a new encumbent, the Department permitted the American consular agent to take charge of German interests. See Privileges and Immunities, *infra*, § 464A.

[7] See, for example, Art. XVII of treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4198.

[8] Art 1 (*a*), *Am. J.*, *Supplement*, Jan. and April, 1932, XXVI, 193; also comment thereon by Quincy Wright, Reporter, *id.*, 217.

Concerning the significance of the term "chancellors" as employed in Art. 2 of the Consular Convention with France, of Feb. 23, 1853, Malloy's Treaties I, 529, see Moracchini *v.* Moracchini, 213 N. Y. Supp. 168; The Lonsdale Shop *v.* Bibily, 213 N. Y. Supp. 170. Also Mr. Kellogg, Secy. of State, to the French Ambassador, June 13, 1925, Hackworth, Dig., IV, 660.

# TITLE B

§ 461. **Appointment of American Consular Officers.** "Foreign Service officers are appointed to positions in the classified Foreign Service of the United States by the President of the United States, by and with the advice and consent of the Senate, either after examination or after five years of continuous service in an executive or quasi-executive position in the Department of State, by transfer therefrom." [1]

It should be observed that vice consuls are commissioned by the Secretary of State; [2] and also that consular agents are commissioned by him, "upon the receipt of nominations from the officer in charge of the particular district." [3]

§ 461. [1] Foreign Service Regulations of the United States, I–3 (b), January, 1941, *citing* 46 Stat. 1208. According to *id.*, I–1 (2), Classified Foreign Service officers are referred to as "permanent officers in the Foreign Service below the grade of minister who are subject to promotion on merit and who may be appointed as diplomatic or Consular officers."

[2] *Id.*, I–3 (c).

[3] *Id.*, I–3 (d).

According to the statutory law, "no candidate shall be eligible for examination for Foreign Service officer who is not an American citizen and who shall not have been such at least fifteen years." (46 Stat. 1208.) See also Foreign Service Regulations of the United States, I–3, Note I, as of January, 1941.

# TITLE C

## EXEQUATUR

### 1

§ 462. **Nature and Effect. Conditions of Issuance.** The right of a consular officer to exercise his functions on foreign soil is dependent upon the consent of the government in control of the country to which he is sent. In times of peace the territorial sovereign possessed in fact of supreme control within its own domain is the political entity from which consent must be obtained. In seasons of war, a belligerent power occupying territory of its enemy may demand that authority for the exercise of consular functions therein shall emanate from itself, and hence be sought and granted accordingly.[1] The act of seeking and receiving of such authority by or in behalf of a neutral State, is not believed to be necessarily indicative of recognition of the *de jure* sovereignty of the military occupant.[2]

The consent of the territorial sovereign is commonly manifested by a document known as an exequatur, which expresses formal recognition of the individual as a consul, bears witness to the fact of his commission to act as such by his own government, and permits him to exercise his functions within the district for which he is appointed.[3] That such consent be appropriately manifested, as by the issuance of an exequatur or other locally adequate document, becomes a matter of formal request by the foreign State for whose duly commissioned consular officer the privilege of exercising his functions as such is desired. When it has been yielded, the consul acts under the authority of both the territorial

§ 462. [1] See Belligerent Occupation, Neutral Consuls, *infra*, § 701.

[2] "The request for an exequatur concerns merely the performance of certain duties by a United States officer toward the vessels and citizens of the United States, with the permission of the authority in actual possession, and cannot be assumed to imply the expression of any opinion as to the right of possession or to operate in confirmation of a claim of right. Such was the position of the United States in obtaining exequaturs from Nicaragua for a consul at Corn Island; from the Hovas government for a consul at Madagascar, and from Great Britain for a consul at Belize." Moore, Dig., V, 13, *citing* Mr. Rives, Acting Secy. of State, to Mr. Hall, Minister to Central America, No. 638, Nov. 12, 1888, MS. Int. Cent. Am., XIX, 173.

[3] Stockton, Outlines, 225; Hall, Higgins' 8 ed., § 105.

Declares Stowell, "The true nature of the exequatur is that of a contract between the foreign State and the receiving State, and its object is to permit the consul to avail himself of its service and to utilize it in the interest of both States." (*Le Consul,* 209.)

A foreign consular officer possessing an unrevoked exequatur issued by the proper authority of the United States will be recognized by the courts as the accredited representative of his country entitled to all of the privileges pertaining to the consular office, even though the government which sends him has been overthrown, and an apparently successful revolutionary government established in its place. United States *v.* Trumbull, 48 Fed. 94.

See Arts. 4 and 6 of Convention on Consular Agents, adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4738, 4739

sovereign and of his own country, in virtue of the exequatur of the one, and the commission of the other.[4]

In the United States, exequaturs signed by the President and bearing the great seal of the United States are issued to foreign consular officers possessing or exhibiting a regular commission signed by the chief executive of the appointing State and under its great seal.[5] To substitute or subordinate officers commissioned by lesser authority there is issued a document signed by the Secretary of State and bearing the seal of the Department of State.[6]

Upon the assignment of an American consular officer, his commission is transmitted to the diplomatic representative accredited to the government within whose jurisdiction the consular office is situated, with instructions to apply for an exequatur. When obtained, the exequatur, together with the commission, is transmitted by the diplomatic representative to the consulate to which the officer is assigned through the supervisory consulate general, if there be one. If there is no diplomatic representative of the United States stationed in the country of assignment, the Department of State makes other arrangements for procuring the exequatur.[7] Upon the receipt of telegraphic or written instructions from the Department of State, the diplomatic representative shall request the government to which he is accredited for provisional recognition for either principal or subordinate consular officers.[8] An American consular officer may enter upon his official duties upon the receipt of his exequatur or, without an exequatur upon the receipt of provisional recognition from the proper authorities.[9]

It may be observed that the United States, in pursuance of its statutory law, finds it expedient to assign a consular officer for limited consular services, such as performance of notarial acts in relation to the administration of the immigration laws, to a post within its own domain, such as that in Manila.[10] This

[4] See Shaw, C. J., in Scanlon *v.* Wright, 13 Pick. 523.

See Art. 3 of Harvard Draft Convention on The Legal Position and Functions of Consuls, and Comment thereon, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 231–232. See, also, Art. 5 of same convention.

[5] Mr. Evarts, Secy. of State, to Mr. Sherman, Secy. of Treas., Dec. 12, 1879, 131 MS. Dom. Let. 13, Moore, Dig., V, 14.

The issuance of an exequatur is dependent upon the submission to the President of the consul's commission emanating either from the head of the appointing State, or from an officer thereof known to possess the power of appointing consular officers. Mr. McLane, Secy. of State, to Mr. Lederer, Austrian consul-general, Feb. 28, 1834, MS. Notes to For. Legs., V, 168, Moore, Dig., V, 15; Mr. Forsyth, Secy. of State, to Baron de Mareschal, Austrian Minister, March 21, 1839, MS. Notes to German States, VI, 51, Moore, Dig., V, 16.

[6] Mr. Evarts, Secy. of State, to Mr. Shishkin, Russian Minister, Nov. 14, 1879, MS. Notes to Russian Legation, VII, 290, Moore, Dig., V, 15.

In Art. XVII of the treaty between the United States and Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4198, the document issued to a subordinate or substitute consular officer is not called an exequatur and is distinguished therefrom at least in name.

See, in this connection, Moracchini *v.* Moracchini, 213 N. Y. Supp. 168.

[7] Foreign Service Regulations of the United States, II–9 (a), as of January, 1941.

[8] *Id.*, II–9 (b), and Note 1, as of January, 1941.

[9] *Id.*, II–10, as of January, 1941.

See Mr. Blaine, Secy. of State, to Sir Edward Thornton, British Minister at Washington, May 27, 1888, MS. Notes to Great Britain, XVIII, 519, Moore, Dig., V, 17.

[10] According to section 8 (a) (3) of Act of March 24, 1934, 48 Stat. 456, 462, in relation to the Philippine Islands: "Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may prescribe, during which assignment

circumstance raises doubt as to the soundness of the suggestion that the acquisition of consular status as such necessarily depends upon the issuance of an exequatur.[11]

## 2

§ 463. **Refusal or Revocation. Place of Service.** While a State may at will refuse an exequatur to a foreign consul,[1] this right is rarely exercised by the United States,[2] except for cause, such as, for example, the previous misconduct of the appointee, or action on his part deemed adverse to the State.[3]

It may be greatly doubted, however, whether the law of nations as yet imposes upon a State a legal duty to permit the functioning of a consular service, although in behalf of a foreign State with which diplomatic relations are maintained, at any particular place, even embracing one where other States are permitted to enjoy such a privilege.[4] The wisdom of a policy that might encourage agreement to accept such a duty is hardly indicative of the absence of a legal right possessed by a State to pursue a different course.[5]

In February, 1941, the Italian Government requested that the American Consulates then established at Palermo and Naples be moved to a place as far north as Rome or farther north, and to a place which was not on the seacoast. Instructions to those officers were duly issued in accordance with that request, and a

---

such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State."

On May 1, 1934, an American vice consul was assigned to Manila. See Foreign Service List, Jan. 1, 1935. The Foreign Service List as of Oct. 1, 1941, contained the names of four consular officers assigned to Manila. The activities of the Consulate were said to be confined to immigration and trade-promotion work.

[11] Declared Mr. Polk, Acting Secy. of State, in a communication to Consul General Ravndal, March 5, 1919. "You and other consular officers are sent to Turkey in a purely consular capacity without exequatur subject to permission to act being granted by the *de facto* authorities in control and with express understanding that your resumption of duties with regard to American commerce should have no political significance or be regarded as a recognition of the rightfulness of control of such authorities. You will confine your work strictly to consular duties." (For. Rel. 1919, II, 811.)

*Cf.* Quincy Wright, in commenting as Reporter on Art. 3 of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 231.

§ 463. [1] Mr. Marcy, Secy. of State, to Mr. Wheeler, Minister to Nicaragua, May 11, 1855, MS. Inst. Am. States, XV, 236, Moore, Dig., V, 28.

[2] Mr. Blaine, Secy. of State, to Mr. Morgan, May 31, 1881, MS. Inst. Mexico, XX, 267, Moore, Dig., V, 28.

[3] Mr. Adee, Second Assist. Secy. of State, to Mr. Sickles, Dec. 26, 1899, MS. Inst. Spain, XXII, 658, Moore, Dig., V, 29.

See Art. 7 of Harvard Draft Convention on The Legal Position and Functions of Consuls.

[4] The exercise by the territorial sovereign of its full legal right in such a situation might seem ordinarily to mark an arbitrary discrimination as against the foreign State concerned. This circumstance would doubtless deter that sovereign, at least under normal conditions, from asserting its privilege.

According to Article 5 of the Convention on Consular Agents, adopted by the Sixth International Conference of American States at Havana, Feb. 20, 1928, U. S. Treaty, Vol. IV, 4738, 4739: "States may refuse to accept consuls appointed in their territory or subject the exercise of consular functions to certain special obligations."

[5] Such a duty is incorporated in Article 2 of the Harvard Draft Convention on The Legal Position and Functions of Consuls, as a reasonable proposal for common acceptance.

supervisory Consulate General in Italy was established in Rome. Shortly thereafter Secretary Hull requested of the Italian Ambassador that all officials of his Government within the territory of the United States confine their movements to those areas in which they exercised the recognized duties of their respective offices (excluding the personnel of the Italian Embassy in Washington whose names appeared on the diplomatic list). Simultaneously the Ambassador was informed that the American Ambassador at Rome had been requested to convey orally to the appropriate Italian authorities the desire of the United States Government that the Italian consular offices at Newark, New Jersey, and Detroit, Michigan, be closed and that the Italian personnel be withdrawn therefrom.[6]

The Department of State declared in 1897, that as a general rule of international intercourse, a government may justly revoke an exequatur without assigning any reason for so doing; that if cause is assigned for revocation, discussion of the sufficiency thereof is invited, and opportunity offered for the presentation of defensive evidence coupled with a request for reconsideration of the action taken; that if, however, no reasons are offered, the State revoking the exequatur cannot be compelled to give any.[7] In 1908, however, the Department of State expressed surprise and regret at the "abrupt action" of Honduras in canceling the exequaturs of the American consul and vice-consul at Ceiba, "without customary diplomatic notification" to the United States, "and without opportunity for interchange of views and temperate investigation of the facts." It was urged that the cancellation of the exequaturs be withdrawn, and that any complaint which the Government of Honduras might feel constrained to make concerning the course of the officers in question "should take the appropriate diplomatic channel of investigation and amicable settlement."[8] The Honduran Government yielded.[9]

[6] Dept. of State Bulletin, March 8, 1941, 249. See also documents in Hackworth, Dig., IV, 680–681.

[7] Mr. Sherman, Secy. of State, to Mr. Pringle, American Chargé, Aug. 18, 1897, For. Rel. 1897, 338, Moore, Dig., V, 27; Mr. Seward, Secy. of State, to Baron de Wetterstedt, April 23, 1866, MS. Notes to Sweden, VI, 174, Moore, Dig., V, 23.

[8] Mr. Bacon, Acting Secy. of State, to the Honduran Minister, July 31, 1908, For. Rel. 1908, 458, where it was also said: "It is very unfortunate, and in some regards most embarrassing, that a question of this character should be precipitated at a moment when we are earnestly acting, coincidently with Mexico, in the interest of peace in Central America. . . . If the American consul and vice-consul at Ceiba be shown to have done any act contrary to international precept, to the instructions of their Government, or to the friendly and impartial purposes of the United States, a frank ascertainment of the facts, and an equally frank comparison of the views of the two Governments could hardly fail to result in a cordial agreement touching the course to be pursued for a friendly closure of the incident. Your Government, Mr. Minister, like mine, can expect nothing less than fair play in such a case, and it certainly can ask no more." Also Art. 5, declaration of the Institute of International Law, Sept. 26, 1896, *Annuaire*, XV, 304.

[9] For. Rel. 1908, 469; *id.*, 456–470, respecting the matter generally.

According to Art. 8 of the Harvard Draft Convention on The Legal Position and Functions of Consuls: "A State may at any time withdraw its consent to a person's exercise of consular functions within its territory. Except in urgent cases, a receiving State should not withdraw its consent without giving the sending State opportunity to provide against the interruption of consular activities." Declares Professor Quincy Wright, in commenting on this article: "In practice, reasons for revoking an exequatur have frequently been assigned. . . . States have often protested when the exequaturs of their consuls have been cancelled without assignment of reason or for reason deemed insufficient. . . . In view of the treaties and practice cited, it is believed that reasons for revoking an exequatur should normally be

In 1922, the British Government announced the intention to withdraw the exequaturs of the American Consul and Vice Consul at Newcastle-on-Tyne, "on the ground that they have attempted to divert passengers from British to American lines by making difficulties over visas for passengers not traveling by American lines and hinting that inconvenience might be encountered in the United States unless passengers should travel by American lines." [10] The American Government did not share this conclusion of fact. While not questioning the right of the British Government to cancel the exequatur of an American consul on the ground that he was *persona non grata,* Secretary Hughes declared that when specific charges were advanced, his government was compelled to make the most thorough investigation in order to clear or to discipline the alleged offender.[11] The Consulate, which was closed, was not re-opened until 1924.[12]

The revocation of his exequatur may be anticipated as the natural consequence of certain conduct on the part of a consul, such as the commission of illegal acts,[13] or manifest hostility towards the State of his sojourn especially when it is engaged in war,[14] or the endeavor to use his consular position to defeat the ends of justice by refusing to appear as a witness in a suit pending against himself.[15]

The revocation by the President of the exequatur of a foreign consul serves to terminate his status as such, and is conclusive upon the courts when advised of the fact by the Secretary of State.[16]

On June 16, 1941, the Under Secretary of State informed the German Chargé d'Affaires at Washington, that it had come to the knowledge of the American Government that agencies of the German Reich in the United States, including

---

communicated, but no formal requirement to this effect is made in the article." (*Am. J., Supplement,* Jan. and April, 1932, XXVI, 244.)

[10] See Mr. Hughes, Secy. of State, to the Ambassador in Great Britain, July 20, 1922, For. Rel. 1922, II, 392. Also Lord Curzon, British Foreign Secy., to the American Chargé at London, Dec. 27, 1922, *id.,* 404.

[11] Communication to the Ambassador in Great Britain, Feb. 12, 1923, For. Rel. 1923, II, 306.

[12] See documents in For. Rel. 1924, II, 249–252. Also Hackworth, Dig., IV, 677–680.

On Oct. 18, 1935, the Czechoslovak Government, according to a press despatch in the *New York Times,* Oct. 19, 1935, announced its decision to withdraw the exequatur from the Polish consul at Moravska-Ostrava, seemingly charging him with concerning himself with the internal affairs of Czechoslovakia and with publicly criticizing the government thereof.

[13] Coppell *v.* Hall, 7 Wall. 542, Moore, Dig., V, 19. See, also, Mr. Jefferson, Secy. of State, to Mr. Duplaine, Oct. 3, 1793, Am. State Pap., For. Rel., I, 178, Moore, Dig., V, 19. Also Moore, Dig., IV, 533–534, and documents there cited, concerning the revocation of the exequaturs of three British Consuls in 1856, on account of their violation of the neutrality laws of the United States during the Crimean War.

[14] Case of Mr. Bunch, Moore, Dig., V, 20–21, and documents there cited; Case of Mr. Rogers, Moore, Dig., V, 22–23, and documents there cited; also Mr. Fish, Secy. of State, to Mr Stevens, June 23, 1873, MS. Inst. Paraguay, I, 163, Moore, Dig., V, 25.

[15] Janssen's Case, in Report of Mr. Seward, Secy. of State, to the President, March 28, 1867, accompanying message of President Johnson to the Senate, March 28, 1867, S. Ex. Doc. No. 1, special session of the Senate, 6, 36, 38, Moore, Dig., V, 23; also Mr. Marcy, Secy. of State, to Commander Figanière, Portuguese Chargé d'Affaires, Feb. 19, 1855, MS. Notes to Portugal, VI, 143, Moore, Dig., V, 20.

Concerning the gross misconduct of certain German consular officers in American territory while the United States was a neutral with respect to World War I, see House Report No. 1, 65 Cong., 1 Sess., *Cong. Record,* Vol. LV, Part I, 319, 321. Also, documents in For. Rel. 1915, Supp., 923–927; For. Rel. 1917, Supp. 1, 579–585.

[16] People *v.* Savitch, 116 N. Y. Misc. 531.

German consular establishments, had been engaged in activities wholly outside the scope of their legitimate duties, and that these activities had been of "an improper and unwarranted character," rendering the continued presence in the United States of such agencies and consular establishments inimical to the welfare of the country. He declared that he was directed by the President to request "that the German Government remove from United States territory all German nationals in anywise connected with the German Library of Information in New York, the German Railway and Tourists Agencies, and the Trans-Ocean News Service, and that each of these organizations and their affiliates shall be promptly closed," and also to request "that all German consular officers, agents, clerks, and employees thereof of German nationality shall be removed from American territory and that the consular establishments likewise be promptly closed." [17] On June 20, 1941, the same officer informed the Italian Ambassador at Washington that he had been directed by the President to request that the Italian Government promptly close all Italian consular establishments within United States territory and remove therefrom all Italian consular officers, agents, clerks and employees of Italian nationality.[18] While it was not stated that the Italian consular service had been guilty of impropriety of action, it was declared that in the opinion of the American Government it was obvious that the continued functioning of Italian consular establishments in territory of the United States would serve no desirable purpose.[19] It is not believed that the action of the American Government with respect to the consular or other establishments whether German or Italian was violative of any legal obligations burdening the United States. It may be observed that the German Government, after protesting against the action of the American Government,[20] proceeded on June 19, 1941, to request that all American consular officers and employees of their consular establishments in Germany and German-occupied territory be withdrawn, and that the consular establishments be closed, embracing within the request the American Express Company and its employees.[21] On June 19, 1941, the Italian Government demanded the closing of American consular establishments within Italian territory.[22]

3

§ 463A. **Unrecognized Governments.** Contacts with unrecognized governments through existing consular services operating within areas under their control, or with such entities through their own services operating within the territories of the foreign State are constant and oftentimes necessary. They afford

[17] Dept. of State Bulletin, June 21, 1941, 743.

[18] *Id.* He added: "I am likewise directed to request the closing of all agencies in this country connected with the Italian Government, together with the cessation of their activities, and, furthermore, the removal of all Italian nationals in any way connected with organizations of the Italian Government in the United States, with the exception of its duly accredited representation in Washington."

[19] *Id.*

[20] See United Press despatch as contained in *New York Times,* June 18, 1941, p. 1.

[21] See statement in Hackworth, Dig., IV, 682.

[22] *New York Times,* June 20, 1941, p. 1; also statement in Hackworth, Dig., IV, 682.

instances of acts falling short of the recognition of new governments, and with proper vigilance may be prevented from amounting to more.[1] They are based upon the idea that it is highly important for States to deal with entities in actual control of, and purporting in fact to govern, particular areas, and with agents of those entities who may be sent abroad to act in a consular capacity on their behalf.

Accordingly, a State may well seek permission from the unrecognized government of another for the consular officers of the former to exercise their functions within the territory which the latter controls, either through officers already there in service, or through others still to be appointed.[2] It would, however, be difficult to seek and obtain a new exequatur from such a government without recognizing it, at least in the absence of a common understanding that such a result was not to ensue.[3] The United States seems to be quite aware of the necessary implications of such action and is not disposed to ignore them.

Again, without granting exequaturs to consular officials of unrecognized governments seeking to exercise their functions within its domain, the United States has at times found it expedient to permit such officials within its territorial limits to perform certain consular acts therein as a means of facilitating commercial intercourse with the country whose unrecognized government they purported to represent.[4]

§ 463A. [1] See *supra*, § 46.

[2] See documents in For. Rel. 1911, 13, concerning the recognition by Belgium of an American Vice and Deputy Consul General at Boma, Kongo.

See statement in Hackworth, Dig., IV, 685–687, respecting American consular representation in Russia, 1918–1923, and in Turkey, 1919–1923.

[3] "With reference to the assignment of certain American consular officers as vice consuls in Chile at a time when the Government of that country was not recognized by the United States, the Department of State, on October 31, 1924, instructed the Embassy in Santiago that if the government of a country issued exequaturs which were formally and unconditionally accepted, such acceptance would have the effect of recognition of that government. The Chilean authorities were informed that the United States would be pleased to have the officers in question perform their functions in Chile, that it was recognized that this could only be done with the consent of the *de facto* authorities, and that the United States would be pleased to have its officers accept the exequaturs provided it were understood that such acceptance did not involve recognition of the existing régime. The Chilean authorities expressed willingness that the exequaturs should be issued with this understanding." (Statement in Hackworth, Dig., IV, 688.)

In July, 1939, the German Government was unwilling to grant an exequatur to an American officer at Prague, as Consul General, with the understanding that such action would not involve a change in the position of the United States with respect to the status of Czechoslovakia. See statement in Hackworth, Dig., IV, 689, and documents cited, *id.*, 689–690.

[4] See illustrative instances in documents in Hackworth, Dig., IV, 691–697. See especially, Mr. Kellogg, Secy. of State, to the Chargé in Ecuador, July 28, 1925, For. Rel. 1925, II, 65.

# TITLE D

## PRIVILEGES AND IMMUNITIES

### 1

§ 464. **Under International Law and Treaty.** Consuls are not diplomatic officers, and can not of right claim the privileges and immunities accorded the latter. Consuls are, nevertheless, "regarded as the officers both of the State which appoints and the State which receives them." [1] They possess, moreover, a certain representative character as affecting the commercial interests of the appointing country.[2] "Since a consular officer in charge of a post outside of a capital city is the representative of the United States Government within his consular district, he is the medium through whom communication with the local civil officials and consular authorities of other countries is had, in the absence of instructions to the contrary." [3] Consular officers are, accordingly, for many purposes, the spokesmen of their fellow-countrymen residing within their respective districts; and upon the death of the latter are oftentimes made by treaty the legal representatives of the non-resident heirs.[4] The privilege of intercourse with local authorities, administrative or judicial, is frequently expressly acknowledged,[5] and upon occasion, in the absence of diplomatic representation, access to the national government of the State is accorded.[6]

The bare authorization of a consular officer to perform duties commonly entrusted to diplomatic officers does not serve to attach to him a diplomatic status, or to clothe him with diplomatic immunity.[7] A foreign consul not ac-

§ 464. [1] Consular Regulations of the United States, of Jan. 11, 1932, section 72, where it was also stated that consular officers "are under the special protection of International Law."
See also The Anne, 3 Wheat. 435, 445–446.
Concerning Consular Jurisdiction in Oriental and certain other countries, see Extraterritorial Jurisdiction, *supra*, §§ 259–264.

[2] Consular Regulations of the United States, of Jan. 11, 1932, section 71.

[3] Foreign Service Regulations of the United States, IX–3, Note 4, as of January, 1941.

[4] See, for example, Art. XV, consular convention with Belgium, March 9, 1880, Malloy's Treaties, I, 99; Art. XXV, treaty with Germany, Dec. 8, 1923, U. S Treaty Vol. IV, 4191, 4201.

[5] See, for example, Art. IX, consular convention with Sweden, June 9, 1910, U. S. Treaty Vol. III, 2848; Arts. XXI and XXIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4200.

[6] See, *id.*, Art. XXI.

[7] A different situation exists, however, when an American Foreign Service officer, who has been commissioned as a consular officer is assigned by the President to the diplomatic branch of the service and thereby given diplomatic status. The Foreign Service Lists of the United States are replete with instances. See § 4 of May 24, 1924, 43 Stat. 140, 22 U.S.C.A. § 4.
The statutory law of the United States forbids an American consular officer to exercise diplomatic functions, or to hold any diplomatic correspondence or relation on the part of the United States in, with, or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United

knowledged by the Department of State to possess the character of a diplomatic officer will not be regarded as such by the courts of the United States.[8]

§ 464A. **The Same.** Within recent years the development of social, economic and commercial relationships between States, manifested in complex as well as freshly intimate associations between their peoples, has served greatly to increase the variety and number of the burdens placed upon consular officers. That circumstance has sufficed to bring home to statesmen a sense of the importance of authoritative statements indicating with precision the scope of certain privileges that should be accorded such officials in order to enable them to perform most advantageously the manifold duties of their office.[1] To that end States have, therefore, had recourse to numerous bi-partite conventions, giving expression to common acknowledgments that have been impressively responsive to what were conceived to be the needs of the time, regardless of whether they reflected or modified what the law of nations seemingly demanded. Thus, in proposing and concluding after World War I the first of a new series of uniform and conventional arrangements in relation to consuls,[2] the United States undertook to make ample, yet careful, provision for the benefit of a service that should satisfy the full requirements of the contracting parties, without undue interference with, or restraint upon the freedom of a territorial sovereign, and also without consciously close regard for preconceived views concerning either the nature of the consular function or the scope of the consular privilege.[3] In this series of agreements, of which numerous provisions

---

States authorized to perform diplomatic functions therein; or in any case, unless expressly authorized by the President to do so. Rev. Stat. § 1738, 22 U.S.C.A. § 105.

See classification of Diplomatic Representatives, *supra*, § 411; also Secretaries of Embassy or Legation, *supra*, § 412.

[8] *In re* Baiz, 135 U. S. 403, 424, 431–432, Moore, Dig., IV, 650; also Mr. Foster, Secy. of State, to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I, 414, Moore, Dig., IV, 445.

§ 464A. [1] See the proposals offered in the Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 193; also, the Convention on Consular Agents, adopted by the Sixth International Conference of American States at Havana, Feb. 20, 1928, U. S. Treaty Series, No. 843; Report on the Legal Position of Consuls from the Subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law, 1927, M. Guerrero, *Rapporteur, Am. J., Special Supplement,* 1928, XXII, 105; Project No. VII, on Consuls from Inter-American Commission of Jurists, 1927, *id.,* 255. The last two documents, together with certain other draft codes, are published in Appendix 4 to the Harvard Draft Convention, in *Am. J., Supplement,* Jan. and April, 1932, XXVI, 389.

[2] The first of the series was the treaty with Germany concerning Friendship, Commerce and Consular Rights, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

See, also, treaty with Esthonia, Dec. 23, 1925, *id.,* 4105; treaty with Hungary, June 24, 1925, *id.,* 4318; treaty with Honduras, Dec. 7, 1927, *id.,* 4306; treaty with Latvia, April 20, 1928, *id.,* 4400; treaty with Salvador, Feb. 22, 1926, *id.,* 4615; treaty with Austria, June 19, 1928, *id.,* 3930; treaty with Norway, June 5, 1928, and Feb. 25, 1929, U. S. Treaty Series, No. 852; treaty with Poland, June 15, 1931, U. S. Treaty Vol. IV, 4572; treaty with Finland, Feb. 13, 1934, *id.,* 4138. Also, Consular Convention with Cuba, April 22, 1926, *id.,* 4048.

[3] Whenever a consul acts as such for his country there is an exercise of the consular function. In the endeavor to take full cognizance of what States are disposed, by treaty or otherwise, to permit such an officer to do and to describe the resulting practice, it seems desirable, for sake of simplicity, to refer to the facts as indicative of consular powers or privileges or immunities of such, rather than as pointing to a definition of, or limitation upon, the consular function as such. The significant fact that looms large at the present time is the sense of freedom on the part of those who commission them to employ consuls

may be invoked by States which are not parties thereto, in consequence of the operation of the most-favored-nation clause in treaties which they have concluded with the United States, there is revealed what in the estimation of the American Government and of several other powers should be the character of the relevant law.[4] This body of opinion in support of particular provisions is as worthy of attention as any evidence of the purely customary law, and is perhaps prophetic of the form which the latter may be expected ultimately to assume.

It should, however, be constantly borne in mind that the consular conventions of a particular country may not purport to refer in terms to the full measure of privileges which are fairly to be claimed for the benefit of the officers of the contracting States. The tasks assigned to those officers by their respective countries vary from time to time, and do not lend themselves to complete enumeration in the articles of a convention.[5] Thus, there may be a strong disinclination on the part of two contracting States to agree that in the event of turmoil within the territory of either, the consuls of the other shall, under certain contingencies, be permitted to make representations in behalf of nationals of a third State. Nevertheless, such a privilege was asserted in behalf of American consuls in Mexico in 1914. In response to the claim of General Carranza that representations and claims in behalf of foreigners, who were chiefly of Spanish nationality, should be made by the diplomatic representatives of the countries to which they belonged, the Government of the United States replied that the foreign powers had, and could have, in the Mexican Republic, but one set of diplomatic representatives, that those representatives were, as General Carranza was aware, at the City of Mexico, the capital of the Republic, which was in the possession of the administration presided over by General Huerta, which was exercising actual control over a number of States of the Republic; that in such circumstances it was no more possible for the diplomatic representatives at the City of Mexico to address representations to General Carranza than it would be for them, if the case were reversed, to address representations to General Huerta. In these circumstances it was declared that the representatives of foreign governments, including those of the United States, had, in conformity

---

whenever they are a convenient and appropriate instrument of legitimate State action, and the absence of complaint on the part of issuers of exequaturs that such officers have been chosen for the tasks assigned to them. See Blackmer *v.* United States, 284 U. S. 421. The legitimacy of State action is not likely to be challenged on account of the choice of the consular agency through which achievement is effected, but rather by reason of the character of what is sought to be accomplished by the government of a State within the domain of another. See Acts in Derogation of the Supremacy of the Territorial Sovereign, *supra*, § 200.

[4] See Irvin Stewart, "American Treaty Provisions Relating to Consular Privileges and Immunities," *Am. J.*, XX, 81; same writer, "Consular Privileges and Immunities under the Treaties of Friendship, Commerce and Consular Rights," *Am. J.*, XXI, 257.

[5] According to Art. I of a provisional agreement between the United States and the Kingdom of Saudi Arabia concerning Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation, of Nov. 7, 1933, U. S. Executive Agreement Series, No. 53: "The consular representatives of each country, duly provided with exequatur, will be permitted to reside in the territories of the other in the places wherein consular representatives are by local laws permitted to reside; they shall enjoy the honorary privileges and the immunities accorded to such officers by general international usage; and they shall not be treated in a manner less favorable than similar officers of any other foreign country."

with the usages and necessities incident to such a situation, made unofficial representations to the local authorities in the territory controlled by General Carranza and the forces that acknowledged him as their leader; that at various points within that territory countries other than the United States were not represented by consular officers, and that unless representations could be made in behalf of their citizens through American consuls, such representations could not be made at all. The legal aspect of such action was summed up as follows:

> The representations thus made through the American consular officers in behalf of other foreigners are strictly in accordance with international law and usage. It is a common thing for the consular representatives of one country to act in an unofficial capacity for the citizens or subjects of other countries. This is a matter of constant, indeed almost daily, occurrence, in peace as well as in war. To prohibit the exercise of such friendly offices would in any circumstances be a deplorable act; but, in the midst of conditions such as exist today in Mexico, it assumes an aspect peculiarly grave and could not fail to give rise to a feeling of anxiety. The Government of the United States has up to the present time exerted all its influence to prevent the adoption of coercive measures on the part of foreign powers for the redress of grievances in Mexico, and in so doing has lent to its influence the weight of its own example; but it is compelled to feel the utmost solicitude as to the situation which would be likely to arise, if it should be announced as the final determination of General Carranza that, within the territory which he controls, requests for the protection of foreigners and their interests may be made only on conditions that manifestly preclude such requests altogether.[6]

The paragraph quoted is illustrative of a situation where, without the aid of a treaty, a State may not unreasonably utilize its consular service to achieve on foreign territory an end of which the propriety is unassailable, and with respect to which the law of nations does not forbid the employment of the consular agency.

## 2

§ 465. **Respect for the Consular Function.** The yielding of consular privileges and immunities is for the purpose of facilitating the performance of the consular function.[1] Such performance is retarded unless respect for that func-

[6] Mr. Bryan, Secy. of State, to Vice Consul Simpich, March 2, 1914, For. Rel. 1914, 794, 795.

General Carranza later appeared to be willing to have the Government of the United States make representations in behalf of the nationals of other States in sections where they lacked representation provided the governments thereof requested the American Government to do so. See Mr. Lansing, for the Secy. of State, to the German Ambassador, April 17, 1914, *id.*, 807. Under such conditions, objection was not made to such action through the medium of the consular service. See report of Consul Letcher, to the Secy. of State, Oct. 19, 1914, *id.*, 829, as illustrative of the conduct of an American consular officer in behalf of a Spanish national.

See documents in For. Rel. 1915, 1030–1096, concerning the protection by the United States in 1915, of British, Spanish, French, German, Turkish and Chinese interests in Mexico. See, especially, Mr. Adee, Acting Secy. of State, to Special Agent Silliman, July 23, 1915, *id.*, 1083; memorandum from Dept. of State, May 7, 1915, *id.*, 1077.

§ 465. [1] Stowell, *Le Consul*, 139, calling attention to Art. XVI of the Jay Treaty with Great Britain, of Nov. 19, 1794, Malloy's Treaties, I, 600.

tion be maintained, and contempt for it both prevented and penalized.[2] Respect is enhanced by provisions in numerous conventions of the United States conferring upon a consul special privileges, such as, for example, that of giving his testimony in a civil case, at his consulate rather than in open court.[3] It is, moreover, expressly acknowledged in the treaties concluded by the United States since World War I, that "as official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the State which receives them."[4] The consular function is upheld locally in the United States by a Federal law making punishable one who falsely assumes or pretends to be a consular officer of a foreign government duly accredited as such to the Government of the United States, with intent to defraud such government or any person, and takes upon himself to act as such officer, or in such pretended character demands or obtains, or attempts to obtain from any person or from such foreign government, or from any officer thereof, any money, paper, document, or other thing of value.[5] It is doubtless possible to enjoin one who interferes with or obstructs the performance by a foreign consul of his official duties.[6]

[2] "Consuls are to be considered as distinguished foreigners, dignified by a commission from their sovereign, and specially recommended by him to the respect of the nation with whom they reside. They are subject to the laws of the land indeed precisely as other foreigners are, a convention where there is one making a part of the laws of the land; but if, at any time, their conduct should render it necessary to assert the authority of the laws over them, the rigor of those laws should be tempered by our respect for their sovereign, as far as the case will admit. This moderate and respectful treatment towards foreign consuls it is my duty to recommend, and press on our citizens, because I ask it for their good, towards our own consuls, from the people with whom they reside." (Communication of Mr. Jefferson, Secy. for Foreign Affairs, to Mr. Newton, Sept. 8, 1791, 4 MS. Am. Let. 283, Moore, Dig., V, 33.)

"Ministers and Consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they discharge their respective duties and are guilty of no violation of the law of nations. . . . As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." (President Fillmore, Annual Message, Dec. 2, 1851, Richardson's Messages, V, 118.)

[3] See, for example, Art. IV of consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2847; Art. IV of consular convention with Belgium, March 9, 1880, Malloy's Treaties, I, 95. Also *infra*, § 476.

[4] See, for example, Art. XVII, treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4198.

"Consular officers possess a certain representative character, and by virtue of their official position are entitled to be treated with due respect in their dealings with national, State and local officials." (Mr. Hackworth, Legal Adviser, Dept. of State, to the Sheriff of Los Angeles County, April 17, 1939, Hackworth, Dig., IV, 737.)

[5] Act of June 15, 1917, Chap. 30, title VIII, § 2, 40 Stat. 217, 226. Also Von Thodorovich *v.* Franz Josef Beneficial Association, 154 Fed. 911. See For. Rel. 1906, II, 934–941, respecting the counterfeiting of the American consular seal at Palermo.

[6] If the consul be an alien, it is believed that he may rely upon paragraph 17, § 24, Chap. 2, of the Federal Judicial Code of Mar. 3, 1911, 28 U.S.C.A. § 41, conferring original jurisdiction upon the United States District Courts, "of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States." Interference with the performance of the consular functions of one empowered to exercise the same by the State to which he is appointed as well as by his own country, violates the law of nations, and in most instances, also, the provisions of treaties which the consular officer may justly invoke.

See, also, Act No. 51 of April 15, 1913, Pennsylvania Sess. Laws of 1913, making it under certain circumstances unlawful for any person, firm or corporation to use the word "Consul"

In their intercourse with local or minor officials oftentimes ignorant of the law of nations and of the terms of existing conventions, consular officers are not infrequently subjected to humiliation, and occasionally to insult.[7] When a foreign consular officer possessed of an American exequatur is, within the domain of the United States, the victim of such treatment, frank expression of regret is to be anticipated upon reasonable protest duly lodged with the superior authorities, State or Federal. If, for any reason, local or other authorities are unable or indisposed to inflict a penalty upon the wrongdoer, the country to which the consul belongs may fairly seek redress through the diplomatic channel.

3

§ 466. **Protection of the Person of a Consul.** To enable him to perform his official duties effectively and without molestation, the person of a consul as well as his reputation are entitled to complete protection. The State to which he is appointed should make the utmost endeavor to accord it. As Commissioner Nielsen found occasion to declare in 1927: "International Law undoubtedly secures to a consular officer the right to perform his functions without improper interference. And it would seem that, in a case in which his personal safety is threatened, authorities of the country of his residence may well be expected to take especial precaution to afford him protection."[1] Neglect in this regard always evokes protest and justifies demands for reparation.[2] Thus, the failure

---

or "Consulate," or the coat of arms of a foreign country for exhibition, display, or advertising purposes, and providing a penalty therefor.

[7] For. Rel. 1905, 517–524, respecting treatment accorded Mr. Winslow, the American Consul General, by a judge of the first instance at Guatemala, in 1905.

See Consul General Hanna to the Secy. of State, April 24, 1914, in reference to the conduct to which he was subjected at Monterey, on April 21 and 22, 1914. For. Rel. 1914, 659.

Case of the German consul at Cincinnati, Moore, Dig., V, 41, and documents there cited; also Opinion of Mr. Garland, Atty. Gen., May 5, 1887, respecting the operation of § 4062, Rev. Stats., 19 Ops. Attys. Gen., 16; also Opinion of Mr. Bradford, Atty. Gen., 1 Ops. Attys. Gen. 41.

§ 466. [1] He added: "It is of course their duty to take proper steps for the protection of all aliens. But when indemnity is claimed before an international tribunal solely as personal compensation to a consular officer who has been injured, I do not believe that a sum so large that it must properly be regarded as punitive damages or as redress for indignity to a nation can properly be awarded on the ground that the injured person is such an official." (Separate opinion in Francisco Mallén Case, Opinions of Commissioners under convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 254; 264–265. Also William E. Chapman Case before same Commission, Opinions of Commissioners, 1931 Vol., 121.

See also Art. 15 (a) of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 197, and Comment *id.*, 313.

[2] Instances are numerous. See cases in Moore, Dig., V, 42–48, especially cases in Venezuela in 1900, For. Rel. 1900, 943–953, and case of Riot at Mollendo, Peru, 1893, For. Rel. 1893, 509–525.

Declared Mr. Bryan, Secy. of State, to the Secy. of War, June 5, 1913: "While it is not desired to send a military force across the line except as a last resort, there would appear to be ample authority for doing so to prevent the killing of, or injury to, the consular representative of this nation whom the appropriate Mexican authorities are unable to protect." (Hackworth, Dig., IV, 710.)

Declared Mr. Webster, Secy. of State, to Mr. Calderon da la Barca, Spanish Minister, Nov. 13, 1851, in connection with the riot in New Orleans in 1851: "While the Government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another in cases of this kind, it supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the coun-

of police or military authority at Teheran, Persia, on July 26, 1924, to make adequate effort to protect Mr. Imbrie, the American Vice Consul, from an attack by a mob which caused his death, inspired the American Government to demand and obtain full reparation.[3]

4

§ 467. **Protection of the Consular Archives, Office and Dwelling.** A consul may "claim inviolability for the archives and official property of his office, and their exemption from seizure or examination." [1] Such inviolability is secured by numerous treaties to which the United States is a party.[2] The Department of State has declared that in the absence of treaty a State is not deprived of the right to serve writs of process within the consular offices, provided suitable consideration be given to the official position of the consular officer; and also that a treaty clause providing for inviolability of consular premises does not necessarily preclude the serving of process upon consular officers in connection with suits brought against them in their private capacity.[3] While according to the customary law the obligation resting upon the territorial sovereign in relation to the consular office or dwelling is narrower than that in relation to the consular archives, the experience of States has shown the desirability of establishing that both be fully protected, and that neither be subjected to search.[4] The recent treaties of the United States make, therefore, the following provision:

---

try to mingle with our own citizens, and here to pursue their private business and objects. The former may claim special indemnity; the latter are entitled to such protection as is afforded to our own citizens." (6 Webster's Works, 509, 511, Moore, Dig., VI, 812–813.)

Respecting indignities suffered by American consular officers at the hands of German frontier authorities in the course of World War I before the United States became a belligerent, see House Report No. 1, 65 Cong., 1 Sess., *Cong. Record,* Vol. LV, 319, 321.

See, also, Mr. Hunter, Acting Secy. of State, to Mr. Molina, Aug. 6, 1852, MS. Notes to Central America, I, 33, Moore, Dig., V, 48; Case of Mr. Jenkins, American Consular Agent at Puebla, Mexico, in 1919, under Claims, *supra,* § 286; E. C. Stowell, The Magee Incident, Washington, 1920, illustrating from Parliamentary Papers, 1875, Vol. 82, how Great Britain in 1874 secured redress for the ill-treatment of its consular representative at San José, Guatemala.

[3] See documents in Hackworth, Dig., IV, 710–712. See other illustrative instances in Hackworth, Dig., IV, 712–716.

§ 467. [1] Consular Regulations of the United States of Jan. 11, 1932, §§ 73 and 77; also Foreign Service Regulations of the United States, as of January, 1941, III–2, Note 1 (d); Mr. Hughes, Secy. of State, to the Governor of New York, Oct. 27, 1922, in relation to the attachment of the archives of the Mexican Consulate General at New York, referred to in Irvin Stewart, Consular Privileges and Immunities, 53–54; also Mr. Hunter, Acting Secy. of State, to Mr. Molina, Aug. 6, 1852, MS. Notes to Central America, I, 33, Moore, Dig., V, 48; case of outrage on the American Consulate at Malaga, April, 1898, For. Rel. 1898, 1078–1085, Moore, Dig., V, 52–53; Arts. 9 and 10, declaration of the Institute of International Law, Sept. 26, 1896, XV, *Annuaire,* 306.

See also documents in Hackworth, Dig., IV, § 433.

[2] See, for example, Art. VI of consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2848; also, Art. VI, consular convention with Greece, Nov. 19, 1902, Malloy's Treaties, I, 857, and, in relation thereto, documents in For. Rel. 1914, 326–330.

See, also, Art. 16 of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 197, and Comment, *id.,* 322.

[3] See Mr. Clark, Under Secy. of State, to the Consul General at Belfast, March 22, 1929, Hackworth, Dig., IV, 719.

See, also, Case of Invasion by Haitian authorities in 1899, of the residence of the American Deputy Consul General, For. Rel. 1899, 405–407, Moore, Dig., V, 55–57.

[4] See case of seizure of American consular archives at Saltillo, Mexico, referred to in For. Rel. 1914, 660–668; invasion by Turkey in 1914, of British and French Consular archives under American seal, For. Rel. 1914, Supp., 748.

> The consular offices and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall not be used as places of asylum. No consular officer shall be required to produce official archives in court or testify as to their contents.[5]

The article does not cause immunity from search to be dependent upon the public character of the documents within the consular office, leaving to the contracting parties the extent to which their respective officers should be cautioned against accepting the custody of unofficial documents or of any private property belonging to their countrymen or to others, and of so abusing the large privilege recorded in the treaty.

It may be observed that except in a public emergency, no officer of the American Foreign Service is permitted to accept private property for storage or safekeeping in his office, or for transmission to some other destination, unless it be property belonging to the estate of a deceased American citizen, or property over which the officer has jurisdiction as a result of a catastrophe at sea. In public emergencies, however, Foreign Service officers may accept private property for storage and safekeeping or for transmission to another destination, provided the owner signs a statement to the effect that the property is being accepted for deposit at his request, at his own risk, and with full knowledge that neither the Government of the United States nor any of its officers assumes responsibility therefor.[6]

The provision forbidding the use of the consular office or dwelling as a place of asylum is a common one in the treaties of the United States.[7] It behooves a

---

See Mr. Polk, Acting Secy. of State, to the American Chargé d'Affaires in Turkey, May 27, 1916, For. Rel. 1916, Supp., 835, in relation to the breaking of American seals on foreign consular offices which had been placed in the care of the Government of the United States, "notwithstanding the formal protest of the American Embassy against such a violation of consular privileges"; The Turkish Minister of Foreign Affairs (Halil), to the American Chargé d'Affaires at Constantinople, June 26, 1916, *id.*, 841, 842; Mr. Philip, American Chargé d'Affaires at Constantinople, to the Secy. of State, July 4, 1916, *id.*, 844.

Also, Mr. Sherman, Secy. of State, to Mr. Neill, No. 250, June 26, 1897, MS. Inst. Peru, XVIII, 37, Moore, Dig., V, 52.

[5] Art. XX, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4199.

*Cf.* Art. 17 of Harvard Draft Convention on The Legal Position and Functions of Consuls.

[6] Foreign Service Regulations of the United States, XX–5, as of January, 1941; also Note 1, prohibiting the acceptance of a will for deposit.

[7] "It is to be noted that this provision [in Art. XX of the treaty with Germany of Dec. 8, 1923] is not a limitation upon the inviolability of the consulate. Use of the consulate as an asylum would be a violation of the treaty; but it would not afford any ground for an invasion of the consulate by the local authorities." (Irvin Stewart, Consular Privileges and Immunities, 101.)

See, also, Art. VI of consular convention with Servia, Oct. 14, 1881, Malloy's Treaties, II, 1619; and, in this connection, Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, March 6, 1899, For. Rel. 1899, 302, Moore, Dig., V, 82.

According to Art. 19 of the Convention on Consular Agents adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4738, 4741: "Consuls are obliged to deliver, upon the simple request of the local authorities, persons accused or condemned for crimes who may have sought refuge in the consulate."

See also Art. 32 (a) of the Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, 200, and Comment, *id.*, 365.

consul not to endeavor to shield from the local jurisdiction any employee sought to be subjected to process, but rather, upon due notice, to facilitate access to him, by placing the employee, if need be, outside of the consular premises.

In 1912, the Department of State declared, in an instruction for the guidance of the American consul at Vera Cruz, that the United States does not claim what is technically known as the right of asylum in the strictest sense. It was said, however, that there is "an evident distinction between cases of this kind and cases in which temporary refuge is given in order to preserve innocent human life." In those of the latter kind the Department found it expedient to give a certain latitude to the judgment of the officer who might be called upon to determine within his discretion the course recommended by broad considerations of humanity in each individual case. It was accordingly announced as the general rule of the Department to place all emphasis upon the responsibility of the officer concerned, and within the foregoing limitations to permit him, at his discretion, to afford temporary refuge where such might be necessary to preserve innocent human life.[8] At the present time the United States is not disposed to assert in this regard a broader privilege for its consular than for its diplomatic officers.[9] The restrictions imposed by treaties to which it has willingly assented serve, however, to lessen the occasions when American consular officers may be expected to endeavor to accord a refuge to alien life even under the precise conditions when the Department of State might approve of such action.

## 5

## CORRESPONDENCE

### a

§ 468. **With Governmental Agencies of the Consul's State.** A State may well assert the right to claim for its consular officer the privilege of free communication with his own government, and with its diplomatic or consular representatives within the domain of the State where he exercises his functions.[1] His

[8] Mr. Knox, Secy. of State, to the American Chargé d'Affaires in Mexico, Oct. 29, 1912, For. Rel. 1912, 925; Mr. Adee, Acting Secy. of State, to the American Vice Consul at Foochow, Nov. 7, 1911, For. Rel. 1912, 174.

[9] See Foreign Service Regulations of the United States, III-4, as of January, 1941.

See also *supra*, § 443.

§ 468. [1] Mr. Blaine, Secy. of State, to Mr. Shannon, Minister to Central America, April 6, 1892, invoking Art. XXXV of the convention with Salvador of Dec. 6, 1870, For. Rel. 1892, 34, Moore, Dig., V, 98. A consular officer doubtless possesses also the right of communication with the naval forces of his country in the waters of the State to which he is appointed.

See also Art. 15, declaration of the Institute of International Law, Sept. 26, 1896, *Annuaire*, XV, 307.

See Mr. Bryan, Secy. of State, to the Consul at Veracruz (Canada), Feb. 8, 1915, Hackworth, Dig., IV, 817; also statement contained in protest by the consular body at Foochow, China, and approved by the Department of State, April 23, 1930, Hackworth, Dig., IV, 817 That statement was as follows: "Under international law a consular officer has the right of free communication with his own government and with the diplomatic and consular representatives of his government stationed in the same territory; the consular officer may use the post or telegraph and he may send his messages in cipher."

privilege may embrace the use of the mails or telegraph or of other appropriate instrumentalities; and his communications may be in cipher.[2]

In 1940, however, the Department of State informed the Treasury Department that it was felt "that for reasons of policy" (a) sealed letters addressed to a consular officer by his government or by a diplomatic officer or another consular officer of his government and bearing the official seal of his government, (b) official consular pouches, and (c) packages addressed to a consular officer bearing the official seal of his government and accompanied by certificates under such seal to the effect that they contained only official communications or documents, should, "for the present," be excepted from examinations made under General Ruling No. 5 of the Treasury.[3] The intimation was thus that deference for the inviolability for such communications was not always a legal obligation imposed by international law.

A State engaged in war may not unreasonably restrict the use of a cipher by neutrals to messages passing between diplomatic missions and their respective governments.[4] Pursuant to such regulations a cipher telegram from the American Minister at Peking addressed to the American Consul-General at Hong Kong was obstructed by the British censor at that place late in 1914. It does not appear that the United States deemed this action worthy of protest.[5]

Official mail bags or pouches of a consular officer are generally deemed inviolable; [6] likewise official communications addressed to such an officer from agencies of his own government or other sources. Such inviolability is not, however, conceded for the personal communications to or from a consul, in relation, for example, to his own commercial transactions in the country of his residence and outside of the scope of his official duties.[7]

In time of war it becomes highly desirable to establish uniform regulations for transmission of the correspondence of neutral consular as well as diplomatic officers in belligerent territory. To such an end the United States on November 25, 1914, directed that inquiry be made of the Austro-Hungarian Government

[2] Mr. Olney, Secy. of State, to Mr. Taylor, Minister to Spain, telegram, Feb. 17, 1897, For. Rel. 1897, 501, Moore, Dig., V, 100.

Also, Art. 13 of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 197, and Comment, *id.,* 306.

[3] Statement of July 16, 1940, Hackworth, Dig., IV, 817, where it was also said: "The Department of State is not aware of any treaty or statutory prohibitions which would prevent this Government from subjecting the persons of, the baggage of, or mail addressed to foreign consular officers to the same treatment now accorded to any other mail, baggage, or person entering the United States under the same circumstances." See also other documents *id.,* 817.

[4] Mr. W. H. Page, American Ambassador to Great Britain, to Secy. of State, telegram, Aug. 27, 1914, American White Book, European War, II, 72.

[5] Same to Same, telegram, Dec. 29, 1914, *id.,* II, 86; Acting Secy. of State, to Mr. Reinsch, American Minister to China, telegram, Jan. 2, 1915, *id.,* II, 86.

[6] See case of mail of Mr. Bunch, British Consul at Charleston in 1861, Moore, Dig., V, 96, and documents there cited, in connection with which Mr. Seward, Secy. of State, regarded as indefensible the enclosure of private letters by the Consul in his official bag.

[7] Mr. Uhl, Acting Secy. of State, to Mr. Terres, No. 113, Dip. Series, Oct. 23, 1895, MS. Inst. Haiti, III, 463, Moore, Dig., V, 99; also Mr. Root, Secy. of State, to Mr. Leishman, Minister to Turkey, Feb. 24, 1906, For. Rel. 1906, II, 1416, in which it was said: "The department is inclined to take your view, that circumspection should be exercised in claiming immunity for postal matter not obviously official. The department sedulously guards against needless extension of the privilege of immunity to include matter for private parties."

(and *mutatis mutandis,* of that of other belligerent Powers), whether it would agree to the following regulations for American diplomatic and consular officers in Austria-Hungary:

> First, all correspondence between American diplomatic and consular officers within Austrian territory to be inviolable if under seal of office; second, no correspondence of private individuals to be forwarded by diplomatic and consular officers under official cover or seal; third, official correspondence between American diplomatic officers residing in different countries is not to be opened or molested if under seal of office; fourth, official correspondence under seal of office between Department of State and American diplomatic and consular officers is not to be opened or molested; fifth, pouches under seal passing between American diplomatic missions by mail or courier not to be opened or molested; sixth, correspondence other than that described in foregoing sent by ordinary mail to be subject to usual censorship.[8]

The Austro-Hungarian Government promptly acquiesced, and in May, 1915, the Department of State announced that the arrangement was "apparently working out satisfactorily."[9] It is understood that the plan was on the whole acceptable also to the other belligerent governments.[10]

On January 5, 1918, the United States then being a belligerent, Secretary Lansing announced that although consular officials had no claim as such to uncensored use of the mails, that use would be granted out of courtesy, and that uncensored correspondence would be permitted between them and their governments, when under official seal; and also that the extension of the privilege of exemption to consular officials would be strictly confined to consuls *de carrière.*[11] In May, 1917, the Department of State informed the Mexican Government that "in accordance with the usual practice of belligerent governments,

[8] Mr. Bryan, Secy. of State, to Mr. Penfield, American Ambassador to Austria-Hungary, telegram, Nov. 25, 1914, For. Rel. 1914, Supplement, 542.

[9] Same to Same, May 20, 1915, American White Book, European War, II, 67.

[10] *Id.*, enclosing telegram of Secy. of State, to Mr. Sharp, American Ambassador to France, April 23, 1915, referring to Department's circular of Dec. 18, 1914, and embracing the following rules established by the Department in respect to diplomatic and consular correspondence:

"1. Communications from private individuals or institutions abroad to private individuals or institutions in United States should not be sent in Department pouches.

"2. Personal letters from United States Diplomatic or Consular officers or employees of American missions or consulates abroad addressed to private individuals in United States may be sent in pouches but should be censored by heads of missions with a view to prevent transmission of statements which would otherwise be censored by Governments, and should be left unsealed with postage fully prepaid.

"3. Official correspondence of diplomatic and consular officers to individuals outside of Department should be marked 'Official business,' and should be left unsealed.

"4. Communications from nations at war to agents in the United States should not be transmitted through pouches.

"5. The Department reserves right to censor all mail received in the pouches."

See documents in For. Rel. 1915, Supplement, 740–743.

See, also, Mr. F. W. Seward, Acting Secy. of State, to Lord Lyons, British Minister, Feb. 6, 1862, Dip. Cor. 1862, 253, Moore, Dig., V, 97; Same to Same, Oct. 18, 1861, Dip. Cor. 1861, 174, Moore, Dig., V, 97. See, also, Special Instructions to American Diplomatic and Consular Officers, No. 486, Oct. 28, 1916; Instructions to American Diplomatic Officers, April 19, 1917.

[11] For. Rel. 1918, Supplement 1, Vol. II, 1755.

the use of code would be forbidden to consular officers of neutral countries." [12]

In early stages of World War II, the American Government made objection to the French announcement that exemption from censorship would not be extended to correspondence between American Consuls in France or between them and American Consuls in foreign countries.[13] Again, in 1940, the American Embassy at Rome was instructed to inform the Italian Foreign Office that "the Italian regulations which require that correspondence between the Consulates and between the Consulates and the Department be subjected to censorship constitute an unwarranted interference with official correspondence and do not give reciprocity of treatment to American consular mail in Italy." [14] One finds difficulty in harmonizing these contentions with assertions previously made in behalf of the United States when itself a belligerent.

b

§ 469. **Interposition with Local Authorities.** The right of a consular officer to interpose with the local authorities for the protection of his countrymen from unlawful acts in violation of a treaty or of principles of justice has been declared by the Department of State to be "so generally admitted as to form an accepted doctrine of international law." [1] This right has received recognition in consular conventions of the United States.[2] Although the matter giving rise to interposition may ultimately become the theme of diplomatic negotiation, that possibility does not deprive a consul of the right, or absolve him from the duty of initiating such inquiries and remonstrances as the interests entrusted to his keeping may from time to time require.[3] The right of interposition is believed to justify, for example, courteous inquiry of a court as to the nature of an offense charged against a fellow countryman, or as to the status of a pending

[12] See Mr. Lansing, Secy. of State, to Ambassador Fletcher, May 7, 1917, Hackworth, Dig., IV, 819; Dept. of State, to the Japanese Ambassador, June 11, 1918, Hackworth, Dig., IV, 819.

See Diplomatic Intercourse of States, Right of Official Communication, *supra*, § 428.

[13] See Mr. Welles, Acting Secy. of State, to the Ambassador in France, Nov. 22, 1939, Hackworth, Dig., IV, 820.

[14] Statement in Hackworth, Dig., IV, 820, together with an explanation of what the American Government was at the time yielding by way of exemption to foreign consular officers.

§ 469. [1] Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Sept. 26, 1895, For. Rel. 1895, II, 1209, Moore, Dig., V, 102; also Von Thodorovich *v.* Franz Josef Beneficial Ass'n, 154 Fed. 911, 913.

Declared Mr. Wilbur J. Carr, of the Department of State in 1907: "It is the duty of a consul to endeavor upon all occasions to maintain and promote all the rightful interests of his countrymen; to protect them in all the privileges provided for by treaty or conceded by usage; and to aid them before the local authorities of the foreign country in all cases in which they may be injured or oppressed." *Am. J.*, I, 891, 906.

See also *supra*, § 464.

[2] See, for example, Art. VIII, consular convention with Germany, Dec. 11, 1871, Malloy's Treaties, I, 552; Art. IX, consular convention with Serbia, Oct. 14, 1881, *id.*, II, 1620; Art. XXI, treaty with Spain, July 3, 1902, *id.*, II, 1707; Art. IX, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2848; Art. XXI, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4200.

See, also, Art. 11, Convention on Consular Agents, adopted by the Sixth International Conference of American States, at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4738, 4740; Art. 12, Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement*, Jan. and April, 1932, 196, and Comment, *id.*, 302.

[3] Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish minister, Oct. 11, 1895, For. Rel. 1895, II, 1213, Moore, Dig., V, 103.

According to Circular Instructions to American Consular Officers in Mexico, Central

case, even in countries where the preliminary proceedings in criminal cases are secret.[4] The right is, however, capable of abuse, which is apparent when a consul demands, for example, information unrelated to the violation of a treaty or of international law, or to the protection of his countrymen.[5]

When upon proper occasion a consul interposes with local authorities, his complaints are entitled to respectful consideration; and if they are not satisfactorily redressed, direct application to the Government of the country is, according to numerous treaties, thereupon justified.[6]

In American opinion the right of consular interposition embraces the privilege of visiting imprisoned nationals within a reasonable time after arrest,[7] and of interviewing them without (in the case of American nationals) restrictions upon the use of the English language, and beyond the hearing of local officials.[8] While the holding of a prisoner incommunicado for a long period without trial would be regarded as unjustifiable,[9] and notably in a case where such action totally prevented the accused from obtaining an attorney to defend him,[10] the Department of State appears to doubt whether "as a matter of international practice," a prisoner may not be held incommunicado for a reasonable time after arrest until questioned by the police or other investigating authorities.[11] The Department has said that while it is not the general practice in the United States to notify the consular representatives of a foreigner who is placed under arrest, such notification would promptly be made upon request therefor by the arrested person.[12]

---

America and South America, Aug. 25, 1898, it was declared: "It is one of the most important duties of consular agents as well as of consuls to use their good offices in behalf of American citizens and for the protection of their interests, and it is confidently believed that our citizens would be treated with injustice less frequently in foreign countries if it were known and felt in each community that the nearest consular representative of the United States took an interest in every American citizen in his district, no matter how humble, and would be sure, if occasion arose, to demand justice."

[4] Mr. Sherman, Secy. of State, to Mr. Sepulveda, May 5, 1897, For. Rel. 1897, 396, Moore, Dig., V, 106.

Also, Mr. Carr, Director of the Consular Service, to Consul General Shanklin, Oct. 7, 1910, Hackworth, Dig., IV, 826. See other instances, *id.*, 827–830.

[5] Mr. Hay, Secy. of State, to Mr. Tower, Ambassador to Germany, No. 42, April 1, 1903, For. Rel. 1903, 447, Moore, Dig., V, 107.

[6] According to Art. XXI, treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4200: "Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the government of the country."

See *supra*, §464A.

[7] See Mr. Hull, Secy. of State, to Minister Summerlin, April 14, 1934, Hackworth, Dig., IV, 830.

[8] See Mr. Fletcher, Under Secy. of State, to Minister Grew, Jan. 6, 1922, Hackworth, Dig., IV, 830.

[9] See Mr. Hughes, Secy. of State, to Minister Cook, Jan. 2, 1925, Hackworth, Dig., IV, 835.

[10] See Walter H. Faulkner Case, American-Mexican General Claims Commission, under convention of Sept. 8, 1923, Opinions of Commissioners, 1927 Vol., 86; Joseph A. Farrell Case, same Commission, 1931 Vol., 157.

[11] Memorandum from Mr. Hackworth, Legal Adviser, Dept. of State, April 23, 1932, Hackworth, Dig., IV, 836.

[12] See Mr. Hull, Secy. of State, to the Italian Ambassador, Oct. 24, 1936, Hackworth, Dig., IV, 837.

Foreign consuls in the United States have at times availed themselves of the right of interposition by appeals to the judiciary committees of State legislatures. Such action has been for the purpose of suggesting the enactment of laws facilitating the exercise of consular rights conferred by existing conventions, or of explaining the nature of proposals in contravention of treaty provisions, or of exposing the evils (also sought to be prevented by certain agreements of the United States) of particular discriminations against aliens and their dependents, both resident and non-resident. Such participation in local political affairs indicates,[13] however, no impropriety of conduct which the State of residence finds just cause to resent. It may be observed that legislative committees have on numerous occasions given heed to such consular suggestions which have at times been incorporated in laws subsequently enacted.[14]

## 6

## CERTAIN ACCESSORY PRIVILEGES

### a

§ 470. **Display of Arms and Flag.** The Foreign Service Regulations of the United States announce that the coat of arms of a consulate are to be placed over the entrance thereto "unless specifically prohibited by the laws of the country."[1] At combined offices (with seeming reference to a case where a diplomatic mission and a consulate are united or associated with each other in occupation of the same premises) only the coat of arms of the mission is to be displayed on the outside of the premises. If the consular section of the combined office is organized as a distinct unit occupying a suite of connecting rooms, it is declared that the consular coat of arms, may, in the discretion of the chief of mission, be displayed above the main entrance thereto from the waiting room or interior hallway.[2]

That "consular officers may place over the outer door of their respective offices the arms of their State with an appropriate inscription designating the official office" is a privilege accorded in numerous treaties.[3]

[13] In the course of the enactment of so-called workmen's compensation acts, consular interposition has been frequent in certain States of the United States, in order to emphasize the equities of non-resident alien dependents, and also to secure recognition of consular officers as legal representatives of such individuals.

A foreign consular officer on one occasion, however, exposed himself to criticism, when, after having been appointed administrator of the estate of an American citizen who had died domiciled within his consular district and on the petition of resident American heirs, he subsequently sought to make use of his alienage in order to confer jurisdiction upon a Federal court in a suit brought by him as administrator. Cerri *v.* Akron-People's Telephone Co., 219 Fed. 285, 294.

[14] See Representation of Non-Resident Heirs or Dependents, *infra*, § 481.

§ 470. [1] IV–14 (b), as of January, 1941.

[2] *Id.*, (c).

[3] See Art. XX, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4199.

See, also, Art. 18 of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement*, Jan. and April, 1932, 198.

See Irvin Stewart, Consular Privileges and Immunities, Chap. III.

In 1912, the Department of State declared that the display by a consul of the flag of his country was "a thing which may be properly claimed as a right under international law," and that in the exercise of it, the flag might be displayed at all times and not merely on certain holidays.[4] This view which was difficult to reconcile with previous utterances of the Department,[5] differed also from that which found expression in Consular Regulations to the effect that "permission to display the national flag is not a matter of right, though it is usually accorded, and is often provided for by treaty." [6] The Foreign Service Regulations of the United States, as of January, 1941, declare that the flag is to be flown between specified hours and on particular occasions, and that "when necessary, the flag may also be flown for purposes of protection." [7]

According to the treaty between the United States and Germany of December 8, 1923, consular officers may "hoist the flag of their country on their offices including those situated in the capitals of the two countries; they may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function." [8]

b

§ 471. **Ceremonial and Rank.** It is doubtless true that "consuls have no claim, under international law, to any formal ceremonial, and no right of precedence except among themselves, and in their relation to the military and naval officers of their own country." [1] Nevertheless, in certain States such as the United States, where a foreign consul is oftentimes the chief representative of his government within a wide territorial area, and is burdened with vast responsibilities in relation to a numerous population of his countrymen residing within his district, he becomes increasingly regarded as a high official entitled to special marks of courtesy.

As a matter of domestic policy the United States has found it wise to indicate a correspondence of rank between American consular and American naval or military officers; [2] and also to prescribe certain rules of conduct respecting official intercourse of officers of the former with those of the latter services. The Foreign Service Regulations of the United States, as of January, 1941, announce: "In the districts to which they are assigned, consuls general shall take place and precedence with but after Brigadier Generals in the Army or Marine

[4] Mr. Knox, Secy. of State, to the Mexican Ambassador at Washington, June 21, 1912, For. Rel. 1912, 903.

[5] See documents in Moore, Dig., V, 58, especially correspondence in For. Rel. 1874, 719 and 730. Also in this connection, Irvin Stewart, Consular Privileges and Immunities, 75–81.

[6] Consular Regulations of the United States, as of Jan. 11, 1932, section 73; also *id.*, section 70.

[7] IV–15. See also Note appended thereto.

See Art. 18 of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 198, and Comment, *id.,* 330.

[8] Art. XX, U. S. Treaty Vol. IV, 4199.

§ 471. [1] Consular Regulations of the United States of Jan. 11, 1932, section 76, where it was also declared that "this precedence, as to officers of the same grade in the consular body of the place, depends upon the date of the respective exequaturs. 1 Halleck, ch. 11, sec. 7."

[2] *Compare,* Mr. Hay, Secy. of State, to Gov. Allen (Porto Rico), May 23, 1900, 245 MS. Dom. Let. 230, Moore, Dig., V, 59.

Corps and intermediate between Rear Admirals and Captains in the Navy; consuls shall take place and precedence with but after Colonels in the Army or Marine Corps and Captains in the Navy; Foreign Service officers commissioned as vice consuls shall take place and precedence with but after Captains in the Army or Marine Corps and Lieutenants in the Navy." [3]

c

§ 472. **Exemption from Taxation.** The Foreign Service Regulations of the United States declare that unless exempted by treaty, American consular officers are subject to local taxes in the city and country in which they reside, and that "as a matter of courtesy and comity, they are often exempted from the payment of a personal tax." [1] It has been said, moreover, by the Department of State that in the absence of treaty, a foreign State is not under any legal obligation to exempt an American consular officer from the payment of a tax upon his income, even though derived from property situated within the territory of the United States.[2] Hence any exemption of such an officer from a tax upon his private income derived from property outside of the territory of the taxing State must be sought upon "grounds of international comity and reciprocal favor." [3] A State is not, however, in the absence of agreement, believed to possess the right to tax the official income or salary of a foreign consul, unless he is one of its own nationals.[4]

The right to tax the private immovable property of a foreign consul, as well as his private movable property or incorporeal property, which may be fairly said to belong, for purposes of taxation, within the taxing State, is not open to doubt.[5] By treaty broad exemptions are, however, habitually conceded.

According to the more recent conventions to which the United States is a party:

[3] IX–3, Note 1, (14). See also *id.*, Note 3, concerning the rank of consular officers in relation to the judges of the United States Court for China.

§ 472. [1] III–6, Note 2, as of January, 1940.

*Cf.* language of Sec. 426, Consular Regulations of the United States, as of Jan. 11, 1932.

[2] Memorandum of the law officer of the Department of State on the payment of income taxes by American consular officers in Great Britain, March 1, 1909, enclosed in instruction of Mr. Knox, Secy. of State, to Mr. Reid, Ambassador to Great Britain, April 21, 1909, For. Rel. 1909, 284.

*Compare* Art. 13, declaration of the Institute of International Law, respecting Consular Immunities, Sept. 26, 1896, *Annuaire*, XV, 306.

[3] Mr. Knox, Secy. of State, to Mr. Reid, Ambassador to Great Britain, April 21, 1909, For. Rel. 1909, 284. Indicating inability on the part of the British Government to exempt from taxation the private income of foreign consular officers derived from property abroad, see Mr. Reid, Ambassador to Great Britain, to Mr. Knox, Secy. of State, June 18, 1909, *id.*, 286.

See Town of Zurich *v.* Finance Dept. of Canton of Zurich, Upper Commission of Appeal in Taxation Questions of the Canton of Zurich, 1927, McNair and Lauterpacht, *Annual Dig.*, 1927–1928, Case No. 264, in relation to the taxation of an employee of an American Consulate in Switzerland.

[4] See Mr. Frelinghuysen, Secy. of State, to Mr. de Struve, Russian Minister, April 21, 1884, MS. Notes to Russia, VII, 449, Moore, Dig., V, 87; also Mr. Seward, Secy. of State, to Mr. Chase, Sept. 23, 1863, 62 MS. Dom. Let. 9, Moore, Dig., V, 87.

Also documents in Hackworth, Dig., IV, 776–780.

[5] See Mr. Hackworth, Legal Adviser, Dept. of State, to Mr. Frank H. Thompson, Nov. 24, 1931, Hackworth, Dig., IV, 783.

> Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territory of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services.[6]

The distinctive feature of the article quoted is the condition on which exemptions are granted, and the extent of those that are yielded, especially in relation to personal property of the consul within the domain of the State where he exercises his functions, when the condition has been met. By necessary implication an exemption is accorded in respect to property and income from property that may be outside of that domain.[7]

No requirement of international law would appear to deny to a State the right to impose and collect an inheritance tax on property located within, or belonging and found within, its domain, because of the ownership of such property by a foreign consul at the time of his decease.[8] Nor does that law impose upon a State a duty to exempt a foreign consular officer from the payment of a luxury or sales tax, such as one with respect to the purchase of an automobile.[9]

[6] Art. XIX, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4199.

*Cf.* Art. 24 of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 199, and Comment, *id.,* 346.

[7] Declared the Dept. of State in 1932: "It is customary under international practice to grant exemption from taxation to consular officers of other countries on grounds of international comity and reciprocal favor. This has been embodied in numerous conventions and treaties. . . . This Government also exempts all foreign consular officers and the employees of foreign consulates in the United States owing allegiance to a foreign government on a reciprocal basis from payment of federal income taxes on the salaries, fees, and wages received in compensation for consular services. Exemption to all other employees of foreign governments who are nationals of the state by which they are employed is granted in accordance with the policy of this Government to exempt from taxation the salaries of agents of foreign governments who render services in this country in connection with legitimate governmental activities undertaken by such governments. Foreign consular officers are exempt in the District of Columbia from the payment of personal property taxes on automobiles and other personal property, either tangible or intangible, owned by them, in addition to exemption from Federal income tax. . . . It is believed that taxation of persons in the categories mentioned by a state or a municipal government in the United States not only would be at variance with the practice now generally adopted in other countries but might subject American officers abroad to similar taxation by foreign countries." (Secy. Stimson, to the Governors of Certain States, May 23, 1932, Hackworth, Dig., IV, 774.)

See U. S. Treasury Dept. Regulations relating to Income Tax under the Internal Revenue Code of 1939, Sec. 19.116–1.

[8] See Mr. Carr, Director of the Consular Service, to Mr. W. P. Crawford, Jan. 6, 1919, Hackworth, Dig., IV, 787.

[9] See Mr. Grew, Under Secy. of State, to Mr. Schurman, Ambassador to Germany, Hackworth, Dig., IV, 788; Mr. Hackworth, Legal Adviser, Dept. of State, to Mr. J. Politzer, Dec. 27, 1933, Hackworth, Dig., IV, 789. See, however, conventional arrangement with Honduras, of Dec. 7, 1927, and in that connection, statement in Hackworth, Dig., IV, 789.

Through an Act of May 9, 1941, 55 Stat. 184, Hackworth, Dig., IV, 793, there was incorporated in the Internal Revenue Code as Section 3802 a provision exempting, under

It goes without saying that habitual readiness on the part of States, with or without the aid of treaties, to grant to consular officers reciprocal exemptions from taxation, must gradually produce a situation where an obligation not to pursue a different course becomes an acknowledged duty.

d

§ 473. **Customs Duties.** It may be greatly doubted whether foreign consular officers are, in the absence of treaty, entitled to the privilege of free entry for goods sent to them for their personal use, or for their personal effects even upon first arrival in the country to which they may be appointed.[1] As has been noted above, the customs courtesies accorded by the United States to foreign consular officers (as well as to diplomatic representatives) are said to rest upon a reciprocal basis.[2] In the yielding of them no sharp line is drawn between the two types of officers, except with respect to the matter of exemption from customs inspection (as distinct from that of freedom of entry) — a privilege seemingly not accorded, in the absence of treaty, to foreign consular officers.[3] Foreign consular officers (with their families, suites, and servants) are said to be entitled to free entry of their baggage and effects.[4]

In the absence of proof of like reciprocal concessions, the Department of State is unwilling to acknowledge that a foreign State by virtue of the most-favored-nation clause in a consular convention with the United States, is necessarily entitled to the benefit of specific customs exemptions yielded by the latter in behalf of consular officers in a treaty with a third State.[5]

In its more recent treaties the United States has agreed to permit the entry free of all duty and without examination of any kind, of all furniture, equipment and supplies intended for official use in the consular offices of the other contracting party, and to extend to its consular officers and to such of their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property, whether accompanying the officer to his post or imported at any other time during his encumbency thereof;

---

specified conditions and on a reciprocal basis, foreign consular officers and their employees from internal revenue taxes on imported articles.

"By an act approved on August 10, 1939, the United States Social Security Act was amended so as to except from the term 'employment,' within the meaning of the act, 'Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative).'" (Statement in Hackworth, Dig., IV, 801, *citing* 53 Stat. 1375.)

§ 473. [1] Mr. Bayard, Secy. of State, to Mr. Cox, Nov. 6, 1885, MS. Inst. Turkey, IV, 305, Moore, Dig., V, 90; also Mr. Moore, Assist. Secy. of State, to Mr. Cafiero, May 11, 1898, MS. Notes to For. Consuls, IV, 413, Moore, Dig., V, 91.

[2] See *supra*, § 441.

[3] Foreign Service Regulations of the United States, III–5, Note 1 (*a*) and (*b*), as of January, 1941.

[4] *Id.* See also Mr. Messersmith, Assist. Secy. of State, to Diplomatic Officers, Aug. 19, 1937, in relation to the Customs Regulations of the United States, Hackworth, Dig., IV, 803.

See arrangement between the United States and Norway concerning Customs Treatment of Importations for Consular Offices and Officers, effected by exchange of notes of Jan. 20, 1932, U. S. Executive Agreement Series, No. 32.

[5] The Department is understood to have taken such a stand in correspondence with Italy in 1926.

provided, nevertheless, that no article, the importation of which is prohibited by law, may be brought into its territories.[6]

e

§ 473A. **Exemption from Public Service.** The Foreign Service Regulations of the United States, as of January, 1941, announce that among the immunities "secured to consular officers in most countries either by public law or by treaty with the country to which the officer is assigned" are "exemption from service on juries, in the militia, and from other public duties," and also "inviolability of consular dwelling house and exemption from military billeting." [1] The more recent treaties to which the United States is a party provide that consular officers, nationals of the State by which they are appointed, "shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatever." [2] The reasonableness of such concessions must be obvious, and they may well be extended to exemptions from requisitions, contributions and forced loans.[3]

f

§ 473B. **Asylum in Consulates.** The matter of asylum in consulates is governed by the same principles that are applicable in situations where refuge is sought in embassies or legations.[1] In numerous cases, however, a consulate rather than an embassy or legation has been the place where protection has been sought and yielded. Accordingly there are materials indicating the views of the Department of State in such situations.[2] The relevant instructions accentuate the distinction between a so-called right of asylum which is not asserted by the Government of the United States, and the yielding of a temporary refuge within a consulate in order to preserve innocent human life.[3]

7

## AMENABILITY TO LOCAL PROCESS

a

§ 474. **Civil Process.** A foreign consular officer is not, according to the law of nations, exempt from the local jurisdiction. The territorial sovereign is not

[6] See, for example, Art. XXVII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4202; Art. XXVII, treaty with Finland, Feb. 13, 1934, *id.*, IV, 4149.

See Mr. Rogers, Assist. Secy. of State, to the Mexican Ambassador, July 19, 1932, Hackworth, Dig., IV, 804.

See Art. 25, Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 199.

§ 473A. [1] III–2, Note 1 (*b*) and (*d*).

[2] See, for example, Art. XVIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4199.

[3] They are embraced in Art. 23, Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 198.

§ 473B. [1] See Asylum in Embassies and Legations, *supra,* § 443.

[2] See documents in Hackworth, Dig., II, § 193.

[3] See Foreign Service Regulations of the United States, as of January, 1941, III–4, and Note 1. Also Mr. Knox, Secy. of State, to Mr. Young, Jan. 30, 1912, For. Rel. 1912, 399.

obliged to yield to him so great a privilege. The practice of States even as reflected in the more recent treaties manifests caution in checking that sovereign in that regard.[1] Such an officer is generally amenable to civil process.[2] Thus, the Department of State has declared that it seems to be generally recognized that in the absence of express treaty stipulations consuls are not entitled to immunity from civil process with respect to acts not performed by them in their official capacity.[3] The Department has also declared that "under generally accepted practice and principles of comity a consul may claim inviolability for the archives and official property of his office and their exemption from seizure or examination," [4] and that the American Government does not recognize the right of foreign courts to exercise control over monies of that Government in the possession of a consul, due as salary to a clerk of his consulate.[5]

Difficulties arise with respect to the service of process.[6] To subject a consular officer to the jurisdiction of a particular tribunal by personal service upon him within his consular offices or dwelling, appears to be incompatible with the common treaty provision declaring such places to be inviolable.[7] The Legal Adviser of the Department of State has declared that "even in a case where a foreign consular officer may properly be subjected to arrest or the service of process, the premises of the consulate should not be invaded for such purpose." [8] A con-

§ 474. [1] See, for example, Art. XVIII, treaty between the United States and Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4199.

According to Consular Regulations of the United States, of Jan. 11, 1932: "A consul, is, however, under public law, . . . subject generally to the civil and criminal jurisdiction of the country in which he resides." *Cf.* Foreign Service Regulations of the United States, III–2, Note 1, as of January, 1941.

"The Federal Council holds the point of view that, according to international law, foreign consuls and vice consuls have no right to claim extraterritoriality. In like manner Switzerland has not recognized such a right to any foreign State in any treaty. If, in spite of that, the Federal Council has employed certain discretion in the cases in question, it is purely for reasons of international courtesy and not at all in virtue of any legal obligation whatsoever." (Memorandum from the Swiss Political Department of Feb. 28, 1918, For. Rel. 1918, Supplement 1, Vol. II, 1805.)

[2] Opinion of Mr. Lee, Atty. Gen., Nov. 21, 1797, I Ops. Attys. Gen. 77, Stowell's Cases, 465, Moore, Dig., V, 72; Opinion of Mr. Wirt, Atty. Gen., Dec. 1, 1820, 1 Ops. Attys. Gen. 406, Stowell's Cases, 467, Moore, Dig., V, 73; Caldwell *v.* Barclay, 1 Dall. 305, Stowell's Cases, 86, Moore, Dig., V, 62.

See, also, Mr. Adee, Second Assist. Secy. of State, to Messrs. Hensel, Bruckmann & Lorbacher, Oct. 29, 1897, 222 MS. Dom. Let. 81, Moore, Dig., V. 64; Mr. F. W. Seward, Assist. Secy. of State, to the Fifth Auditor of the Treasury, March 23, 1861, 53 MS. Dom. Let. 507, Moore, Dig., V, 62; Case of American Vice-Consul at Dresden in 1910, For. Rel. 1910, 522–523.

See Arts. IV–VIII of declaration of the Institute of International Law respecting consular immunities, Sept. 26, 1896, *Annuaire,* XV, 305.

[3] See Mr. Adee, Second Assist. Secy. of State, to the Ambassador to France, April 12, 1923, Hackworth, Dig., IV, 272.

[4] See Dept. of State to the Czechoslovak Legation, May 17, 1926, Hackworth, Dig., IV, 729.

[5] See Dept. of State, to Consul Ray, June 7, 1913, Hackworth, Dig., IV, 729.

[6] See case of attempted service of a writ in a libel suit upon the Consul General of Italy at Denver in 1909; also opinion of Solicitor for the Department of State, concerning the matter, Jan. 27, 1910, enclosed in communication of Mr. Knox, Secy. of State, to Mr. Leishman, American Ambassador to Italy, Jan. 31, 1910, For. Rel. 1910, 674. Also same to the Italian Ambassador, Jan. 13, 1910, *id.,* 673.

[7] See Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, March 6, 1899, For. Rel. 1899, 302, Moore, Dig., V, 82.

[8] Mr. Hackworth, to the Sheriff of Los Angeles County, April 17, 1937, Hackworth, Dig., IV, 737. See, however, *supra,* § 467.

sul should not attempt to escape service by taking refuge in his consulate. Should he do so, however, the agreement to regard it as inviolable should not be disregarded. The territorial sovereign by threatening to withdraw his exequatur, or by complaint to his government, is never without the means of causing such an officer to place himself within the reach of the local courts.[9]

b

§ 475. **Criminal Process.** Because amenable to the local jurisdiction, a consular officer finds himself subject to arrest when charged with offenses which, according to the local law, are rendered criminal, and for the commission of which the offender is made punishable.[1] Consular Regulations of the United States have declared that if he does not engage in business and does not own real estate, it is probable that such an officer "would not be subject to arrest or incarceration, except on a criminal charge," and that "in the case of the commission of a crime he may either be punished by the local laws or sent back to his own country." [2]

The Foreign Service Regulations of the United States, as of January, 1941, declare that in most countries, either by reason of public law or by treaty, consular officers enjoy "exemption from arrest except for crimes under the local law." [3] There is, however, evidence of a tendency to make appropriate endeavor to shield a consular officer from local prosecution on account of the commission of minor offenses. Statements of conditions of immunity greatly vary, and oftentimes fail to lay down a clear and precise test of whether the officer is entitled to immunity.[4] According to the more recent treaties to which the United States is a party he is "exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment." [5] To an American judge the test so manifested should suffice to make clear a distinction with which he is likely

---

See, in this connection, *In re* Thomas C. Sargent, Supreme Court, Chile, 1923, Williams and Lauterpacht, *Annual Dig.*, 1923–1924, Case No. 180; Lonsdale Shop Inc. *v.* Bibily, 213 N. Y. Supp. 170.

[9] Note the argument of Mr. Marcy, Secy. of State, to Mr. Figanière, Portuguese Chargé d'Affaires, March 27, 1855, MS. Notes to Portugal, VI, 145, Moore, Dig., V, 80–81.

§475. [1] United States *v.* Ravara and Reporter's Note thereon, 2 Dall. 297, 299, Stowell's Cases, 415, 417, Moore, Dig., V, 65; Opinion of Mr. Cushing, Atty. Gen., 7 Ops. Attys. Gen. 367, 384, Stowell's Cases, 548, 552, Moore, Dig. V, 70.

See, also, Mr. Monroe, Secy. of State, to Mr. Harris, Chargé d'Affaires at St. Petersburg, Dec. 23, 1815, with respect to Kosloff's Case, MS. Inst. U. S. Ministers, VIII, 17, Moore, Dig., V, 66; Same to Same, July 31, 1816, MS. Inst. U. S. Ministers, VIII, 89, Moore, Dig., V, 67; Mr. Olney, Secy. of State, to Moustapha Bey, Turkish Minister, Feb. 19, 1897, For. Rel. 1897, 583, Moore, Dig., V, 72.

*Compare* Art. VII, of the declaration of the Institute of International Law respecting consular immunities, Sept. 26, 1896, *Annuaire*, XV, 305.

See documents in For. Rel. 1917, Supplement 1, 579–585, concerning the conviction of the German consuls Bopp and Schack for violations of American laws, and in relation to the revocation of their exequaturs as well as their internment as enemy aliens.

[2] Consular Regulations of Jan. 11, 1932, section 73.

[3] III–2, note 1.

[4] See documents in Hackworth, Dig., IV, 739–745, with respect to interpretations of Art. II of the consular convention with France of Feb. 23, 1853.

Art. 20 of Harvard Draft Convention on The Legal Position and Functions of Consuls yields an exemption from arrest "except for a serious offense." There may well be diversity of opinion whether a particular offense is "serious."

[5] See Art. XVIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4181, 4199.

to be familiar; and it should, moreover, serve to deter the arrest and confinement of a consular officer on merely a civil complaint, which is sought to be avoided.[6]

A State may not unreasonably through its statutory law forbid foreign consular officers to commit particular acts, and may essay to punish such officers in case they defy the prohibition. Thus, according to the Tariff Act of the United States of June 17, 1930, it is declared to be unlawful for any foreign consul to deliver to the master of any foreign vessel the register, or document in lieu thereof, deposited with him in accordance with the provisions of an earlier section of the Act, until the master produce to the consul a clearance in due form from the collector of the port where the vessel has been entered. Moreover, any consul offending against these provisions is made liable to the payment of a substantial fine.[7] This Act takes cognizance of the practice of numerous maritime States which demands, as a matter of municipal law, the deposit of ship's papers with the consul of the country to which the vessel belongs.[8]

c

§ 476. **The Giving of Testimony.** In respect to civil cases, the more recent treaties to which the United States is a party provide that "when the officer

[6] Croxall's Case, Moore, Dig., V, 68–70, *citing* Mr. Forsyth, Secy. of State, to Mr. Cass, Minister to France, No. 6, Dec. 6, 1836, and No. 19, April 13, 1838, MS. Inst. France, XIV, 220, 239.

[7] 19 U.S.C.A. § 1438.

[8] The statutory law of the United States requires every master of a vessel belonging to citizens of the United States, who shall sail from any port of the United States, on his arrival at a foreign port, to deposit his register with the consular officer, if there is one at such port. See 46 U.S.C.A. § 354; also, Consular Regulations of the United States, as of February, 1935, section 175.

*Jurisdiction of Courts in the United States.* Through Art. III, § 2 of the Constitution, the Supreme Court of the United States is given original jurisdiction in all cases affecting consuls. According to § 256 of the Federal Judicial Code, Act of March 3, 1911, Chap. 231, "the jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . . Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls." (36 Stat. 1160.) Respecting the legislation of the United States prior to the enactment of this law, see Moore, Dig., V, 72–78.

According to par. 18 of § 24, Chap. II, of the Judicial Code, the United States District Courts are given original jurisdiction "of all suits against consuls and vice-consuls." (36 Stat. 1093.)

In 1930, the Supreme Court of the United States, in the case of Popovici *v.* Agler, 280 U. S. 379, construed the Federal statutory law as not denying to the State courts jurisdiction over suits against consular officers for divorce and alimony. See R. G. Surridge, "Jurisdiction over Suits against Foreign Consuls in the United States," *University of Pennsylvania Law Review*, LXXX, 972. Declares that writer at p. 985: "The federal courts now have jurisdiction over all suits and proceedings against consuls and vice-consuls to the exclusion of the State courts only where the jurisdiction of the subject matter has been vested in the federal courts. This exception seems to include nothing other than cases involving the domestic relations of consuls and vice-consuls, but it may conceivably be found to include more."

See People *v.* Savitch, 116 N. Y. Misc. 531, where a former foreign consul was held amenable to the courts of New York on account of unofficial acts committed by him during the time when he was serving as consul.

See documents in For. Rel. 1915, 404–412, concerning the dismissal at the suggestion of the Department of State of criminal proceedings instituted in 1915, by the State of Washington in a State court against one W. Müller, German consul at Seattle.

"In the absence of any citation of any decision to the contrary, we are of the opinion that, the court having acquired jurisdiction over the defendant, such jurisdiction was not

is a national of the State which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience"; and it is added that "the officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties." [1]

Exemption from the obligation to appear as a witness except for the defense of persons charged with crime has in the past been conceded in some consular conventions of the United States.[2] In the more recent treaties to which it is a party provision is wisely made that "in criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defense"; that "the demand shall be made with all possible regard for the consular dignity and the duties of the office"; and that "there shall be compliance on the part of the consular officer." [3]

---

divested by the fact that, perhaps on the very day of trial of the action, the defendant was appointed to a vice consular office." (Earle *v.* De Besa, 293 Pac. 885, 886.)

See also documents in Hackworth, Dig., IV, § 436.

§ 476. [1] See, for example, Art. XVIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4199. This is closely followed in Art. 15 of Convention on Consular Agents, adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4738, 4740.

[2] See, for example, Art. IV, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2847.

See Art. VIII of Declaration of the Institute of International Law in respect to consular immunities, Sept. 26, 1896, *Annuaire,* XV, 305, J. B. Scott, Resolutions, 125.

*Criminal Cases.* According to Art. II of the consular convention with France, Feb. 25, 1853, it is provided that consular officers of the contracting States "shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes, or deposition, is to be received from them in the administration of justice, they shall be invited, in writing, to appear in court, and if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwellings." Malloy's Treaties, I, 529. Respecting the exemption of a French consul under this convention from the duty to testify as a witness for the defense in a criminal case, notwithstanding the Sixth Amendment to the Constitution of the United States, securing to persons accused of crime the right of compulsory process for obtaining witnesses in their favor, see *In re* Dillon, 7 Sawyer, 561, Moore, Dig., V, 78–81, and documents there cited; United States *v.* Trumbull, 48 Fed. 94. An agreement that even under the special circumstances specified in the convention with France, a foreign consul is exempt from the obligation to appear as a witness, might be at variance with the Sixth Amendment, if the latter were given a literal interpretation. If, however, as was held by Hoffman, J., in Dillon's Case, the Amendment was designed merely to place the accused in the same position in making his defense, as the Government occupied in endeavoring to establish his guilt, the bare removal of the consular officer beyond reach of the court's process, by virtue of a treaty, would do no violence to the Amendment.

See Mr. Polk, Acting Secy. of State, to Mr. Warren, Assist. Atty. General, Jan. 16, 1916, interpretative of the Sixth Amendment, Hackworth, Dig., IV, 760.

Art. IV of the consular convention with Sweden, June 1, 1910, provides that "in all criminal cases, contemplated by the Sixth Article of the amendments to the Constitution of the United States, whereby the right is secured to persons charged with crimes to obtain witnesses in their favor, the appearance in court of said consular officers, shall be demanded, with all possible regard to the consular dignity and to the duties of his office, and it shall be the duty of such officer to comply with said demand. A similar treatment shall also be extended to the consuls of the United States in Sweden, in the like cases." (U. S. Treaty Vol. III, 2847.)

[3] See, for example, Art. XVIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4199.

"There seems to be no compelling reason why the defense should be placed in a better position than the prosecution in the calling of witnesses. It is to be hoped that all later provisions on this subject will be drawn along the lines of the German treaty." (Irvin Stewart, Consular Privileges and Immunities, 144.)

See Art. 22 of Harvard Draft Convention on The Legal Position and Functions of Con-

The Department of State is of opinion that a convention providing for the inviolability of the consular archives is rendered nugatory if a consular officer may be compelled to disclose their contents by his testimony in a local forum.[4] According to Secretary Hay, such an officer cannot justly be required to divulge information coming to him in his official capacity, "for that is the exclusive property of his government"; [5] but that in relation to matters within his personal knowledge or observation in his mere capacity as an individual, he is not privileged from testifying as a witness.[6] In 1932 the Department of State declared that "while, in the absence of applicable treaty provisions, consular officers are not exempt from being called as witnesses by the Tribunals of the country in which they are stationed, or from giving testimony both in civil and criminal cases, they cannot be required to testify as to the contents of the consular archives nor as to information which has come to them in their official capacity." [7] The more recent treaties to which the United States is a party declare that "no consular officer shall be required to produce official archives in court or testify as to their contents." [8]

It should be observed, however, that the Department of State has on occasion, for the sake of the promotion of justice, indicated a willingness to permit a consular officer to produce documents contained in the consular archives for use in judicial proceedings.[9]

---

suls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 198, and Comment, *id.,* 341; also Art. 15 of Convention on Consular Agents, adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4738, 4740.

[4] Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, March 6, 1899, respecting Guenther's Case, For. Rel. 1899, 302, Moore, Dig., V, 82.

Also Case of the American consular officer at Solingen, in 1905, For. Rel. 1905, 458–461.

[5] Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, April 17, 1899, For. Rel. 1899, 566, Moore, Dig., V, 84–85; also Mr. Rockhill, Third Assistant Secy. of State, to Mr. Mason, U. S. consul, July 31, 1894, For. Rel. 1899, 304, Moore, Dig., V, 83; Mr. Blaine, Secy. of State, to Mr. Phelps, No. 178, Dec. 17, 1890, and No. 196, Jan. 29, 1891, MS. Inst. Germany, XVIII, 389, 403, Moore, Dig., V, 83.

[6] Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, April 17, 1899, For. Rel. 1899, 566–568, Moore, Dig., V, 84. In the same Instruction it is declared that a consul is not to refuse to testify because the facts to which he is required to testify might be of a political character, or simply because his testimony might have a tendency to implicate American citizens or others in the commission of unlawful acts. See, also, in this connection, Mr. Merry, Minister to Nicaragua, to Mr. Hay, Secy. of State, May 9, 1899, For. Rel. 1899, 583, Moore, Dig., V, 85.

[7] Mr. Carr, Assist. Secy. of State, to Mr. Heisler, April 7, 1932, Hackworth, Dig., IV, 753; the Acting Secy. of State to Consul General Halstead, Feb. 27, 1930, Hackworth, Dig., IV, 764; Mr. Hull, Secy. of State, to Ambassador Bingham, Oct. 30, 1935, Hackworth, Dig., IV, 767.

[8] Art. XX, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4199.

According to Art. 22 of Harvard Draft Convention on The Legal Position and Functions of Consuls: "A receiving State . . . shall not require a consul to disclose information received in the performance of consular functions if such disclosure would be incompatible with the national interests of the sending State." (*Am. J., Supplement,* Jan. and April, 1932, 198.)

[9] See instances in Hackworth, Dig., IV, 768–770.

## 8

## PRIVILEGES IN RELATION TO DECEASED COUNTRYMEN

### a

§ 477. **In General.** Upon the death of a countryman within the consular district, a consular officer is accorded by international law, and even more broadly by treaty, extensive privileges. These concern notification of the consul by local authorities of the fact of death; the taking charge of or placing the consular seal upon the assets of the decedent pending the appointment of an administrator; the administration of the estate of the decedent; and the distribution to foreign heirs in the State to which the consul belongs, either of property of the estate, or of pecuniary benefits due them by reason of their connection with or dependence upon the decedent.

The foregoing privileges are of great importance to foreign consuls in the United States, and particularly to those within whose consular districts reside large numbers of their fellow-countrymen, engaged in industrial occupations in the course of which death is frequently encountered. Such persons oftentimes leave surviving heirs or dependents residing in the country to which they owe allegiance. The proper protection of the interests of the non-resident heirs or dependents renders it expedient, and at times imperative, that a consular representative should automatically, and by virtue of the law, act in their behalf.[1]

### b

§ 478. **Notification of the Deaths of Fellow-Countrymen.** Numerous conventions of the United States have provided that in case of the death of a citizen of either contracting party within territory belonging to the other, who has no known or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consular representative of the State of the deceased, that information may be at once transmitted to the parties interested.[1] In the absence of local laws imposing a duty upon specified officials

§ 477. [1] The helplessness of non-resident dependents has oftentimes been utilized by local agencies which, when fortified by powers of attorney, have served their principals without zeal or scruple, and with vigorous opposition to the endeavors of the consular representative of the decedent to obtain justice in behalf of those who suffered pecuniary loss through his demise.

See, generally, in this connection, Art. 11 (e), Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 196, and Comment, *id.,* 272. Also Act of July 12, 1940, 54 Stat. 758.

§ 478. [1] See, for example, Art. XVI, consular convention with Austria-Hungary, July 11, 1870, Malloy's Treaties, I, 44; Art. X, consular convention with Germany, Dec. 11, 1871, *id.,* I, 553; Art. XVI, consular convention with Italy, May 8, 1878, *id.* I, 982; Art. XV, consular convention with Belgium, March 9, 1880, *id.,* I, 99; Art. XXVI, treaty with Spain, July 3, 1902, *id.,* II, 1709; Art. XIV, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2851.

In the more recent treaties to which the United States is a party, as in Art. XXIV of that with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4201, the obligation to notify the consul is dependent upon his countryman's dying "without having in the territory of his decease any known heirs or testamentary executors."

to make the requisite notification, foreign consuls in the United States oftentimes fail to learn of the deaths of their intestate fellow-countrymen residing within the same consular district. Upon complaint made through the diplomatic channel, the Department of State has on more than one occasion formally communicated with the governors of the several States (excepting those of States whose statutory law made appropriate provision), requesting that the terms of the particular treaty invoked be brought to the attention of the "competent local authorities," in order that the stipulation with respect to consular notification be complied with.[2] The failure of certain States generally to deal with the matter by appropriate legislation has at times served to leave the international obligation unfulfilled,[3] and to suggest the importance if not the necessity of a Federal law making uniform and adequate provision responsive to the formal undertaking of the United States.

According to instructions long in force,[4] the Department of State has made it the duty of a consular officer to take all steps practicable to procure information relative to the death of any American citizen within his consular district.[5]

"The duty of reporting deaths of American citizens, as well as that of looking after the estates of the deceased, is regarded as most important, and the Department enjoins especial care and promptness in all matters connected therewith." [6]

c

§ 479. **Temporary Possession of the Assets of an Estate.** Official opinion in the United States has lacked uniformity with respect to the right of a consul, in the absence of treaty, to take even temporary possession of the assets of the estate of a deceased and intestate countryman. It was announced by Secretary Clay in 1827, that such an officer might, according to the prevailing practice, put his official seal upon the effects of the deceased until the local law operated upon them by the grant of administration, or if no administration were granted, for the purpose of transmission to the kindred of the deceased.[1] Much the same idea had been expressed by Secretary Pickering in 1799.[2] Secretary Marcy, in 1855, went so far as to declare that American consuls were "authorized and required to act as administrators on the estates of all citizens of the United States

[2] See, for example, Mr. Adee, Acting Secy. of State, June 27, 1907, to the Governors of the States, For. Rel. 1907, I, 53.

[3] See, however, § 12151, Vol. 5, Michigan Annotated Statutes, imposing upon judges of probate, in connection with the application for letters of administration, the duty to notify the appropriate consular officer; also § 7231, Minnesota Gen. Stat. 1913. According to § 20A, Act of April 21, 1915, amending Chap. 467, Minnesota General Laws of 1913, provision is made in the Workmen's Compensation Act, that in case a decedent be a native of a foreign country leaving no known dependents within the United States, "it shall be the duty of the department of labor to give written notice of said death to the consul or other representative of said foreign country forthwith."

[4] See Circular Instructions to American Consular Officers, July 25, 1914.

[5] Foreign Service Regulations of the United States, XIII–7, Note 1, as of June, 1939.

[6] Consular Regulations of the United States, Note 1, as of February, 1935, appended to section 386.

§ 479. [1] Communication to Mr. Vaughan, British Minister, Nov. 12, 1827, MS. Notes to For. Legs., III, 400, Moore, Dig., V, 117.

[2] Communication to Mr. Smith, May 13, 1799, 11 MS. Dom. Let. 324, Moore, Dig., V, 117.

dying intestate in foreign countries and leaving no legal representative or partner in trade." [3]

The Supreme Court of the United States in 1912 announced it to be "the universally recognized right of a consul to temporarily possess the estate of a citizen of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration." [4]

Consular Regulations of the United States of 1896, announced that by the law of nations as well as by statute a consular officer was the "provisional conservator of the property within his district belonging to his countrymen deceased therein." [5] In 1903, Secretary Hay, having in mind the views of Attorney General Cushing expressed in 1855 and 1856, respecting the statutory law, said that the power and duty to guard, collect and transmit the assets of an estate were not exclusive; and that if those powers were not conferred by treaties or by the local law or usage, it became the consul's "alternative duty to aid others upon whom those functions devolve under local law." [6] American consular officers have been instructed to exercise greatest care not to exceed powers granted by treaty or "by local statute." [7] The existing statutory law, as revealed in an Act of Congress of July 12, 1940, pays utmost deference to the requirements of the local law as well as for established usage.[8]

[3] Communication to Mr. Aspinwall, Aug. 21, 1855, 44 MS. Dom. Let. 270, Moore, Dig., V, 118. The Secretary's statement should, however, as was suggested by the Supreme Court of the United States, in Rocca *v.* Thompson, 223 U. S. 317, 327, be read in the light of the existing statutory law of the United States (§ 1709, Rev. Stat.), which did not contemplate the assertion of a right of consular administration which the local law did not permit.

[4] Rocca *v.* Thompson, 223 U. S. 317, 331. Similarly it was declared by the Court of Appeals of New York in 1914, that "the function of consuls is to preserve derelict estates. When their countrymen die in foreign lands it is their duty to step in and guard the stranded property from waste. This right belongs to them, irrespective of express statute or treaty, by virtue of their office." Matter of D'Adamo, 212 N. Y. 214, 223.

Mr. Cushing, Atty. Gen., in the course of an opinion, Sept. 12, 1856, declared that "Sundry legislative acts of the United States, proceed on the assumption that American consuls, in foreign countries, will collect and remit the assets of deceased Americans. Their authority to do this will depend, of course, on the law of the foreign country. If permitted by that law, and so far as permitted, the consul may do it, but not otherwise, nor further, unless allowed by treaty. And so it is with respect to foreign consuls in the States of the Union." (8 Ops. Attys. Gen. 98, 100, Stowell's Cases, 568, 570.) See, also, Opinion of Mr. Cushing, Atty. Gen., June 2, 1855, 7 Ops. Attys. Gen. 242, 274, Stowell's Cases, 511, 538.

[5] Section 409, wherein it was also declared that "He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting and transmitting them, to be disposed of pursuant to the law of the decedent's state — 7 Ops. Attys. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory." This language was retained in the Consular Regulations of Jan. 11, 1932. See also Foreign Service Regulations of the United States, XIII–10 (a), as of June, 1939.

[6] Communication to Mr. White, Chargé at London, No. 1109, Jan. 15, 1903. For. Rel. 1903, 487, Moore, Dig., V, 123.

[7] Mr. Adee, Acting Secy. of State, to Mr. Sands, Minister to Guatemala, No. 6, Oct. 12, 1909, For. Rel. 1909, 346, 347.

[8] It is there declared to be the duty of a consular officer, or, if no consular officer is present, a diplomatic officer, under such procedural regulations as the Secretary of State may prescribe — "First. To take possession and to dispose of the personal estate left by any citizen of the United States, except a seaman who is a member of the crew of an

It may be observed that numerous treaties of the United States provide, in varying form, that in case of the death of a national of either party without will or testament in the territory of the other, the consular officer of the State of which the deceased was a national and within whose district the deceased had made his home at the time of death "shall, so far as the laws of the country permit and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of the same." [9]

d

§ 480. **Administration of Estates.** It is not believed that in the absence of agreement a consular officer is possessed of an exclusive right to administer the estate of a deceased intestate countryman. The statutory law of the United States does not contemplate that an American consular officer shall exercise the functions of an administrator unless authorized by treaty or by the local law, "or usage," to do so.[1]

In the United States the right to administer property left by a foreigner within the territory of any State of the Union is "primarily committed to State law." [2] Various treaties of the United States, the interpretation of which has become the subject of frequent adjudication in American courts, have purported to confer upon consular officers certain privileges of administration.

---

American vessel, who shall die within or is domiciled at time of death within his jurisdiction: *Provided,* That such procedure is authorized by treaty provisions or permitted by the laws or regulations of the country wherein the death occurs, or the decedent is domiciled, or that such privilege is accorded by established usage: *Provided further,* That the decedent shall leave in the country where the death occurred or where he was domiciled, no legal representative, partner in trade, or trustee by him appointed to take care of his personal estate." (54 Stat. 758.)

[9] Art. XXIV, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4201. *Cf.* Art. XIV, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2851; Art. X, treaty of friendship with Paraguay, Feb. 4, 1859, Malloy's Treaties, II, 1367. See, also, the provisions of par. 10, Art. III, consular convention with Colombia, May 4, 1850, Malloy's Treaties, I, 316; Art. VIII, treaty of friendship with Costa Rica (followed in later treaties with Honduras and Nicaragua), July 10, 1851, *id.,* I, 344; Art. XXVII, treaty of friendship with Spain, July 3, 1902, *id.,* II, 1709. *Compare* the provisions of Art. VI, treaty of friendship with Persia, Dec. 13, 1856, *id.,* II, 1373, and, in this connection, Santovincenzo *v.* Egan, 284 U. S. 30.

See, Julius Puente, "Consular Protection of the Estates of Deceased Nationals," *Illinois Law Review,* XXIII, 635.

§ 480. [1] According to an Act of July 12, 1940, 54 Stat. 758: "A consular officer or, in his absence, a diplomatic officer shall act as the provisional conservator of the personal property within his jurisdiction of a deceased citizen of the United States but, unless authorized by treaty provisions, local law, or usage, he shall not act as administrator of such personal property. He shall render assistance in guarding, collecting, and transmitting the property to the United States to be disposed of according to the law of the decedent's domicile."

According to the Foreign Service Regulations of the United States, as of June, 1939: "A consular officer shall not accept an appointment to office from any foreign state as administrator, guardian, or in any other fiduciary capacity, for the settlement or conservation of the estates of deceased persons, or of their heirs, or of other persons under legal disabilities, without having previously secured the permission of the Secretary of State so to do." (XIII–9, Note 2.)

See Mr. Moore, Counsellor of Dept. of State, to Chargé Engert, Oct. 20, 1937, Hackworth, Dig., IV, 861.

[2] Rocca *v.* Thompson, 223 U. S. 317, 329. See, also, Pagano *v.* Cerri, 93 Ohio S. 345, 112 N. E. 1037.

According to Art. IX of the treaty with the Argentine Republic of July 27, 1853, a consular officer was given "the right to intervene in the possession, administration and judicial liquidation of the estate [of a deceased intestate countryman] conformably with the laws of the country, for the benefit of the creditors and legal heirs." [3] In 1912, the Supreme Court of the United States declared that the treaty did not take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and did not commit the same to consular officers of that country, to the exclusion of persons entitled to administer by the local laws of the State in which the foreign decedent died and left property.[4] It was not intimated that the President with the approval of the Senate lacked the constitutional power to conclude, in behalf of the United States, a treaty conferring upon a foreign consul an exclusive right to administer.[5] The sole question was whether such a right had in fact been conferred by the terms of the particular convention; and that was decided negatively.

According to Article X of the treaty of friendship with Paraguay of February 4, 1859, a consular officer, in the event of the death of an intestate countryman, "shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, until an executor or administrator be named by the said Consul General, Consul or Vice Consul, or his representative." [6] In 1914, the Court of Appeals of New York expressed the opinion that the words "so far as the laws of each country will permit" must be deemed to qualify the right of a consular officer to name an executor or administrator, as well as his right of temporary custody.[7]

By Article XXXIX of the treay of friendship with Peru, of July 26, 1851, it was agreed that pending the conclusion of a consular convention, in the absence of legal heirs or representatives, "the Consuls or Vice Consuls of either party shall be *ex officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district." [8] The same language was employed in Article XXXVI of the treaty with Peru of

[3] Malloy's Treaties, I, 23.

[4] Rocca *v.* Thompson, 223 U. S. 317, *affirming* In the Matter of the Estate of Ghio, 157 Cal. 552. *Compare In re* Wyman, 191 Mass. 276, Stowell's Cases, 460; *In re* Lobrasciano's Estate, 77 N. Y. Supp. 1040, Stowell's Cases, 235; Carpigiani *v.* Hall, 172 Ala. 287. See, also, "Rights of Consular Officers to Letters of Administration under Treaties with Foreign Nations," by Frederic R. Coudert, *Col. Law Rev.*, XIII, 181; Ernest Ludwig, Consular Treaty Rights, 108–115; For. Rel. 1908, 6–9, respecting consular jurisdiction under Art. IX of the treaty of July 27, 1853, over estates of American citizens dying in the Argentine Republic.

[5] "We cannot feel that the Court had any real doubt as to the constitutionality of a treaty granting to Consuls the right to administer upon the estates of their deceased nationals for the benefit of foreign heirs." Frederic R. Coudert, in *Col. Law Rev.*, XIII, 181, 185. See, also, Santovincenzo *v.* Egan, 284 U. S. 30, 40.

[6] Malloy's Treaties, II, 1367.

[7] Matter of D'Adamo, 212 N. Y. 214, 230–231, where the court practically overruled the conflicting opinion of the Surrogate of New York County in *In re* Baglieri's Estate, 137 N. Y. Supp. 175. The Court of Appeals adverted to the fact that the Paraguayan treaty was before the Supreme Court of the United States when it decided Rocca *v.* Thompson, and "though not mentioned in the opinion, must have been held unavailing to establish an exclusive right in favor of the Italian consul."

[8] Malloy's Treaties, II, 1400.

September 6, 1870,[9] and in Article XXXIII of the treaty with the same State of August 31, 1887.[10] All of these treaties have long since been terminated.[11] It may be observed, however, that a mixed commission under the claims convention with Peru, of January 12, 1863,[12] made an award against the United States by reason of the detention of the goods of a deceased Peruvian citizen from the Peruvian consul in New York in violation of the treaty of July 26, 1851.[13]

According to Article VI of the treaty of friendship with Persia, of December 13, 1856, it was provided that in case of the death of a citizen or subject of either of the contracting parties within the territories of the other, the "effects" should be delivered up to the family or business partners of the decedent, and in the absence thereof, "to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country."[14] In the Consular Regulations of the United States of 1896, it was stated that American consuls in Persia "may administer upon the property of their deceased countrymen."[15]

In a treaty with Salvador of December 6, 1870, which was abrogated on notice given by that country May 30, 1893, broadest privileges were conferred upon consular officers enabling them to perform the functions common to an administrator.[16] Neither the Persian nor Salvadorean treaty appeared to make the enjoyment of the right conferred upon a consul dependent upon the sanction of the local law.

According to Article XIV of the consular convention with Sweden of June 1, 1910, the consular officer or his representative "shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate."[17] The Supreme

[9] *Id.*, II, 1425.

[10] *Id.*, II, 1441. Mr. Justice Day, in Rocca *v.* Thompson, 223 U. S. 317, 332, adverted to Art. XXXIII of the treaty with Peru of Aug. 31, 1887, as an instance where it had been the purpose of the United States to commit the administration of estates of citizens of one country, dying in another, exclusively to a consular officer.

[11] Malloy's Treaties, II, 1388, note *a*, 1414, note *a*, and 1431, note *a*.

[12] *Id.*, II, 1408.

[13] Moore, Arbitrations, IV, 4390–4392. See, in this connection, the interesting provisions of Art. IX of agreement (*accord*) concluded by Bolivia, Ecuador, Peru and Venezuela, July 18, 1911, in relation to the exercise of consular rights in the territories of the contracting parties. Brit. and For. State Pap., CVII, Part 1, p. 603.

See certain Articles of the Brazilian decree No. 855, of Nov. 8, 1851, Brit. and For. State Pap., XCII, 424; also exchange of notes between the Governments of Brazil and Germany, 1897–1898, with respect to the application of the provisions of the decree, *id.*, 422–424.

[14] Malloy's Treaties, II, 1373. Concerning the application of this treaty, which is no longer in force, see Santovincenzo *v.* Egan, 284 U. S. 30, 36, 37.

[15] Section 91, Moore, Dig., V, 117.

[16] Par. 10, Art. XXXIII, Malloy's Treaties, II, 1563.

[17] U. S. Treaty Vol. III, 2851. See *In re* Holmberg's Estate, 193 Fed. 260, where it was held that this Article brought a consular officer of Sweden within the tenor of Rev. Stat. § 4544, providing that when a seaman died intestate, and his assets did not exceed $300, they should be paid into a specified court, and by it delivered to any persons proving themselves entitled to take out letters of administration, even though no letters were taken out. This convention was to remain in force ten years from the date of the exchange of ratifications

Court of Minnesota in 1912,[18] and the Court of Appeals of New York in 1914,[19] were of opinion that the clause — "so far as the laws of each country will permit" — served to qualify the entire sentence in which they were contained, and to render, therefore, a foreign consul merely a person eligible to act as administrator when no one having a prior right under the local law was competent or able to act.

It may be observed that the courts of last resort in Minnesota, New York and Ohio have appeared to share the reluctance of the Supreme Court of California to impute to the Federal Government the intention "by means of its treaty-making power, to materially abridge the autonomy of the several States and to interfere with and direct the State tribunals in proceedings affecting private property within their jurisdiction." [20] Inasmuch as it has been conceded by these tribunals that it lies within the power of the United States to confer an exclusive right to administer the estate of a deceased intestate countryman upon a foreign consular officer, and in view of the fact that such a right has on three distinct occasions been accorded Peruvian consuls, it may be doubted whether the true significance of the terms employed in conventions is to be derived from the effect produced upon the institutions of a particular State of the United States by the grant of the right asserted.[21] In view, however, of the mode and nature of the reference to the local laws, the decisions respecting the Swedish and Paraguayan conventions may be regarded as the natural and reasonable consequence of the phraseology of the texts. Although the consular right thereby conferred must, in the light of judicial opinion, be regarded as subordinate to that conferred by local statutes upon specially designated individuals, it is suggested that a consular officer who is entitled to invoke the benefits of these conventions may justly claim the right of appointment whenever the appointing judge is given discretionary power, or whenever no opposing applicant relies upon a superior statutory right.[22]

---

which took place March 18, 1911, and thereafter from year to year, unless within a specified time, either party should give notice of its intention not to renew it.

[18] Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122.

[19] Matter of D'Adamo, 212 N. Y. 214. Such was also the view of the Supreme Court of California in 1915, in *In re* Servas' Estate, 146 Pac. 651.

[20] Matter of the Estate of Ghio, 157 Cal. 552, 557; Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122, 140; Matter of D'Adamo, 212 N. Y. 214, 227–228; Pagano *v.* Cerri, 93 Ohio S. 345, 112 N. E. 1037. See, also, *In re* Servas' Estate, 146 Pac. 651; Chryssikos *v.* Demarco, 134 Md. 533.

[21] The problem here, as in every case involving the interpretation of a treaty, is to ascertain the sense in which particular terms were employed by the contracting parties. Light thereon may come from many sources, such as from declarations of the negotiators, or from local constitutions. It is, however, an indirect ray that passes through the constitutionally subordinated agencies of a single nation, or through *ex parte* and unrelated views of national policy emanating from its foreign office. See The Interpretation of Treaties, So-called Rules of Construction, *infra*, § 535.

Respecting divergent views of policy expressed by the Department of State, see Moore, Dig., V, 118–124, and documents there cited; also Mr. Root, Secy. of State, to Mr. Brun, Danish Minister, No. 678, May 2, 1907, For. Rel. 1907, I, 304.

[22] Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122; *In re* Bagnola's Estate, 154 N. W. 461, where the Supreme Court of Iowa declared in 1915: "It is thoroughly well settled that under our treaty obligations the Consul [of Italy] has the initial right to administer upon the property of the subjects of his country"; *In re* Infelise's Estate, 149 Pac. 365 (Montana).

In the more recent conventions concluded by the United States since World War I, and exemplified in the treaty with Germany of December 8, 1923, the consular officer "shall have the right to be appointed as administrator within the discretion of a tribunal or other agency controlling the administration of estates provided the laws of the place where the estate is administered so permit." [23]

e

§ 481. **Representation of Non-Resident Heirs or Dependents.** As early as 1821, the Supreme Court of the United States announced that a foreign consul was a competent party to assert or defend the rights of property of his countrymen in any courts of the nation having jurisdiction of causes affected by the application of international law.[1] It is believed that no special authorization, by treaty or otherwise, is essential in order to warrant the intervention by such an officer in cases affecting his non-resident countrymen whensoever he has reason to conclude that their interests require the consular protection.[2] Judicial opinions differ, however, with respect to the scope of the interventional privilege when the consul lacks such special authorization.[3]

The United States has concluded certain conventions which, in varying form,

See, also, *dissenting* opinion of Donahoe, J., in Pagano *v.* Cerri, 112 N. E. 1037, 1041, in relation to the requirements of the Ohio statutory law.

[23] Art. XXIV, U. S. Treaty Vol. IV, 4201. In the negotiation of this treaty, the Department of State had no doubt about the power of the United States, in a constitutional sense, to agree to confer upon a foreign consular officer an exclusive and superior right to administer estates of deceased intestate countrymen. For reasons of policy, however, it was believed to be important to cause any consular privilege of administration to be subordinate to the provisions of local statutory law.

§ 481. [1] The Bello Corrunes, 6 Wheat. 152. It was also there said, pp. 168, 169, that "Whether the powers of the vice-consul shall in any instance extend to the right to receive, in his national character, the proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed." See, also, The Anne, 3 Wheat. 435, 445–446.

See Art. 11 (*f*) of the Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 196, and Comment, *id.,* 277.

[2] Thus a consul, without special authorization, might, it is believed, as the legal representative of his non-resident countrymen, start suit, in their behalf, should occasion so require.

In Nicola Marsicana *v.* Felice Ambrose *et al.,* Gen. No. 313,768, Superior Court of Cook County, Illinois, Judge Sullivan held, on June 1, 1915, on petition of the Royal Italian Vice-Consul, that under existing treaty provisions with Italy, that officer had the right to enter his appearance as legal representative of Felice Ambrose, an Italian subject residing in Italy (who had been made a party defendant to a bill in chancery and had been defaulted), and in his own name as consular representative take whatever steps might be deemed necessary to protect the latter's interests.

[3] See Hunko *v.* Buffalo Crushed Stone Co., 196 N. Y. Supp. 569; Vujic *v.* Youngstown Sheet and Tube Co., 220 Fed. 390. *Cf. In re* Herrman's Estate, 159 Minn. 274, 277, where the court declared: "We have been cited to no case, and we have found none, holding that a consul, simply by virtue of his office, has power to act for and represent individual claimants to property, so as to foreclose their claims thereto, without special authority from them to do so. Unless specifically authorized to represent claimants by statute, treaty or the claimants themselves, he is not the personal agent of the individual claimants, and service of process or other papers upon him does not operate as service upon them." See, also, *In re* Hansen's Estate, 281 N. Y. Supp. 617.

Concerning the statutory authority conferred upon American consular officers, see Act of July 12, 1940, 54 Stat. 758. See also Foreign Service Regulations of the United States, XIII–9–II, as of June, 1939.

recognize a consular officer as the legal representative of his non-resident countrymen, and which serve to enable him to act in their behalf as completely as if he held their mandate.[4] According to Article VIII of the consular convention with Germany of December 11, 1871, he was, for certain purposes, presumed to be their legal representative.[5] By virtue of Article XV of the consular convention with Belgium of March 9, 1880, he was accorded the right to appear personally or by delegate on behalf of the absent or minor heirs or creditors, until they were duly represented,[6] while Article VI of the treaty of friendship with Persia of December 13, 1856, expressly declared that the effects of the deceased ("in case he has no relations or partners") should "be delivered up" to the consul or agent of the nation of which the deceased was a subject or citizen.[7] Provisions of certain treaties of commerce, such as were contained in Article XXII of that with Italy of February 26, 1871, permitted citizens of each contracting party to succeed to personal property by will or otherwise within the territory of the other, and to take possession thereof, "either by themselves, or others acting for them."[8]

According to certain recent treaties such as that with Norway, of June 5, 1928,[9] and that with Poland, of June 15, 1931,[10] a consular officer is given "the right to appear personally or by delegate in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities for all such heirs or legatees in said estate, either minors or adults, as may be non-residents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them unless such heirs or legatees themselves have appeared either in person or by duly authorized representative." These and other recent treaties to which the United States is a party provide, moreover, that a consular officer of either party may, in behalf of his non-resident countrymen, receipt for their distributive shares derived from estates in process of probate, or accruing under the provisions of so-called Workmen's Compensation Laws or other like statutes, provided he remit any funds so received through the appropriate agencies of his government to the proper distributees, and provided further, that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.[11]

[4] "In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present or represented." (Miller, J., in Succession of Rabasse, 17 So. 867, 47 La. Ann. 1454.)

[5] Malloy's Treaties, I, 552.

[6] Malloy's Treaties, I, 99.

[7] *Id.* II, 1373. See Santovincenzo *v.* Egan, 284 U. S. 30.

[8] Malloy's Treaties, I, 976.

[9] Art. XXIV, U. S. Treaty Vol. IV, 4537.

[10] Art. XXIV, U. S. Treaty Vol. IV, 4583.

In the case of Paperno *v.* Engineering Co., 202 Mich. 257, it was held that a Russian consul "perforce of both his duty to conserve the estate of a deceased subject of his government, and as representative of the next of kin who were also subjects of his government, had the right to institute proceedings for the appointment of an administrator."

[11] See, for example, Art. XXV, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4201.

The significant feature of the development of the conventional arrangements to which the United States is a party in relation to consular representation of non-resident countrymen is the acknowledgment of the officer as normally possessed of largest powers which local authorities are obliged to respect and of which any curtailment must be attributable to the acts of those countrymen themselves. This acknowledgment stands out sharply in contrast to the conventional policy in relation to the administration of estates where, notwithstanding the terms of former treaties that seemingly conferred upon a consular officer privileges of administration that overshadowed the rights of locally established agencies, the privilege of administration is now definitely subordinated to the precepts of the local statutory law.

f

§ 482. **The Most-Favored-Nation Clause.** The consular conventions to which the United States is a party commonly provide in substance that the consular officers of the contracting parties shall enjoy reciprocally, all the privileges, exemptions and immunities that are enjoyed by officers of the same rank and quality of the most-favored nation.[1] Aspects of the interpretation of such provisions are dealt with in another place.[2] It here suffices to note that in 1930, the Department of State declared that "this Department has consistently held that the most-favored-nation clause with respect to rights and privileges of consular officers does not embrace unconditionally specific rights and privileges which are granted on the basis of reciprocity to consular officers of third countries, but

---

The benefit of this article was denied the Danish Consul in San Francisco, who had invoked it under the most-favored-nation clause in Art. VIII of the treaty between the United States and Denmark, of April 26, 1826, in the case of *In re* Clausen's Estate, 202 Calif. 267.

The exercise of the consular right variously accorded from time to time by treaty has received repeated recognition by local American governmental agencies in the making of distribution of funds to non-resident alien heirs or legatees.

See, for example, *In re* Tartaglio, 33 N. Y. Supp. 1121, 1123, Stowell's Cases, 360, 361; *In re* Rosario Carioto, Probate Court of Cook County, Illinois, *Chicago Legal News*, October 1, 1910, Vol. 42, page 57; *In re* Paola La Torre, Probate Court of Wayne County, Michigan, May 31, 1911, Ludwig's Consular Treaty Rights, 62; *In re* Giuseppe Cernyar's Estate, Orphans' Court of Westmoreland County, Pa., No. 58, May Term, 1911, Ludwig's Consular Treaty Rights, 63; *In re* Estate of Charles Casper, District Court of St. Louis County, Minn., July 17, 1906, Ludwig's Consular Treaty Rights, 72; Vujic *v.* Youngstown Sheet and Tube Co., 220 Fed. 390. *In re* White, 166 N. Y. Supp. 712, Hackworth, Dig., IV, 864. See, also, judgment of the Italian Court of Cassation, Feb. 4, 1907, contained in communication of Mr. Griscom, American Ambassador to Italy, to Mr. Root, Secy. of State, April 29, 1907, For. Rel. 1907, II, 750.

The provisions of the Workmen's Compensation Acts of certain American commonwealths, embracing Minnesota, Nebraska, Pennsylvania and Wisconsin, acknowledge in varying form that the consular representative possesses in behalf of his non-resident countrymen a right (which in some cases is made an exclusive one) to settle claims for compensation, and to receive for distribution compensation arising thereunder. See Session Laws of Minnesota for 1929, Act of April 19, 1929, Chap. 251, p. 279; § 113(5) of Employer's Liability Act of Nebraska, Chap. 35, Art. VIII, § 3663, Rev. Stat. of Nebraska, 1913; Purdon's Pennsylvania Statutes Annotated, Title 77, § 563; Wisconsin Session Laws, 1931, Chap. 403 (revising Chap. 102 of statutes relating to workmen's compensation act), p. 648.

§ 482. [1] See, for example, Art. II, convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2847.

[2] See Interpretation of Treaties, Most-Favored-Nation Clause, Consular and Other Privileges, *infra*, § 537.

that the right to enjoy such specific rights and privileges is embraced in the most-favored-nation clause in the event that the country whose consular officers assert such rights or privileges thereunder accords in fact the same rights and privileges to American consular officers in their territories." [3] The American Government has on numerous occasions expressed itself in like fashion.[4]

## 9

## SHIPPING AND SEAMEN

### a

§ 483. **Jurisdiction in Controversies Respecting Seamen.** That a seaman when in foreign ports and places should be subjected for certain purposes to the control of the consular representative of the State to which the ship belongs is a matter of common necessity to maritime nations. In response thereto modern consular conventions have made elaborate provision. Those of the United States have been designed to cope with three distinct problems: first, with the jurisdiction over seamen; secondly, the reclamation of deserting seamen; and thirdly, the adjustment of damages suffered at sea and arising in matters of wreck and salvage.

Elsewhere there have been observed the conditions under which, by virtue of certain treaties to which the United States is a party, a consular officer is given jurisdiction over controversies arising out of the internal order of private vessels of his country and in cases arising between officers and crews pertaining to the enforcement of discipline on board thereof, and also over questions concerning the adjustment of wages and the execution of contracts relating thereto.[1] In this connection there have been noted the changes wrought in the form of recent relevant treaties.[2]

By certain treaties the persons arrested at the request of consular officers by the local authorities are to be held in custody "during the whole time of their

[3] Mr. Castle, Assist. Secy. of State, to the Minister in Switzerland, Jan. 15, 1931, Hackworth, Dig., IV, 704.

[4] Instances are recorded in Hackworth, Dig., IV, 702–704 and 784–785.

§ 483. [1] See Rights of Jurisdiction, *supra*, §§ 222–223.

See documents in Hackworth, Dig., II, § 140, and IV, § 445.

[2] See, for example, Art. XXIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4200; Art. XXV, treaty with Finland, Feb. 13, 1934, U. S. Treaty Vol. IV, 4148.

*Cf.* Art. XI, consular convention with Belgium, March 9, 1880, Malloy's Treaties, I, 97, which is followed in Art. XI, consular convention with Roumania, June 17, 1881, *id.*, II, 1515, and in Art. XI, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2849. Concerning the Swedish convention see The Ester, 190 Fed. 216.

See, also, the slightly differing provisions of Art. XI, consular convention with Austria-Hungary, July 11, 1870, Malloy's Treaties, I, 42; Art. XIII, consular convention with Germany, Dec. 11, 1871, *id.*, I, 554; Art. XI, consular convention with the Netherlands, May 23, 1878, *id.*, II, 1258; Art. I, supplemental consular convention with Italy, Feb. 24, 1881, *id.*, I, 983; Art. XXIII, treaty of friendship with Spain, July 3, 1902, *id.*, II, 1708. Respecting the convention with the Netherlands, see The Albergen, 223 Fed. 443.

See analysis of earlier treaties of the United States by Chief Justice Waite, in Wildenhus's Case, 120 U. S. 1, 13–17.

See case of intervention by the American Consul General at Rio de Janeiro in 1908, notwithstanding the absence of any appropriate treaty, For. Rel. 1909, 41–42.

stay in the port" at the disposal of the latter.[3] The statutory laws of the United States enacted for the purpose of executing its treaties,[4] permit an arrested seaman to be held in custody for a period not to exceed two months, and that (according to the opinion of the Supreme Court of the United States), irrespective of the departure of the ship prior to the expiration of such time.[5] The more recent treaties of the United States merely provide that a consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and that upon such a request the requisite assistance shall be given.[6]

In the absence of treaty the exercise of jurisdiction by an American court of admiralty in a contest between a foreign seaman and the master of a foreign ship and relating to a maritime contract is deemed to be within the discretion of the tribunal. The Supreme Court of the United States has, however, declared that admiralty courts will not interfere between the parties in such cases "unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction."[7]

[3] This provision is found, for example, in Art. VIII, consular convention with France, Feb. 23, 1853, Malloy's Treaties, I, 531; Art. I, supplemental convention with Italy, Feb. 24, 1881, *id.*, I, 983; and in Art. XXIII, treaty of friendship with Spain, July 3, 1902, *id.*, II, 1708.

[4] Rev. Stat. §§ 4079, 4080 and 4081, 22 U.S.C.A. §§ 256, 257 and 258.

But see the repeal in part of § 4081, by the Act of March 4, 1915, Chap. 153, § 17, 38 Stat. 1184, in so far as the earlier statute related to the arrest and imprisonment of officers and seamen charged with desertion from merchant vessels of foreign nations in the United States and Territories and possessions thereof.

[5] See Dallemagne *v.* Moisan, 197 U. S. 169, Moore, Dig., V, 129. In the same case it was held that while the statute required application for the arrest of a seaman to be made "to any court of record of the United States, or any Judge thereof, or to any commissioner appointed under the laws of the United States," and the issuance of the warrant of arrest to a United States Marshal, and hence rendered irregular an application to and an arrest by a local chief of police, the bringing of a seaman so arrested before a United States court on *habeas corpus* rendered it the duty of such tribunal to examine the case and commit the seaman to prison, if he came within the terms of the treaty, and served to render unimportant the irregularity of the arrest.

"American seamen," for the purposes of the Foreign Service Regulations of the United States (as of June 1941, XVI–2, notes 2 and 3, Hackworth, Dig., IV, 883), are described as follows:

"(*a*) Seamen who are native-born or fully naturalized citizens of the United States.

"(*b*) Aliens who have acquired and maintained the character of American seamen. An alien can acquire the character of an American seaman for the purposes of protection and relief under the laws of the United States only by shipping on a vessel of the United States in a port of the United States before a shipping commissioner. Having once acquired such status, he may thereafter re-ship on any American-owned vessel either in a foreign port or in a port of the United States without losing his rights and privileges as an American seaman.

"However, if an alien having the status of an American seaman, deserts from an American-owned vessel except as a result of cruel or unusual treatment, or ships on a foreign vessel, or definitely abandons his calling as a seaman, he forfeits his status as an American seaman."

See Nationality, Seamen, *supra*, § 394.

[6] See, for example, Art. XXIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4200; Art. XXV, treaty with Finland, Feb. 13, 1934, U. S. Treaty Vol. IV, 4148.

See in this connection, case referred to in Hackworth, Dig., IV, 882, where the crew of a Norwegian vessel arriving in Philadelphia, in March, 1938, engaged in a sit-down strike, and where the Consul requested assistance from the local authorities, which was refused. See The Wind, 22 F. Supp. 883.

[7] The Belgenland, 114 U. S. 355, 364. See, also, The Lady Furness, 84 Fed. 679; The

b

§ 484. **Reclamation of Deserting Seamen.** It has been laid down as a general proposition that the surrender of deserting seamen cannot, in the absence of treaty, be granted by the authorities of the United States.[1] The statutory law which formerly made provision for the recovery of deserters from foreign vessels, was limited in its scope to cases where applications for arrest emanated from consular officers of foreign States with which appropriate conventions had been concluded.[2] The conduct of an American consul in causing, in 1899, the arrest and imprisonment in the Argentine Republic of a deserter from an American vessel of war, was not approved by the Department of State, because of the absence of a treaty with that country providing for the arrest in the United States of deserters from Argentine vessels, and of the resulting inability of the Government to give assurance of reciprocity.[3]

Numerous conventions of the United States have, in the past, provided for the reclamation of deserting seamen through the consular service. According to the arrangement with Sweden of 1910, the consular officer was permitted to cause the arrest of officers, sailors and "all other persons making part of the crews in any matter whatever, of ships of war or merchant vessels of their nation, who may be guilty, or be accused, of having deserted said ships and vessels, for the purpose of sending them on board or back to their country."[4]

In 1915, the United States, through the enactment of the Seaman's Act, departed from its previous policy established by consular conventions in harmony with the statutory law. That Act announced that in the judgment of Congress, Articles in treaties and conventions of the United States, in so far as they pro-

---

Troop, 128 Fed. 856, where an American court of admiralty entertained jurisdiction after the appropriate British consul disclaimed authority to adjudicate the question as respecting the duty of the master of a British ship to furnish a German seaman with proper care, treatment and supplies after his accidental injury in the service of the ship. Respecting the Act of December 21, 1898, 30 Stat. 763, relating to the protection of American seamen, and the application thereof to the shipment of seamen on foreign vessels in American ports, see Patterson *v.* Bark Eudora, 190 U. S. 169.

See Canada Malting Co. *v.* Paterson Co., 285 U. S. 413, 421–422; also, in this connection, Civil Disputes of Seamen Arising from Their Connection with the Ship, *supra*, § 223.

§ 484. [1] See opinion of the court in Tucker *v.* Alexandroff, 183, U. S. 424, 431, *citing* Moore, Extradition, § 408; also dissenting opinions of Justices Gray, Harlan, White, and Chief Justice Fuller, *id.*, 467; Opinions of Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 148, and 6 Ops. Attys. Gen., 209; also Moore, Dig., IV, 417 and documents there cited; Mr. Hunter, Acting Secy. of State, to Mr. Osborn, Minister to the Argentine Republic, No. 190, Nov. 6, 1883, MS. Inst. Argentine Republic, XVI, 292, Moore, Dig., IV, 420.

[2] See statement in Moore, Dig., IV, 418; also Mr. Adee, Acting Secy. of State, to Duke de Arcos, Oct. 9, 1901, informing the latter of the absence of any law or regulation of the United States, providing for the punishment of deserters from the vessel of a foreign country with which the United States had no treaty, For. Rel. 1901, 484.

See Rev. Stat. § 5280. Respecting the operation of the statute in relation to the treaties, see Opinion of Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen. 148; Opinions of Mr. Black, Atty. Gen., 9 Ops. Attys. Gen. 96 and 246; Tucker *v.* Alexandroff, 183 U. S. 424, Moore, Dig. IV, 422–424; United States *v.* Minges, 16 Fed. 657; United States *v.* Kelly, 108 Fed. 538. See, also, enactment of the Philippine Commission, Jan. 16, 1906, providing for the arrest, examination and return of seamen deserting from foreign vessels, For. Rel. 1906, II, 941–942.

[3] Mr. Hay, Secy. of State, to Mr. Buchanan, Minister to Argentine Republic, No. 476, April 4, 1899, MS. Inst. Argentine Republic, XVII, 453, Moore, Dig., IV, 422.

[4] Article XII, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2850. This Article was terminated by agreement in 1920.

vided for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the coöperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, and any other treaty provision in conflict with the provisions of the Act, ought to be terminated. To that end the President was requested and directed, within ninety days after the passage of the Act, to give notice to the several governments, respectively, that so much "as hereinbefore described" of all of such treaties and conventions between the United States and foreign governments would terminate on the expiration of such periods after notices had been given as might be required in such agreements.[5]

Notice of abrogation of articles of treaties in conflict with the Act was accepted by certain foreign States with the understanding that the other provisions of the conventions should remain in force.[6]

c

§ 485. **Matters of Wreck and Salvage.** It is found desirable that a foreign consul should be permitted to direct proceedings relative to the salvage of vessels under the flag of his country and which are wrecked upon the coasts of the State to which he is accredited. The United States has concluded numerous conventions making provisions appropriate to that end.

The more recent treaties to which the United States is a party provide that all proceedings relative to the salvage of vessels of either contracting party wrecked upon the coasts of the other shall be directed by the consular officer of the country to which the vessel belongs and within whose district the wreck may have occurred; that pending the arrival of such officer, who shall be immediately informed of the occurrence, the local authorities shall take all necessary measures for the protection of persons and the preservation of wrecked property; that the local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if those interests do not belong to the crews that have been wrecked, and to carry into effect the arrangements made for the entry and exportation of the merchandise *saved;* and also that such merchandise is not to be subjected to any customhouse charges, unless it be intended for consumption in the country where the wreck may have taken place.[1]

It may be observed that these provisions are in sharp contrast to those of an

[5] Act of March 4, 1915, Chap. 153, § 16, 38 Stat. 1184, 22, U.S.C.A. § 258.

[6] Mr. Phillips, Acting Secy. of State, to the Senate, March 27, 1919, with enclosures, Senate Doc. No. 2, 66 Cong., 1 Sess.

See *infra* § 539; also Hackworth, Dig., II, § 144, and documents there cited.

§ 485. [1] See, for example, Art. XXVIII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4202; also, Art. XXVII, treaty with Poland, June 15, 1931, U. S. Treaty Vol. IV, 4584.

That the Federal courts of the United States have jurisdiction in cases of claims for salvage even where all parties are aliens, see Mason *v.* Blaireau, 2 Cranch, 240, 264, Moore, Dig., II, 78.

early arrangement which vested "primary responsibility in regard to salvage and the disposition of salved property in the local authorities, reserving to the consul only the right to intervene in the proceedings in regard to repair, provisioning or sale of the vessel and sometimes, if only nationals of the sending State were interested, in the settlement of damages and average." [2] The difference is perhaps important as a manifestation of a disposition to enlarge and enhance the importance of the consular function, and of acknowledgment of the fitness of a consular officer to direct and control the work of salvage.

d

§ 485A. **Ships' Papers.** Declared the Department of Commerce and Labor in 1912:

> The custom of maritime nations recognizes the Consul of the vessel's nationality as the sole guardian of all national rights pertaining thereto, and it cannot be expected that an American Consul can exhibit the crew list of an American vessel in proceedings to secure the rights of seamen if he is not permitted to have possession of the crew list. To all intents and purposes, the papers of the vessel are part of the vessel itself and are properly within the continuous jurisdiction of the vessel's nation, and therefore in a foreign port within the jurisdiction of the Consul of that nation. This custody of the ship's crew list by the Consul of her nation is a protection to the rights of seamen, and proper action by the Consuls in matters concerning those rights is rendered almost impossible by the passage of the papers out of the control of the nation to which the vessel belongs.[1]

[2] See Quincy Wright, Reporter, in Comment on Art. 11 (h) of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 292, where attention is called to Art. 16 of consular convention between the United States and Germany, Dec. 11, 1871, Malloy's Treaties, I, 555.

Art. 11 (h) of the Harvard Draft Convention appears to be in harmony with the theory exemplified in the earlier convention with Germany.

In a memorandum by Mr. Hackworth, the Legal Adviser of the Department of State, under date of Nov. 28, 1934 (Hackworth, Dig., II, 256) on the question of remuneration for services for the salvaging of vessels in distress, it was stated that "the matter is not governed by international law, except in so far as international agreements on the subject may be regarded as international law." Attention was called to various articles of the Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, concluded at Brussels, Sept. 23, 1910, and to which the United States was a party. (U. S. Treaty Vol. III, 2943.) In commenting on the Convention and the Act of Congress of Aug. 1, 1912, designed to give effect to it (37 Stat. 242), Mr. Hackworth said: "It will be seen that this Act, which follows very closely the provisions of the Convention, does not undertake to fix the amount to be paid for salvage services, nor does it lay down any yardstick by which that amount is to be determined. It leaves the matter in the hands of the courts as theretofore. It would seem that the Convention referred to above was framed largely along the lines of the practice obtaining in the United States and Great Britain in salvage matters. It leaves with the courts the question of determining the amount to be awarded, without any maximum limitations." (Hackworth, Dig., II, 260.)

According to The Foreign Service Regulations of the United States, as of June, 1941, XVII-5: "If treaty provisions, established usage, or local laws permit, a consular officer shall assume jurisdiction over a vessel of the United States which has been wrecked or stranded on a coast within his district or which has been brought into his district after having suffered a disaster at sea and over any cargo or effects belonging to citizens of the United States which have been brought into the officer's district from a wrecked or lost vessel of the United States; provided that the captain or owner of the vessel, or the owner or consignee of the cargo, or the owner of the effects, is absent or incapable of taking possession of the property concerned, and provided that no salvage claim has attached to the property."

It should be noted, however, that in 1922, the Department of State observed that the law and practice, in the light of the American statutory law, appeared to contemplate a possible presentation of a vessel's papers to officers other than the consul, and the eventual delivery of such papers to the consular officer.[2]

The duties of an American consular officer with respect to the deposit of ship's papers, and their return to the master upon fulfilment of requisite conditions are set out in the Foreign Service Regulations of the United States.[3]

## 10

## NOTARIAL FUNCTIONS

### a

§ 486. **Administration of Oaths.** It is of highest importance that a consular officer should be permitted to perform certain notarial acts within his consular district.[1] Numerous conventions to which the United States is a party confer that privilege. According to Article XXII of the treaty with Germany of December 8, 1923 "Consular officers may, in pursuance of the laws of their own country, take, at any appropriate place within their respective districts, the depositions of any occupants of vessels of their own country, or of any national of, or of any person having permanent residence within the territories of, their own country." [2] It will be observed that the treaty does not require the affiant

---

(*Citing* 46 U.S.C. 721, and Exec. Order 8689, Feb. 19, 1941.) See also notes 1, 2 and 3, thereunder.

§ 485A. [1] Mr. Cable, Acting Secy. of Commerce and Labor, to Mr. Knox, Secy. of State, March 25, 1912, Hackworth, Dig., II, 273. It was also said: "In the opinion of this Department the requirement by Congress that vessels of the United States shall produce certified copies of their crew lists is within its powers and should be recognized by South American countries. The right of our Consuls in Peru to the custody of the papers of American vessels while in ports of that country should be upheld."

See R. S. § 4309, 46 U.S.C.A. § 354, concerning the deposit of ship's papers by the master of a vessel "belonging to citizens of the United States," on arrival at a foreign port after sailing from a port of the United States.

See in this connection, Mr. Stimson, Secy. of State, to Consul Allen, May 17, 1929, Hackworth, Dig., II, 275.

"All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship's papers, which serve the purpose of identification on the open sea. But neither the number, nor the kind, of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject." (Lauterpacht's 5 ed. of Oppenheim, I, § 262.)

[2] Statement in Hackworth, Dig., II, 275, citing Mr. Carr, Director of the Consular Service, to Consul Spamer, Jan. 11, 1922. In this communication "reference was made to section 4209 of the Revised Statutes providing that foreign vessels coming into American ports shall, previous to entry, produce to the Collector of Customs, with whom such entry is made, the vessel's register or other documents in lieu thereof, together with the clearance and other papers granted at the port of departure, and providing further that the master within 48 hours after such entry shall deposit these papers with the consul or vice consul of the nation to which the vessel belongs and deliver to the Collector of Customs a certificate of the consul or vice consul that this has been done."

[3] See those of June 1941, XVI–1, Note 5, Hackworth, Dig., IV, 902. See also documents, *id.*

§ 486. [1] McNair's 4 ed. of Oppenheim, I, § 433.

[2] U. S. Treaty Vol. IV, 4200; also Art. XXIV, treaty with Finland, Feb. 13, 1934, U. S. Treaty Vol. IV, 4147. *Cf.* Art. X, treaty with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2849; Art. XXII, treaty with Spain, July 3, 1902, Malloy's Treaties, II, 1707.

to be a national of the country of which the officer is the consular representative, permanent residence within its territory, or a specified connection with one of its vessels sufficing to permit the taking of depositions.[3]

Every consular officer of the United States is required, whenever application is made to him therefor, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit or deposition, and to perform any other notarial act which any notary public is required or authorized to perform within the United States.[4] Such acts, in order to be valid and effectual, must be certified by the consul under his hand and seal of office.[5] The Department of State declared in 1930, that it was not aware of any judicial determination of the question whether the statutory law required American consular officers to perform notarial acts to be used in foreign countries upon application therefor by aliens. The view was expressed, however, that it was not the intention of Congress to require such service by American consular officers, and accordingly, they were instructed "that they are not required to perform service of the character mentioned in behalf of aliens." [6] This attitude found renewed expression in the Foreign Service Regulations of the United States, as of January, 1941.[7]

b

§ 487. **Authentication of Documents.** Certain treaties to which the United States is a party announce that

> such officers may draw up, attest, certify and authenticate unilateral acts, deeds, and testamentary dispositions of their countrymen, and also contracts to which a countryman is a party. They may draw up, attest, certify and authenticate written instruments of any kind purporting to express or embody the conveyance or encumbrance of property of any kind within the

[3] The treaty probably thus yields to a consular officer a privilege of broader scope than might well be claimed for him under international law.

See communication from Mr. von Bülow to Mr. Schlözer, of Oct. 12, 1874, contained in communication from Mr. Schlözer to Mr. Fish, Secy. of State, Nov. 13, 1874, For. Rel. 1874–1875, 462, 463.

[4] Act of April 5, 1906, Chap. 1366, § 7, 34 Stat. 101, 22 U.S.C.A. § 98. See F. Van Dyne, Our Foreign Service, 154–155.

*Compare* the situation prior to the enactment of the Act of 1906, indicated in communication of Mr. Adee, Second Assistant Secy. of State, to Mr. Johnson, April 20, 1887, 121 MS. Inst. Consuls, 102, Moore, Dig., V, 110.

See Foreign Service Regulations of the United States, X–5, and notes thereunder, as of January, 1941.

[5] Rev. Stat. § 1750, 22 U. S. C. A. § 131.

[6] Note 3, appended to section 482 of Consular Regulations of the United States of Jan. 11, 1932.

[7] X–5, Note 9, where it was also said: "However, officers may perform such services on behalf of citizens or subjects of countries with which the United States has formal diplomatic and consular relations, provided that the applicant for such service furnishes satisfactory evidence that the officer's certificate would satisfy the requirements of the law of the country where the document is to be used; that the service is legally necessary and cannot be obtained otherwise than through the American diplomatic or consular officer without loss or serious inconvenience to the applicant; and that the certificate will be used solely for the purpose for which it is requested."

See generally, Consular Regulations of the United States, as of January, 1941, 10–5, and notes thereunder: also documents in Hackworth, Dig., IV, § 442.

territory of the State by which such officers are appointed, and unilateral acts, deeds, testamentary dispositions and contracts relating to property situated, or business to be transacted, within the territories of the State by which they are appointed, embracing unilateral acts, deeds, testamentary dispositions or agreements executed solely by nationals of the State within which such officers exercise their functions.[1]

Agreement is also made that instruments and documents thus executed and copies and translations thereof, when duly authenticated under his official seal by the consular officer shall be received as evidence in the territories of the contracting parties as original documents or authenticated copies, as the case may be, and shall have the same force and effect as if drawn by and executed before a notary or other public officer duly authorized in the country by which the consular officer was appointed; provided, always that such documents shall have been drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect.[2]

The treaties of the United States are silent respecting any right or duty on the part of a consular officer to authenticate the signatures of officials of the State to which he is accredited. Secretary Marcy, in 1853, was of opinion that the duty of authentication was not discretionary, but one impliedly assumed by a consular officer upon receipt of his exequatur or commission. Hence the refusal of a Spanish consul to authenticate the signature of the Secretary of State was deemed to be arbitrary and unreasonable.[3] Discrimination by foreign consular officers in the United States against American citizens of certain races, by the refusal to authenticate for their use the signatures of public officials, has been the subject of frequent if unsuccessful remonstrance.[4] It may be greatly doubted whether the Department of State would today assert that a foreign consul within

§ 487. [1] Art. XXII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4200. *Cf.* Art. XXII, treaty with Spain, July 3, 1902, Malloy's Treaties, II, 1707; Art. X, consular convention with Sweden, June 1, 1910, U. S. Treaty Vol. III, 2849.

[2] Art. XXII, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4200. The provisions contained in the treaty with Germany are incorporated in numerous treaties subsequent to it, such as in Art. XXIV of that with Finland of Feb. 13, 1934, U. S. Treaty Vol. IV, 4147.

"In affixing to a document his certificate of authentication a consular officer assumes, of course, no responsibility for the contents of the document, nor does he wish to convey the impression he does so. When in his opinion the circumstances seem to warrant, and always in connection with certificates of marriage and decrees of divorce, the consular officer should include in the *body* of his certificate of authentication a qualifying statement reading as follows: 'For the contents of the annexed document the consulate (general) assumes no responsibility.'" (Note 9, of February, 1935, to section 482 of Consular Regulations of the United States.)

See generally, with respect to the notarial functions of American Consular Officers, Foreign Service Regulations of the United States, as of January, 1941, X–5, and notes thereunder; also documents in Hackworth, Dig., IV, § 442.

[3] See communication to Mr. Magallon, Spanish Minister, Jan. 19, 1854, MS. Notes to Spanish Legation, VII, 10, Moore, Dig., V, 115.

[4] Moore, Dig., V, 116, and documents there cited, respecting the refusal of Russian consular officers to exercise certain notarial functions for the use of certain classes of American citizens.

See, Mr. Adee, Acting Secy. of State, to Mr. Moeser, July 13, 1894, 197 MS. Dom. Let. 671, Moore, Dig., V, 116, respecting the refusal of an Austro-Hungarian consul to certify to the official character of a notary public. In the course of this communication it was declared that "it has been held that an American consul cannot be required to certify to the official character or acts of a foreign notary public. 12 Ops. Attys. Gen. 1." See, also, Catlett *v.* Pacific Insurance Company, 1 Paine, 594, Stowell's Cases, 98.

the United States is under an obligation to authenticate the signatures of American notaries public.[5]

It may be observed that consuls do not appear to be entrusted with the power of authenticating the laws of foreign States. According to the view expressed by Chief Justice Marshall as early as 1804, consular officers cannot issue official copies of foreign laws; and no reason appears "for assigning to their certificate respecting a foreign law any higher or different degree of credit than would be assigned to their certificates of any other fact."[6]

The Foreign Service Regulations of the United States announce that except when authorized by the Department of State, officers of the Foreign Service shall not perform legal services of the kind usually performed by attorneys for private persons.[7] Thus, the drawing of wills, powers of attorney, or other legal instruments, and the performance of other legal services, are said not properly to come within the scope of diplomatic or consular functions. Officers are instructed to decline to perform legal services, except in emergencies when no lawyer is available and delay would work hardship to an American citizen. In such event, the officer is expected to inform the interested person that the services are performed at the latter's risk and that the Government can assume no responsibility therefor.[8]

[5] See Mr. Adee, Second Assist. Secy. of State, to Mr. H. Elenbogen, Nov. 7, 1916, Hackworth, Dig., IV, 854.

"Although the receiving State may not be able to require a resident consul to authenticate acts of its officials and although the sending State is not obliged to require its consul to do so, it seems that the receiving State should permit the function if the sending State has authorized it, at least when the official act in question concerns the interest of the sending State, its national or its vessel." (Quincy Wright, Reporter, commenting on Art. 11 (a) of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement*, Jan. and April, 1932, XXVI, 259.)

[6] See Church *v.* Hubbart, 2 Cranch, 187, 237. In this case, in order to prove that the ship *Aurora* and her cargo had been sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration were produced by the defendant in the circuit court. The edicts of the Crown were certified by the American consul at Lisbon to be copies of the original law of the realm. The certificate was granted under the official consular seal. The consul was not sworn. His certificate was to the effect that the edicts offered as evidence were true copies of the original. The court declared that to give this certificate the force of testimony, it would be necessary to show that this was one of those consular functions to which the laws of the United States attached full faith and credit. *Compare* the power conferred upon consular officers with reference to the authentication of foreign extradition papers by the Act of Congress of Aug. 3, 1882. See, also, in this connection, Mr. Knox, Secy. of State, to the Mexican Ambassador, April 13, 1910, For. Rel. 1910, 731.

[7] X–3, as of January, 1941.

[8] *Id.*, note 1.

See also Mr. Wilson, Acting Secy. of State, to the Italian Chargé at Washington, July 2, 1910, For. Rel. 1910, 676.

"Officers and employees of the Foreign Service are forbidden to wear any uniform, other than one authorized by the Congress, or any decoration, other than one bestowed upon him by the United States, during the period he is connected with the Foreign Service." (Foreign Service Regulations of the United States, I–27, as of January, 1941.) It should be observed that the statutory injunction, set forth in Rev. Stat. § 1688, was addressed solely to persons in the diplomatic service.

Concerning the prohibition against acceptance of presents, testimonials, and gratuities by officers and employees of the Foreign Service, see Foreign Service Regulations of the United States, I–23, as of January, 1941, citing the Constitution, Art. I, Sec. 9, Cl. 8, and also Act of June 17, 1874, 18 Stat. 77.

Concerning prohibitions against engaging in business, see Foreign Service Regulations of the United States, I–19, as of January, 1941, citing Act of Feb. 5, 1915, 38 Stat. 807 (in re-

11

§ 488. **Miscellaneous Duties.** There are numerous duties, the performance of which by its consular officers is required by the appointing State, and which are rarely opposed by that other within whose domain they are undertaken. Concerning many the treaties are silent and diplomatic controversy infrequent. As questions relating to performance are chiefly confined to issues between consular officers and their own governments, they possess but slight international significance. As Chief Justice Hughes declared, in 1931, in the course of the opinion of the Court in the case of *Blackmer* v. *United States:*

> While consular privileges in foreign countries are the appropriate subjects of treaties, it does not follow that every act of a consul, as *e.g.*, in communicating with citizens of his own country, must be predicated upon a specific provision of a treaty. The intercourse of friendly nations, permitting travel and residence of the citizens of each in the territory of the other, presupposes and facilitates such communications. In selecting the consul for the service of the subpœna, the Congress merely prescribed a method deemed to assure the desired result but in no sense essential. The consul was not directed to perform any function involving consular privileges or depending upon any treaty relating to them, but simply to act as any designated person might act for the Government in conveying to the citizen the actual notice of the requirement of his attendance.[1]

The United States finds its consular officers a valuable ally in protecting its own institutions, such as its customs revenue, its public health and its merchant marine. This involves the performance of acts that relate to foreign as well as American persons or property or shipping. Thus, there is imposed upon American consular officers the duty to certify as to the correctness of invoices of merchandise to be imported into American territory.[2] Such officers, as well as medical officers detailed for that service by the President, are utilized also for the purpose of issuing bills of health to vessels clearing from foreign ports for ports in

---

lation to diplomatic officers), and Act of April 6, 1906, 34 Stat. 101 (in relation to consular officers).

It is obvious that a State may well demand that all foreign consular officers functioning within its territorial limits abstain from pernicious political activities, and that it should on its own part exact of members of its foreign services abstention from such activities. See documents in Hackworth, Dig., IV, § 873.

§ 488. [1] 284 U. S. 421, 439.

*Marriages.* Concerning the prohibition against the celebration of marriage by Foreign Service Officers, see Foreign Service Regulations of the United States, XIII–1, as of June, 1939. See also Diplomatic Intercourse of States, Marriages, *supra,* § 453.

[2] See Act of April 5, 1906, 34 Stat. 100; also Act of June 17, 1930, 46 Stat. 720.

According to the Consular Regulations of the United States, as of February, 1935, section 185: "The customs and immigration laws and regulations of the United States relating to manifests of cargo and passengers, immigration manifests, and alien-crew lists, apply as well to vessels under foreign flags as to vessels of the United States, and consular officers are therefore instructed to inform the masters of all vessels leaving their ports for the United States that they are required to produce the cargo and passenger manifests, immigration manifests, and crew lists required by the provisions of law regulating these matters."

the United States,[3] and of informing the Government through consular reports of the sanitary condition of foreign ports.[4] It is not without significance that the more recent treaties to which the United States is a party provide that a consular officer of either High Contracting Party shall have the right to inspect within the ports of the other High Contracting Party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels, and to be enabled thereby to execute intelligently bills of health and other documents required by the laws of his country, and to inform his Government concerning the extent to which its sanitary regulations have been observed at ports of departure by vessels destined to its ports, with a view to facilitating entry of such vessels therein.[5]

For the protection of American shipping and seamen, the statutory law of the United States imposes elaborate duties upon American consular officers in relation to the shipment and discharge of seamen, the recovery of wages and damages, provisions for crews, the relief of the destitute, and kindred matters.[6]

As a protection against fraudulent naturalization, the Nationality Act of 1940, as has been noted above,[7] imposes upon American diplomatic and consular officers in foreign countries, the duty, from time to time, through the Department of State, to furnish the Department of Justice with the names of those persons, within their respective jurisdictions, who have been naturalized and who have

[3] See Act of Feb. 15, 1893, Chap. 114, § 2, 27 Stat. 450, with subsequent amendments, as set forth in 42 U.S.C.A. § 82.

See, also, Consular Regulations of the United States, as of February, 1935, section 375, and Notes appended thereto. According to Note 1, it is declared that the Quarantine Laws and Regulations of the United States require masters of aircraft, under certain conditions, clearing from or leaving a foreign port for a port of the United States or its possessions or other dependencies to obtain a consular bill of health. See, also, Note 2, *id.*, in relation to the treatment of foreign naval vessels.

See Art. 11 (i) of Harvard Draft Convention on The Legal Position and Functions of Consuls, *Am. J., Supplement,* Jan. and April, 1932, XXVI, 196, and Comment, *id.*, 294.

[4] Act of Feb. 15, 1893, Chap. 114, § 4, 27 Stat. 451, with subsequent amendments, as set forth in 42 U.S.C.A. § 93.

[5] These provisions found expression for the first time in Article XXVI of the treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4201. They were incorporated therein at the urgent request of the Public Health Service. It will be recalled that in earlier days Germany declined to permit American consular officers to exercise such privileges. See *supra,* § 200.

See Exemptions from Territorial Jurisdiction, Other Vessels in Foreign Public Service, *supra,* § 256, concerning the incompetence of a consular officer "merely by virtue of his office," to appear on behalf of his government and claim immunity of a vessel from process in admiralty proceedings.

[6] Concerning the duties of American Consular Officers in relation to the shipment of seamen in foreign ports, see Executive Order, Oct. 16, 1937, 2 Fed. Reg. 2601, Hackworth, Dig., IV, § 447; in relation to the discharge of seamen, same order, Hackworth, Dig., IV, § 448; concerning wages, extra wages and effects of seamen, see Art. XIV of Consular Regulations of the United States, and documents in Hackworth, Dig., IV, § 448; in relation to the relief of seamen, see Art. XV of Consular Regulations of the United States, also documents in Hackworth, Dig., IV, §§ 450–455 and § 459; in relation to the transportation of seamen, Art. XVI of same Regulations, also documents in Hackworth, Dig., IV, § 456 and § 459; in relation to the desertion of seamen, Art. XVII of same Regulations, also documents in Hackworth, Dig., IV, § 449.

Concerning consular problems peculiar to various classes of seamen, see documents in Hackworth, Dig., IV, § 457 (Destitute Seamen), § 458 (Ill or Injured Seamen); and § 459 (Shipwrecked Seamen).

[7] See *supra,* § 370.

taken permanent residence in the country of their nativity, or in any other foreign country.[8]

American consular officers play an important part in connection with the enforcement of the immigration laws and regulations of the United States. In general, they are required to assist in that enforcement.[9] Thus, it is declared to be the duty of such officers to report to the Department of State all information possible which might be of value in preventing violation of those laws and regulations, and specifically, to report thereto at once all violations of the law regulating the transportation of immigrants by sea, by masters of vessels bound to any port of the United States.

As has been noted elsewhere,[10] under the existing statutory law, the United States in applying a selective system for the control of immigration at its source, has imposed heavy burdens on its consular officers, in causing them to make tests at points of departure of the eligibility of aliens to entrance into American territory, whether as immigrants or non-immigrants, to decide whether immigrants fall within quota or nonquota classes, and to regulate and restrict by numerical limitations a preference system for quota immigrants.[11] This task calls for the issuance by such officers of appropriate visas for immigrants entitled thereto.[12]

Officers of the Foreign Service (embracing consular officers) are burdened with the duty of protecting the rights and interests of the United States in its international, agricultural, commercial, and financial relations. In pursuance of this duty, they are instructed to guard against the infringement of rights of American citizens in matters relating to commerce and navigation which are based on custom, international law, or treaty; to observe, report on, and, whenever possible, endeavor to remove discriminations against American agricultural, commercial, and industrial interests in other countries; and also to protect the national commercial reputation of the United States.[13]

[8] Sec. 338 (*c*), 54 Stat. 1137, 1159.

Concerning the duties of American consular officers in connection with the Social Security Board of the Federal Security Agency activities abroad, see Foreign Service Regulations of the United States, IX–11, as of January, 1941.

Concerning services for distressed American citizens abroad, see *id.*, XX–3, as of January, 1941.

Concerning assistance to the American Red Cross, see *id.*, XX–6, as of January, 1941.

[9] See Consular Regulations of the United States, Jan. 11, 1932, section 361. Also Foreign Service Regulations of the United States, Chap. XXII, as of January, 1941; also Visa Supplement A, and appendices thereto, as of November, 1940. See Passports, Visa, *supra*, § 403.

[10] See Aspects of the Immigration Law of 1924, *supra*, § 60A.

[11] See Visa Supplement A of the Foreign Service Regulations of the United States, XXII–1, Note 7, as of November, 1940.

Also American Passports, Visa, *supra*, § 403.

[12] See The Immigration Work of the Department of State and Its Consular Officers, revised to July 1, 1938, Department of State, 1939, 1; also, J. F. Simmons, "The Role of Our Consuls in Controlling the Flow of Immigration," Department of State, Press Releases, May 26, 1934, 315.

[13] Foreign Service Regulations of the United States, XIV–1, as of January, 1941, and Notes appended thereto. Also, *id.*, XIV–2, 3 and 4, of like date.

See also Diplomatic Intercourse of States, *supra*, §§ 446 and 447.

Concerning the Registration of Nationals, see Passports, *supra*, § 406B.

# *PART V*

## Agreements Between States

### TITLE A

§ 489. **Preliminary. Nature of Contractual Obligations.** Agreements between States are a necessary incident of international intercourse, and increase in number and variety as that intercourse expands and produces a consciousness of mutual dependency. In scope and design such compacts have recorded with precision the changing needs of the international society, reflecting the extent of the progress of individual States on the pathway from isolation to intimacy of association with other nations. The treaties of a State are the milestones which mark its movements in relation to the outside world and which reveal the direction that it has chosen.

The disposition of States to contract with each other, and their habitual recourse to such action, have been due to a wide perception of the common advantage derivable from undertakings to limit reciprocally individual freedom of action, and to confidence in the efficacy of such means to fix restraints not otherwise to be established save by the sword. The number of agreements concluded since the beginning of the nineteenth century testifies to the conviction of statesmen that international compacts are capable of operating as such a deterrent. Because there has been found to be a readiness on the part of States to acknowledge that an obligation of an essentially legal character, possessing the quality which the law familiarly attaches to contracts between individuals, should be deemed to be impressed upon public international agreements, it has proven desirable as well as feasible for States to negotiate them. Treaties are thus concluded, because in the minds of the contracting parties their undertakings are to be performed, and because the right of non-performance is given up.[1]

The foregoing considerations have, moreover, played their part in encourag-

§ 489. [1] In a conference at the White House, Aug. 19, 1919, between President Wilson and members of the Senate Committee on Foreign Relations, with respect to the pending treaty of peace with Germany, the President declared with reference to Art. X ("to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League") that the undertaking of the United States, should it ratify the treaty, would constitute "a very grave and solemn moral obligation." "But it is a moral, not a legal, obligation," he said, "and leaves our Congress absolutely free to put its own interpretation upon it in all cases that call for action. It is binding in conscience only, not in law." In response to an inquiry from Senator Borah, the President stated that the reason why the obligation expressed in Art. X was simply a moral obligation, was the circumstance that "there is no sanction in the treaty." Thereupon, Senator Borah asked: "But that would be a legal obligation so far as the United States was concerned if it should enter into it; would it not?" The President answered: "I would not interpret it in that way, Senator,

ing States to conclude numerous multi-partite arrangements. The increasing disposition to do so since the beginning of the present century, and notably since the termination of the World War, 1914–1918, has resulted in a variety of agreements whereby numerous States have undertaken to lay down special rules of conduct for their common observance, and to that extent have created, as among themselves, a conventional international law. Some features of that practice, and the particular relationship of the United States to it, will be observed in another place.

That unscrupulous States have shown contempt for valid compacts when it was believed that their provisions could be safely or advantageously ignored, is not proof that States have been or remain generally disposed to act on such a principle. Nor is the absence of a sanction established by law indicative that no burden or restraint of a legal nature is imposed upon a State which consents to bear or respect it. The family of nations has acted upon a different theory. Practice has long revealed the habits of its members of performing from a sense of obligation, to which must be ascribed the character of law, numerous duties not enforceable by judicial process or by the application of any force applied by the arm of the law.[2] Recognition of legal restraints arising from treaty has thus been a natural consequence of an experience characterized by an acknowledgment of the legal nature of obligations not recorded in definite agreements, and for which, nevertheless, the society of nations has united in demanding observance.[3]

---

because there is involved the element of judgment as to whether the territorial integrity or existing political independence is invaded or impaired. In other words, it is an attitude of comradeship and protection among the members of the League, which in its very nature is moral and not legal." (Senate Doc. No. 106, 66 Cong., 1 Sess., 502 and 509. Also *id.*, 515.)

Apart from the matter of the interpretation of the Article discussed, it may be doubted whether the reason given by the President for the distinction which he drew has met with general support, or commends itself for adoption. To demand a sanction as a condition precedent for a legal obligation imposed by treaty or otherwise, is to reverse the principle upon which enlightened States embracing the United States have found it necessary to act.

"Every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of International Law in regard to observance of treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by Parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisal, etc." (Award of Tribunal in North Atlantic Coast Fisheries Arbitration, Sept. 7, 1910, G. G. Wilson, Hague Arbitration Cases, 145, 166.)

See, also, in this connection, Jean Otételéchano, *De la Valeur Obligatoire des Traités Internationaux*, Paris, 1916, Chap. I.

*Cf.* views of President Wilson requesting the repeal of the provision in the Panama Act exempting vessels in the American coastwise trade from payment of tolls, For. Rel. 1914, 317.

"The right to make binding obligations is a competence attaching to sovereignty." (Hughes, C. J., in Perry *v.* United States, 294 U. S. 330, 353.)

"Even sovereigns may contract without derogating from their sovereignty." (Cardozo, J., in Charles S. Steward Machine Company *v.* Davis, May 24, 1937, 301 U. S. 548, 597.)

[2] "Law does not cease to exist merely because it is broken, or even because, for a time, it may be broken on a large scale; neither does the escape of some criminals abolish penal justice. No country is so well ordered that offences are not frequently committed, or that wilful and concerted resistance to the law never occurs. Concerning the law of nations, the wonder is not that it should be broken, but that, down to the present war, it should have been fairly well observed by most nations and ostensibly respected by all, in spite of lacking any defined sanction." (Sir Frederick Pollock, in his Introduction to Coleman Phillipson's 5th English edition of Wheaton, xli.)

[3] If, at the beginning of the present century, there was real doubt in Europe or America

Examination of the agreement-making experiences of the members of the international society reveals, however, the fact that a contracting State, smarting under the operation of a harsh and sacrificial treaty forced upon it after a disastrous war as the price of peace, is to be expected to leave nothing undone to rid itself of the burdens of the contractual yoke.[4] From generation to generation a people may consecrate itself to preparation for that achievement regardless of what it may entail. In one sense these considerations may appear to have no bearing upon the existence and continuity of obligations registered in an agreement. Yet the very nature and persistence of them warn the jurist as well as the statesman not to fail to take cognizance of their corrosive effect upon the conventional fabric; and they may even inspire the suggestion, or possibly the conviction, that the arrangement was not designed to outlive the time when the victor could in fact compel observance of what it had exacted. In such ways the facts of the international life point to the grotesque unreality of formulæ that intimate that States can be impressed with a sense of legal duty to observe faithfully whatever treaty provisions may be thrust upon them. Those facts show, moreover, that it is the mode by which the contractual burden is imposed, rather than the sheer power to escape the consequences of an inconvenient arrangement, which is likely to be decisive of the character and extent of the effort to thwart or nullify the arrangement.[5]

Out of the practice of concluding international agreements there has come into being a body of law touching the significance of acts whereby the parties purport to manifest assent to, endeavor to perform, and seek to terminate their undertakings. The individual contracting State may, and not infrequently does, seek to interpret that law with the aid of analogies drawn from what it regards as the private law of contracts locally obtaining within its own territory. Inasmuch, however, as there is no commonly accepted international law of contracts, and as various systems of private law oftentimes attach differing consequences to identical acts, a State may find it difficult, if not impossible, to establish that an analogy derivable from its own system of jurisprudence necessarily points

---

as to the legal nature of the obligation attaching to a treaty, the response of Great Britain and its Allies to the appeal of Belgium in 1914 made clear the fact that a group of enlightened States was committed to a different doctrine.

The Commission of the Peace Conference on the Responsibility of the Authors of the War and on Enforcement of Penalties concluded that "the neutrality of Belgium, guaranteed by the treaties of the 19th April, 1839, and that of Luxemburg, guaranteed by the treaty of the 11th May, 1867, were deliberately violated by Germany and Austria-Hungary." In a Memorandum presented by the American representatives on the Commission, Messrs. Robert Lansing and J. B. Scott, and annexed to the Report, the opinion was expressed that "these acts should be condemned in no uncertain terms and that their perpetrators should be held up to the execration of mankind." (Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Violation of the Laws and Customs of War, Oxford, 1919, 20 and 63.) It is to be regretted that the Treaty of Versailles did not, in addition to its provisions for reparation and restoration, give definite expression to these recommendations.

"In fact the war began in order to enforce upon Germany respect for the solemn treaty she had made nearly 80 years before in regard to the neutrality of Belgium." (Note of Premiers Millerand and Lloyd George, addressed to the United States, Feb. 17, 1920, in relation to the Fiume controversy, *Congressional Record*, LIX, 3784, 3785, Feb. 27, 1920.)

[4] See Manifestation of Assent; Compulsion, *infra*, § 493; Achievements in Termination of War, *infra*, § 923.

[5] See Achievements in Termination of War, *infra*, § 923.

to what is to be regarded as the correct solution of the problem involved. All that can be done in a controversy pertaining to, or arising from what may be called a treaty question, is to show the extent to which the practice of States betokens general acquiescence in the principle or reasoning that is invoked. That fact, whether it indicates resemblance or lack of resemblance to the requirements of any one system of private law is the decisive thing. The United States, by reason of the history and character of its own legal institutions must be, and remains, prone to seek in Anglo-American concepts and statements of the law of contracts analogies which it deems to be applicable to the law pertaining to treaties. If it has been in any degree successful in gaining respect for them, it is the result of the achievement, rather than any other circumstance that is worthy of note. It is thus what the United States maintains to be the law of nations pertaining to agreements between States, rather than the extent of the resemblance thereof to what it regards as the law of contracts obtaining within American territory, that will be made the object of special scrutiny.

The international society is necessarily interested in the objectives which, through the instrumentality of treaties or other forms of agreement, its members seek to attain. This is seen not only when attempt is made to modify the law of nations as among contracting States through fresh and amendatory rules set forth in a multi-partite arrangement, but also when a treaty is employed as a means of frustrating or evading the operation of some prohibition of that law, or becomes the agency through which one party is compelled, in opposition to its desires, to give up territory and even its political independence. Still again, there is common interest in the extent to which it may be sought to penalize a State on account of a continued unwillingness to accept the terms of a proferred convention. In the United States special interest has been shown in assertions through treaties to which it has not been a party, to impair the rights of a non-signatory State such as itself. The alertness, good judgment and need of amity that are the common portion of the several members of the international society generally suffice, however, under normal conditions, to protect each against harmful and invidious uses of agreement-making. Nevertheless, a grim feature of the life of nations is still seen in the tendency or temptation, which the United States itself has been unable to resist, to employ a treaty for the purpose of holding in leash, and perhaps demoting in rank, a weak State charged with impotence or unconcern in relation to supposedly international standards of conduct.[6]

There is abundant evidence illustrative of the informality and simplicity with which States frequently proceed to enter into and are deemed to perfect their contractual relationships.[7]

[6] See Haiti, *supra*, §§ 22, and 82A.

[7] See Judgment of April 5, 1933, in Case concerning the Legal Status of Eastern Greenland, with respect to effect upon the Norwegian State of a declaration by M. Ihlen, Norwegian Minister of Foreign Affairs, of July 22, 1919, in response to a Danish request of July 12, 1919. Publications, Permanent Court of International Justice, Series A/B, No. 53, p. 73. Also, James W. Garner, "The International Binding Force of Unilateral Declarations," *Am. J.*, XXVII, 493.

Also, The Case Concerning the Legal Status of Eastern Greenland, *supra*, § 101A.

"The contracts of States are not tied to any form." [8] Those expressed in documents vary greatly in kind and formality. Many are not recorded. While the more important international agreements are embodied in treaties, it will be found that the compacts properly so described comprise but a part of the arrangements by means of which States have generally undertaken to regulate their conduct with respect to each other.[9]

---

Also Advisory Opinion of The Permanent Court of International Justice, Oct. 15, 1931, in case of the Railway Traffic Between Lithuania and Poland, Publications, Permanent Court of International Justice, Series A/B No. 42, p. 116.

See Mr. Hughes, Secy. of State, to Senator Lodge, May 5, 1924, concerning certain declarations made in behalf of the Turkish Government in connection with the signature of certain conventional arrangements at Lausanne in 1923, set forth in For. Rel. 1924, Vol. II, 715, 719.

[8] Westlake, Int. Law, 2 ed., I, 290.

[9] "In diplomatic literature, the words 'treaty,' 'convention,' and 'protocol' are all applied more or less indiscriminately to international agreements. The words 'convention' and 'protocol' are indeed usually reserved for agreements of lesser dignity, but not necessarily so. In the jurisprudence of the United States, however, the term 'treaty' is properly to be limited, although the Federal statutes and the courts do not always so confine it, to agreements approved by the Senate. Such an agreement may be and often is denominated a 'convention,' and perchance might be called 'protocol'; but it is also, by reason of its approval by the Senate, in the strict sense a 'treaty,' and possesses, as the product of the treaty-making power, a specific legal character." (J. B. Moore, in *Pol. Sc. Quar.*, Sept. 1905, XX, 385, 388.)

See in this connection, Hackworth, Dig., V, § 461, and documents there cited concerning the "Meaning of Terms"; also *id.*, § 466.

See also A. D. McNair, The Law of Treaties, British Practice and Opinions, Oxford, 1938, 47.

# TITLE B

## VALIDITY

### 1

§ 490. **Restrictions of International Law.** If international law obtains among States, it is not unreasonable to assert that that law may denounce as internationally illegal agreements which are concluded for the purpose of, and with a view to causing the performance of acts which it proscribes.[1] This implies that the obligation of a State to respect the terms of an agreement with another is dependent upon something more than the mere yielding of consent, and may not come into being if the international society regards the arrangement as gravely injurious to its interests and contemptuous of what its law of nations is deemed to require. Opportunities for the invocation of this principle, as between contracting States are, however, rare. Such States are not disposed to admit that their mutual undertakings are contemptuous of international law. Still less are they willing to submit to adjudication before an international tribunal questions touching the validity of their arrangements. Nor do the parties to a treaty in their dealings with each other endeavor, through the diplomatic channel, to deny the existence of an obligation to perform on the ground that it marks an attempt to achieve what the law of nations forbids. Thus practice has not served to develop a body of law growing out of instances where contracting States have in fact tested the validity of treaties according to the relationship of the objectives sought to be achieved to the requirements of international law.

Heretofore, statesmen have at times not been deterred from the endeavor to bind the States which they represented to undertakings which paid scant regard for the most solid rights of other powers.[2] While the latter have not, through

§ 490. [1] Hall, Higgins' 8 ed., § 108, where it is said that "the requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. Thus a treaty is not binding which has for its object the subjugation or partition of a country, unless the existence of the latter is wholly incompatible with the general security; and an agreement for the assertion of proprietory rights over the open ocean would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law." See, also, Bonfils-Fauchille, 8 ed., § 819; Crandall, Treaties, 2 ed., 3; Mérignhac, II, 641; McNair's 4 ed. of Oppenheim, I, §§ 505–506. Also, G. Coumoul, *Des Conditions de Validité des Traités internationaux,* Toulouse, 1911, 65.

[2] It may be noted that the resolution by which the Senate on Feb. 18, 1916, advised and consented to the ratification of the convention with Nicaragua of Aug. 5, 1914, providing for the cession of rights for the construction of a ship canal by a Nicaraguan route, the lease of certain islands, and the right to establish a naval base on the Gulf of Fonseca, declared that advice and consent were given with the understanding that nothing in the convention was "intended to affect any existing right" of Costa Rica, Salvador and Honduras. U. S. Treaty Vol. III, 2742, 2743. See, in this connection, Costa Rica *v.* Nicaragua, Central

such action, been deprived of the right to challenge the validity of the agreements, the contracting States have not infrequently, by reason of their united strength and purpose, been able to achieve their designs at the expense of the non-contracting countries.[3] The sinister aspect of such arrangements has doubtless frequently been obscured by assertions to the effect that the contracting powers were endeavoring to safeguard their own respective rights, thus disclaiming by inference a design to impair those of any other States. It would be difficult to point to an instance in recent years where the sole and acknowledged objective of the contracting parties was to violate the legal rights of a non-signatory State. Again, no instance has been seen where a contracting State has in its relations with any other, denied the existence of a duty of performance on the ground that it would impair the rights of a third State, or that the objectives of the parties were, in respect to that State, internationally illegal.

The circumstance that outside States although left to their own devices may, nevertheless, intervene to preserve their rights, and effectively do so, as against the action of foreign contracting powers, shows that in the slow and rough development of international law there are still forces beyond the control of contracting States that may serve to offer potent opposition to, and even nullify, the provisions of a treaty which are defiant of what that law yields generally to the several members of the international society.[4] In theory, any agreement which purports to do violence to the underlying principles of international law must, to that extent, be regarded by the family of nations as internationally invalid. This is true despite the absence of a disposition on the part of the contracting parties to make such a claim.[5]

2

**§ 491. Restrictions Imposed by a General Convention. Article XVIII of the Covenant of the League of Nations.** A group of States may doubtless, through a general convention, prescribe a course of action to be pursued as a condition to the conclusion of binding agreements. Article XVIII of the Covenant of the League of Nations is illustrative of such an attempt. It was there announced that every treaty or international engagement entered into thereafter by any member of the League should be forthwith registered with the Secretariat and should as soon as possible be published by it. It was provided also that "no treaty or international engagement shall be binding until so reg-

---

American Court of Justice, September, 1916, *Am. J.*, XI, 181, 229; Comment on the case by Philip M. Brown, *id.*, 156; Republic of El Salvador *v.* Republic of Nicaragua, Central American Court of Justice, March, 1917, *id.*, 674, 730. See, also, documents in For. Rel. 1914, 953–969.

[3] See, in this connection, Ronald F. Roxburgh, International Conventions and Third States, London, 1917, §§ 23, 24, 25, and 71.

[4] See the action of President Wilson with respect to the reliance of Great Britain and France upon the Treaty of London of 1915, as a basis for the adjustment of the territorial limits of the Serb-Croat-Slovene Kingdom, and set forth in communications sent in his behalf to the British and French Governments, Feb. 10, and Feb. 24, 1920. For the correspondence touching the controversy, see *Congressional Record,* Feb. 27, 1920, LIX, 3779–3787. See Alfred von Verdross, "Forbidden Treaties in International Law," *Am. J.*, XXXI, 571.

istered."[1] The object of this provision was to deter the conclusion of secret agreements designed to frustrate the operation of the League.[2] It should be observed, however, that the article did not purport to render a treaty invalid that was not registered with the Secretariat. The disposition of members of the League frequently to agree that treaties to which they are a party shall become binding or operative or enter into force upon the exchange of ratifications, or at some other period that is permitted to precede registration,[3] and even to agree that registration shall follow the coming into force of the arrangement,[4] betokens a practical construction to the effect that registration is not regarded as a condition of validity.[5] Such action renders it unnecessary to enquire to what extent the form which Article XVIII assumed when incorporated in the Covenant reflected the exact design of those who were responsible for it, or to what extent either that design or the article that grew out of it failed to be in harmony with the practice that has grown up in relation to the matter of registration.[6] The

§ 491. [1] U. S. Treaty Vol. III, 3342.

According to the Report of Sub-Committee No. 5 of the First Committee of the Assembly of the League of Nations (1921), p. 167, the words "every treaty or international engagement" embraced any international engagement, whatsoever might be its nature, form, importance or duration, or the status of the officials who concluded it.

[2] See Memorandum approved by the Council of the League of Nations at Rome, May 19, 1920, concerning the registration of treaties as prescribed under Art. XVIII of the Covenant. League of Nations *Official Journal,* 1920, p. 154.

[3] See, for example, convention between the United Kingdom and China in relation to the rendition of Weihaiwei of April 18, 1930, of which ratifications were exchanged October 1, 1930, registration occurring on February 6, 1931, League of Nations Treaty Series, CXII, 49. See, also, commercial agreement between Roumania and the Croat-Serb-Slovene State, of August 4, 1930, which went into force on September 1, 1930, and of which the registration occurred on October 9, 1930, League of Nations Treaty Series, CVII, 253. A convention of commerce and navigation, concluded by Finland and Portugal, March 8, 1930, provided that the arrangement should come into force on the thirtieth day after the date on which the ratification of Finland had been notified at Lisbon. Registration was effected on August 20, 1930. A note in the League of Nations Treaty Series adverted to the fact that the treaty had come into force on May 7, 1930. League of Nations Treaty Series, CV, 441, 443. See, also, convention concerning Legal Proceedings in Civil and Commercial Matters, concluded by Great Britain and Spain, June 27, 1929, and of which ratifications were exchanged April 9, 1930, League of Nations Treaty Series, CI, 375. The foregoing conventions have been brought to the attention of the author by Mr. James Simsarian whose unpublished paper on Article XVIII of the Covenant contains a thorough discussion of the interpretation and treatment thereof by members of the League.

The agreement on Aerial Navigation with a view to the Application of Article 144 of the Treaty of Saint-Germain-en-Laye, concluded by Austria, Great Britain, France, Italy and Japan, October 27, 1927, came into force February 18, 1929, and was registered April 27, 1934. League of Nations Treaty Series CXLVIII, 265.

The International Telecommunication Convention, concluded at Madrid, December 9, 1932, announced in Article 40 that it would come into force on January 1, 1934, and did so. Registration took place August 30, 1934. League of Nations Treaty Series, CLI, 5.

[4] According to Article 21 of the Convention for the Regulation of Whaling, concluded at Geneva Sept. 24, 1931: "The present Convention shall be registered by the Secretary-General of the League of Nations as soon as it has entered into force." (U. S. Treaty Vol. IV, 5372, 5377.)

[5] A Report of the Committee appointed by the Assembly in 1921, to study the scope of Article XVIII, reached somewhat rigid conclusions concerning the matter of registration that did not prove to be prophetic of the character of practices that developed in the succeeding years. League of Nations, V, Legal, 1921–1925, Doc. No. C.256.1921.V.A.C.31. See Manley O. Hudson, "The Registration and Publication of Treaties," *Am. J.,* XIX (1925), 273, 282–283. See Report of MM. Adatci and Charles De Visscher to the Institute of International Law, 1923, *Annuaire,* XXX, 22, 47–49.

[6] In relation to the preparation of Article XVIII see David Hunter Miller, The Drafting of the Covenant, New York, 1928, Vol. II; also, documents in David Hunter Miller, My Diary at the Conference of Paris, 1924.

failure on the part of members of the League of Nations to register at any time with the Secretariat a treaty which they have concluded is not to be reconciled with what deference for the terms of the Covenant would appear to demand. It is not sought, however, to discuss the legal effect of such failure.[7]

Through an arrangement effected by an exchange of notes between the Acting Legal Adviser of the Secretariat of the League of Nations and the American Consul at Geneva, signed January 22 and 23, 1934, provision was made for the registration of treaties and other international agreements of the United States with the Secretariat of the League of Nations.[8] It was declared that the decision by the United States to adopt the practice of such registration would not involve acquiescence by the United States in the stipulation of Article XVIII of the Covenant "that no instrument shall be binding until registration."[9] It has been announced that since 1925, the Department of State has sent to the Secretariat of the League copies of treaties to which the United States has become a party; and that these are published in the League of Nations Treaty Series, but that treaties prior to 1934, were not regarded as "registered."[10]

3

§ 492. **Capacity to Contract.** The power of a State to enter into a valid engagement with another may be impaired by reason of the dependence of the former upon an independent State.[1] The control exercised by the latter over the foreign relations of the dependent may serve to preclude it from making agreements in its own behalf, or the terms of the arrangement fixing the status of dependency may limit the field within which the dependent is free to contract.[2] Nevertheless, such a limitation does not necessarily imply that treaties at variance with it which are concluded by the dependent entity are without any legal value. It has reference rather to the right of the superior, by timely action, to step in and frustrate by its intervention the contractual achievements of the dependent that are contemptuous of its status as well as of the rights of the protector derivable from it. There may, however, be no interference by such superior or protector with the agreement-making endeavors of the dependent.

[7] See Manley O. Hudson, "Legal Effect of Unregistered Treaties in Practice, Under Article 18 of the Covenant," *Am. J.*, XXVIII, 546.

[8] U. S. Executive Agreement Series, No. 70; also, Dept. of State Press Releases, Feb. 3, 1934, 62.

[9] It was added that "such registration would result in publication of treaties and executive agreements between the United States and Members of the League and likewise between the United States and other States not Members of the League in the 'League of Nations Treaty Series' in the same category and with the same promptitude as treaties registered by the Member States."

[10] A statement in Hackworth, Dig., V, § 477. See also other documents there published or cited.

§ 492. [1] Hall, Higgins' 8 ed., § 108.

[2] Thus Cuba, following its constitutional declaration of June 12, 1901, and its treaty with the United States of May 22, 1903, embodying the so-called Platt Amendment, relinquished throughout the life of that agreement capacity to conclude a valid treaty with any foreign power which would impair or tend to impair Cuban independence, or which would permit such power to obtain by colonization, or for military or naval purposes, or otherwise, lodgment in, or control over, any portion of the Island. See Articles I and II, Malloy's Treaties, I, 363. Also, *supra*, § 19.

Such inaction is likely to be invoked by outside States that have concluded treaties with the dependent, in support of the contention that the provisions thereof are worthy of respect.[3] In a word, the weakness of a treaty attributable to the dependent status of a contracting party is generally such as to render voidable rather than void commitments with States other than the protector. The practice of nations seemingly supports this conclusion.

In the course of the nineteenth century, some States paid no nice regard to the condition or relationship of dependency upon Turkey of certain backward countries with which treaties were sought and concluded. Protests when made by or in behalf of the superior or suzerain were unavailing.[4] In one instance none were made until years after the consummation of the agreement with the dependent.[5] The relationship of Bulgaria to the Sultan of Turkey roughly and perhaps vaguely set forth in the Treaty of Berlin of 1878, did not serve greatly to deter the former from concluding various treaties with numerous States. Such few objections as were raised by the suzerain generally proved to be ineffectual.[6] There were instances also where an oriental protector or superior found itself obliged to acquiesce in an agreement concluded by its dependent with a foreign power and by such process to relinquish the right thereafter to interfere.[7]

Looseness of the tie connecting the superior with the inferior, manifested by the inability of the former to maintain the subordination of the latter, is bound in the long run to obscure and efface incapacity to conclude international agreements. Moreover, that incapacity gradually disappears beyond the horizon as the dependent State strides forward and finally attains its goal of independence. Where, however, the relationship of dependence is clearly defined and duly maintained as well as sponsored by the superior or protecting State, it is unlikely that a foreign power will at the present time attempt, without the consent of the superior, to conclude a treaty with its dependent embodying provisions which it is known that the latter lacks the full capacity to bind itself to observe.

In the negotiation of treaties with dependent States the burden rests upon the other contracting parties to ascertain the scope of the agreement-making power retained by the former, as well as the mode by which it is to be exercised. Those parties assume the risk of obtaining provisions that a superior, if alive

[3] See Instruction of the Department of State, Sept. 3, 1908, to the American Minister at Constantinople, relative to the position of Turkey in respect to the treaty between the United States and Tripoli, of June 4, 1805, State Department, Numerical File No. 901, *Am. J.*, XXVI, 133, Hackworth, Dig., V, § 485. Also, *infra*, § 543.

[4] The treaty between France and Tunis of May 13, 1881, is an instance. See, in this connection, documents in Brit. and For. St. Pap., LXXIII, 437–491. Also, Gabriel Effendi Noradounghian, *Recueil d'Actes Ottoman*, IV, 285–292.

[5] In relation to the conclusion of the treaty between the United States and Tripoli, of June 4, 1805, see Instruction of the Department of State to the American Minister at Constantinople, Sept. 3, 1908, State Dept. Numerical File No. 901, Hackworth, Dig., V, § 485.

[6] See, for example, Bulgaria's participation in the First Hague Peace Conference, despite Turkish opposition. *Rev. Gén.*, XV, 527–528.

[7] See agreement between France and Siam, of July 15, 1867, whereby the latter recognized the French protectorate over Cambodia, Brit. and For. St. Pap., LVII, 1340; also preliminary convention between France and China, of May 11, 1884, whereby the latter agreed to recognize treaties concluded or to be concluded between France and Annam, *id.*, LXXV, 1110; also arrangement between Great Britain and China, of April 27, 1906, *id.*, XCIX, 171, whereby the latter confirmed a convention on boundaries between Great Britain and Tibet, of Sept. 7, 1904, *id.*, XCVIII, 148.

to its rights and interests, may both regard as voidable and encounter no difficulty in rendering valueless, at least if recourse be had to an arbitral forum.[8]

4

§ 493. **Manifestation of Assent. Compulsion.** States, like individuals, must manifest assent to the terms of so-called agreements proposed to them for acceptance. The perfecting of the contractual relationship awaits such manifestation. The appropriate and sufficient expression of it depends in part upon the form or channel through which it is sought to bind the parties. The proposed arrangement may be an informal contract or a formal instrument embracing one deemed to be a treaty.

When the wrongful act of one person compels a manifestation of apparent assent by another to a transaction without his volition, there is said to be an instance of duress. It is said to exist also when any wrongful threat of one person by words or other conduct "induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement." [1] The fact of presence of duress renders a transaction at private law either void or voidable.[2]

There is deemed to be slight opportunity for the application of this principle at least in some stages of the process of concluding formal agreements between States. Acts which are regarded as requisite for the perfecting of the contractual relationship may not be committed to negotiators and, in the case of a treaty, are not apparent in the mere signature of the instrument. Thus the wrongful compelling of such individuals, through personal intimidation, to sign a treaty would not at the present time possess or attain much significance when the State which they represent retains the right of ratification, and does not purport to bind itself until ratifications have been exchanged. If, however, in a particular case, the power to perfect an agreement in behalf of the State were lodged in a plenipotentiary who was compelled through fear of injury to his person to accept its terms, his principal would doubtless thereby acquire the right to avoid the contract.[3] It might fairly be contended that the authority conferred upon him

[8] See A. D. McNair, Constitutional Limitations Upon The Treaty-Making Power, 1933, 3. Declared that author in 1938: "Moreover, it is believed that it is the duty of a State when contracting with a dependent State to satisfy itself as to the scope of the latter's treaty-making power and the procedure prescribed for its exercise, and that a State concluding in ignorance with a dependent State a treaty which is in excess of the latter's powers has no legal redress against the latter or its dominant State." (The Law of Treaties, British Practice and Opinions, 146.)

"No decision of an international tribunal has been found which declares that a treaty is invalid for a lack of capacity of a party which had previously placed itself under obligation to another State agreeing not to enter into such a treaty. The two decisions of the Central American Court of Justice in Costa Rica *v.* Nicaragua and El Salvador *v.* Nicaragua are not to be placed on this ground." (Comment on Art. 3 of Harvard Draft Convention on the Law of Treaties, *Am. J.*, XXIX, *Supplement*, 709.)

§ 493.[1] Restatement of the Law of Contracts as adopted and promulgated by the American Law Institute at Washington, D. C., May 6, 1932, II, § 492.

[2] *Id.*, §§ 494 and 495.

[3] Bonfils-Fauchille, 8 ed., § 818; S. B. Crandall, Treaties, 2 ed., § 5; Hall, Higgins' 8 ed., § 108; McNair's 4 ed. of Oppenheim, I, §§ 499–500; Dana's Wheaton, § 267; Woolsey, 6 ed., § 104.

to bind his country was not unlimited, and not designed to be exercised save under conditions when he was free from such compulsion.[4]

A State may compel another to exercise, contrary to its volition, the full measure of its agreement-making power in order to accept a proffered treaty, or may by threat induce it to do so under an influence of a fear sufficient to preclude the exercise of free will or judgment, and may employ such threat with the expectation that it shall so operate. In such situations it may, however, in fact, be denied that the compulsion or threat is wrongful and that the situation is exactly analogous to one of duress in private law. Belligerent States do not in practice admit that the pressure brought to bear upon a defeated foe to accept the proffered terms of treaties of peace is wrongful, or weakens the validity of acceptance.[5] The United States would doubtless not admit that the compulsion applied to Haiti as a means of causing that Republic to accept the treaty concluded on September 16, 1915, was wrongful.[6] Nor are contracting powers, themselves the authors of provisions which they have succeeded in compelling others to accept, disposed to permit any question touching the possible effect of compulsion upon the matter of validity to be adjudicated in any international forum. Nevertheless, the political status of a country claiming independent statehood must, on principle, be deemed to be impaired, whenever it is forced against its own will, to forego the right to reject the terms of an unacceptable convention.

[4] According to Art. 32 of Harvard Draft Convention on The Law of Treaties: "(a) As the term is used in this Convention, duress involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State; provided that, if the coercion has been directed against a person signing a treaty on behalf of a State and if with knowledge of this fact the treaty signed has later been ratified by that State without coercion, the treaty is not to be considered as having been entered into by that State in consequence of duress.

"(b) A State which claims that it has entered into a treaty in consequence of duress may seek from a competent international tribunal or authority a declaration that the treaty is void.

"(c) Pending agreement by the parties upon and decision by a competent international tribunal or authority, a party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

"(d) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority." (*Am. J.*, XXIX, *Special Supplement*, October, 1935, 663.)

[5] The Treaty of Versailles, of June 28, 1919, U. S. Treaty Vol. III, 3329, is illustrative.

It may be doubted, however, whether the belligerent right is unlimited. The exercise of the power to cause a prostrate foe to accept terms which international law itself forbade the victor to impose might on principle be regarded as invalid. Thus, were that law to forbid a belligerent to acquire by sheer conquest the territory of its enemy, a treaty that registered a transfer contrary to the volition of the grantor might be regarded as ineffectual to deprive it of its rights of sovereignty. The relation of the law to the thing sought to be accomplished, whether by subjugation or through the instrumentality of an agreement under duress, would be decisive of the result.

It should be observed that the provision of Art. 116 of the Treaty of Versailles, whereby Germany accepted "definitely the abrogation of the Brest-Litovsk Treaties and all other treaties, conventions and agreements entered into by her with the Maximalist Government in Russia" (U. S. Treaty Vol. III, 3390), is not to be attributed to a sense that international law had been violated by the pressure which Germany had applied to its foe, but rather to the power of the so-called Principal Allied and Associated Powers to cause a relinquishment of what they sought to have their enemy relinquish.

". . . Even though a vanquished nation is in effect compelled to sign a treaty, I think that in contemplation of law its signature is voluntary." (Memorandum of the Solicitor for the Dept. of State, Mr. Nielsen, June 30, 1921, Hackworth, Dig., V, § 485.)

[6] See, Haiti, *supra*, § 22; Intervention, Haiti, *supra*, § 82A; also *supra*, § 489.

Interference with the right of rejection is believed to constitute a form of intervention, demanding by way of justfication such a showing as is acknowledged to be requisite whenever recourse is had to such action. Intervention by treaty remains a grim and tragic feature of the international society because the technical consent that is wrung from a supposedly independent State is accepted as a manifestation of the national will, and a fiction is employed to sustain the contention that there has been no impairment of political independence. The practice, moreover, weakens respect for the sanctity of treaties, as well as for principles to which the international society avows attachment.[7]

It should be observed, however, that it is the character of what is sought to be done, rather than the quality to be attached to the instrument through which achievement is sought to be effected, which is the chief concern of the international society. If the law which governs its membership limits the freedom of a belligerent in exacting terms of peace from a prostrate foe, or if it gradually forbids transfers of territory that are contemptuous of the wishes of the inhabitants, or purports to deny to a State, possibly by reason of the nature of conduct to which it has had recourse, the privilege of wringing particular concessions from a neighbor, it should not be difficult to establish the invalidity of the instrument that was utilized to facilitate and give expression to the accomplishment of the illegal designs. The practical problem of the present time concerns, therefore, the legal effect of compulsion upon achievements attributable to it, rather than the legal quality of agreements that are utilized in order to make compulsion effective.[8]

5

§ 493A. **Error.** Erroneous assumptions as to the existence of facts may lead contracting States to agree to provisions which are attributable to those assump-

[7] "If international society is to survive, it must evolve some machinery for stigmatizing as void treaties which are concluded as the result of force or undue pressure or in breach of the existing obligations of the parties." (A. D. McNair, "Constitutional Limitations Upon the Treaty-Making Power," 1933, 15.)

". . . But the 'sanctity of treaties' will never be more than a cant phrase so long as the law is too weak to deny the validity of a treaty entered into under coercion, or to lay down canons of international public policy, comparable to those of municipal law, which shall be conditions of any treaty's validity *ab initio*." (J. L. Brierly, Law of Nations, 2 ed., 208.)

According to Art. I of the treaty of friendship between Russia and Turkey of March 16, 1921: "Each of the contracting parties agrees not to recognise any peace treaty or other international agreement imposed upon the other against its will." (Brit. and For. St. Pap., CXVIII, 991.)

According to Art. II of the treaty of friendship between Persia and Russia of Feb. 26, 1921: "The R.S.F.S.R. expresses its reprobation of the policy of the Tsarist Governments of Russia, which, on the pretext of ensuring the independence of the peoples of Asia, concluded, without the consent of the latter, treaties with European Powers, the sole object of which was to subjugate those peoples. . . . It regards as null and void the whole body of treaties and conventions concluded by the former Russian Government with third parties in respect of Persia or to the detriment of that country." (Brit. and For. St. Pap., CXIV, 901.)

[8] See Equality and Similarity of Independent States, *supra*, § 11; The Principle of Self-Determination, Some Conclusions, *supra*, § 109E; Agreements Between States, *supra*, §§ 489 and 490.

See, also, Art. 11 of Convention on Rights and Duties of States, concluded at the Seventh International Conference of American States, at Montevideo, Dec. 26, 1933, U. S. Treaty Vol. IV, 4807, 4809.

See Achievements in Termination of War, *infra*, § 923.

tions and which in terms manifest the reliance placed upon them. This has been the case where, for example, incorrect geographical suppositions due to the fanciful portrayals of ill-informed cartographers have resulted in agreements for the establishment of boundaries purporting to follow courses or positions of rivers which proved to be utterly false.[1] In such cases the common error has not been regarded as necessarily invalidating the arrangement, but rather as an element or circumstance to be heeded in interpreting the agreement after the error was disclosed; and it has not obscured or deterred the effort to ascertain the actual design of the parties at the time of contracting and of implications therefrom had they then been made aware of the truth.[2] In a word, the form of the text based upon the false assumption has not been permitted to compete on an equal plane with other evidence, intrinsic or extrinsic to the document, which revealed the actual thought of the contracting States in attempting to agree to a line of demarcation.

In general, however, as Professor Garner has declared: "if a treaty was based upon material error and created obligations for a party which it clearly would not have assumed if the real facts had been known to it before ratification, such party is not bound by the treaty." [3] Under such circumstances that party should be enabled, by taking timely and appropriate steps, to free itself from the obligation of further performance.[4]

Quite a different problem presents itself when it is sought to correct errors that have crept into the text of a treaty. No insurmountable difficulty presents itself when the common effort of the parties to eradicate an error precedes the final consummation of the agreement, especially where the error is of minor and perhaps typographical aspect.[5] Where, however, the error is of substantial character, the correction of which entails a change in or amendment of the text as it was presented to the Senate of the United States for its approval, the Government of the United States would deem it necessary to submit the corrected text to that body for its approval before taking the final steps that would serve to cause the agreement to be binding upon the United States.[6] If the

§ 493A. [1] See Geographical Evidence in Boundary Disputes, Maps, *supra*, § 151A.

[2] See United States *v.* Texas, 162 U. S. 1, 37–38. See The Interpretation of Treaties, The Attitude of the Supreme Court of the United States, Miscellaneous Considerations, *infra*, § 533E.

[3] Comment as Reporter on Art. 29 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 1129.

[4] Art. 29 of the Harvard Draft Convention on The Law of Treaties would make the enjoyment of that right dependent upon the declaration of a "competent international tribunal or authority" that the arrangement is not binding on the parties, yielding, however, to a party seeking such declaration the privilege of provisional suspension of the arrangement, under specified conditions. *Id.*, 663.

FRAUD. The author has seen no case of a treaty to which the United States has been a party where the attempt has been made to impugn the validity of the agreement on account of alleged wilful misrepresentation on the part of itself or of any other party. The matter of fraud is dealt with in Article 31 of the Harvard Draft Convention on The Law of Treaties, *id.*, 663, and Comment thereon, *id.*, 1144.

[5] See Mr. Kellogg, Secy. of State, to the Norwegian Minister at Washington, July 25, 1928, Hackworth, Dig., V, § 478.

[6] See, for example, procedure followed in correcting an erroneous reference to a date made in the convention for the Rectification of the Rio Grande, signed in behalf of the United States and Mexico on Feb. 1, 1933, as described in statement in Hackworth, Dig., V, § 478.

correction of an error involves a modification of a treaty after it has been ratified by the United States, even though it may not have become finally operative, the Government of the United States regards the matter of correction as an essentially amendatory task, and as one, therefore, that necessitates the fresh approval of the corrected text by those possessed of the constitutional privilege of participating in the making of treaties that are to bind the United States.[7] When an error is not sought to be corrected until after the treaty concerned has become operative, any textual modification for purposes of rectification would normally call for fresh approval (in the case of the United States) on the part of the Senate. Nevertheless, the triviality of particular errors may be such as to encourage a procedure which utilizes a common interpretation which serves to ignore them.[8]

6

§ 494. **Constitutional Limitations.** An independent State possesses the capacity to enter into international agreements that cover a vast field of action pertaining to objectives that are of infinite variety.[1] Such a State may, however, formally resolve through the medium of a constitution not to avail itself of the full measure of its capacity to contract and so strive to prevent itself from agreeing to accept classes of undesired undertakings. Again, by such means it may resolve that the authority to exercise the agreement-making function in its behalf shall be lodged in a specified agency, and that the agency shall follow a prescribed procedure when endeavoring to bind the principal.

In making such decisions and in taking such action a State finds itself unhampered by any requirement of international law other than by that which obliges each member of the international society not to render itself impotent to respond as it should to the duties which it owes to the other members thereof. Careful scrutiny of the scope of those duties may, however, warrant the conclusion that an independent State is not obligated, save as a consequence of an existing treaty, to agree to accept particular proposals. Thus it is not necessarily obliged by international law to agree, as through the instrumentality of a treaty, to do what the principles of that law may require it to do. So it happens that as a matter of fact, the self-imposed restrictions which some States have been disposed to establish through the instrumentality of written constitutions do not serve to interfere with, or necessarily retard the performance of international obligations; constitutional checks upon treaty-making thus

[7] "When the British Embassy pointed out certain errors in the French text of the Load Line Convention of July 5, 1930 (4 Treaties, etc. [Trenwith, 1938] 5287), which had already been ratified by the United States, the Department of State replied that it was without authority to make any alteration in the text of the convention as acted upon by the Senate and ratified by the United States." (Hackworth, Dig., V, § 478.) It may be observed that the convention was not proclaimed by the President of the United States until Jan. 5, 1933.

See also views of the Department of State communicated to the British Government in 1932, and in 1936, with reference to the inclusion in Regulation XIX annexed to the International Convention for Promoting Safety of Life at Sea, of a paragraph inadvertently omitted therefrom, as set forth in Hackworth, Dig., V, § 478.

[8] See illustrative documents in Hackworth, Dig., V, § 478.

§ 494. [1] "But the right to make binding obligations is a competence attaching to sovereignty." (Perry *v.* United States, 294 U. S. 330, 353.)

prove to be mere manifestations of an endeavor by the individual State to choose the pattern of its governmental life in the international community, and to regard the making of its choice as a domestic matter.

An independent State doubtless possesses power to agree to do many things which by its constitution it has resolved with itself not to agree to do. The exercise of that constitutionally-restricted residue of power may be effected by a repeal of the constitutional prohibition, or possibly in certain situations by recourse to some extra-constitutional (as distinguished from unconstitutional) procedure.[2] That effort may be made to employ either of these methods as a means of enabling a State to achieve by agreement what the provisions of its constitution seemingly forbid or deter is not, of course, decisive of the validity of agreements which it enters into in pursuance of its constitution without amending it, or without resorting to an applicable extra-constitutional procedure.

It is reasonable and necessary for the domestic courts of a country such as the United States to regard an unconstitutional treaty as void.[3] This circumstance causes the nature and extent of constitutional limitations in relation to treaty-making to become a matter of concern to foreign powers whenever they have occasion to conclude agreements with it. Doubtless those who in virtue of a constitution are possessed of authority to exercise the agreement-making function in behalf of a State must be deemed to be judges of the constitutionality of treaties which they essay to conclude; and this fact may encourage foreign negotiators to rely upon the opinions of those judges that provisions which they are prepared to accept are not unconstitutional. Nevertheless, in negotiating with a State where the final and authoritative decision as to the constitutionality of a treaty must await the conclusion of the highest domestic tribunal, as is true in the case of the United States, and where that fact must be presumed to be known to foreign contracting powers, there is brought home to them ample warning that that tribunal may in fact find occasion to pronounce a consummated treaty unconstitutional, and that if it does, the arrangement must be deemed to be without value.[4]

[2] See *infra*, § 501.

[3] "Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void." (Fuller, C. J., in Downes *v.* Bidwell, 182 U. S. 244, 370.) "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." (Swayne, J., in The Cherokee Tobacco, 11 Wall. 616, 620.)

Also Mr. Blaine, Secy. of State, in For. Rel. 1881, 335, 337. See, also, The Treaty-making Power in Various Countries: a collection of memoranda concerning the negotiation, conclusion, and ratification of treaties and conventions, with excerpts from the fundamental laws of various countries, Department of State, 1919.

[4] According to Art. VI of the convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, of Jan. 23, 1924, U. S. Treaty Vol. IV, 4225: "In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded." The reason for this provision was that inasmuch as the convention purported to permit what the Volstead Act forbade in allowing the introduction into American territory of intoxicating liquors under seal, the fear arose in some quarters lest the treaty might be construed as permitting what even the

The constitutional or fundamental law of a contracting State may in terms give sharp warning to all concerned as to objectives not to be dealt with, or agencies not to be employed in treaty-making, or modes of procedure that are to be avoided. Disregard of them may not be excusable on the part of a foreign contracting party. That law may, however, also contain inhibitions that are not apparent even to those who negotiate. The provisions of an agreement may thus contemplate the performance of acts or the use of methods which a foreign contracting party may, after diligent effort to inform itself as to the requirements of the law, have no reason to suppose to be at variance with any constitutional restriction. In such case, there may be room for the contention that the other contracting State which proposed or willingly accepted the agreement, and even formally declared it to be constitutional, is not in a position to plead invalidity in justification of non-performance, or in defense of a claim for losses sustained in consequence of a failure to perform.[5] Thus, it may be said that where a contracting State holds out to another assurance that the terms of a proposed agreement are not violative of the fundamental laws of the former, and does so through an agent who is supposedly conversant with the requirements thereof by reason of the character of his connection with the particular department of his government to which is confided the management of foreign affairs, and when no written constitution is involved, and no published and authoritative instrument notoriously proclaims an opposing view, there is ground for the conclusion that the contracting State holding out such assurance is not in a position to deny the validity of the agreement which has been concluded in pursuance thereof.[6]

---

Eighteenth Amendment to the Constitution itself forbade. This view was not shared by the Secretary of State. Nevertheless, he thought it wise to have it understood on both sides that should the convention be obstructed in its operation by judicial or legislative action, it should be deemed to lapse, and the pre-existing rights of the contracting parties be automatically revived. See *supra*, §§ 235A and 235B.

[5] According to Article 21 of the Harvard Draft Convention on The Law of Treaties: "A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty." (*Am. J.*, XXIX, *Supplement*, October, 1935, 661.) See discussion by Prof. J. W. Garner, Reporter, *id.*, 992–1009.

The Permanent Court of International Justice, in the course of its judgment of April 5, 1933, concerning the Legal Status of Eastern Greenland, concluded that a declaration by M. Ihlen, the Norwegian Minister for Foreign Affairs, to the Danish Minister, July 22, 1919, to the effect that "the Norwegian Government would not make any difficulty in the settlement of this question," being a reply given by the Minister for Foreign Affairs on behalf of his Government in response to a request of a diplomatic representative of a foreign Power, "in regard to a question falling within his province," was binding upon the country to which the Minister belonged. (Publications, Permanent Court of International Justice, Series A/B, No. 53, 71.) Declares Professor Garner: "Apparently, if the Court had been convinced that the Norwegian Minister for Foreign Affairs had not been legally competent to make the declaration of July 22, it would not have held the declaration to be binding on Norway." (*Am. J.*, XXIX, *Supplement*, October, 1935, 1007.)

[6] See Walter Hollis, "The International Effect of 'Unconstitutional' Treaties," Special Report, Columbia University School of Law, 1936.

See also A. D. McNair, The Law of Treaties, British Practice and Opinions, 1938, 38–46; Introductory note by that author in Ralph Arnold, Treaty-Making Procedure, 1933; J. Mervyn Jones, "Constitutional Limitations on the Treaty-Making Power," *Am. J.*, XXXV, 462.

Declared Secretary Stimson, on Dec. 9, 1931, in a communication to the President of Nicaragua, who had suggested that the Bryan-Chamorro Nicaraguan-canal treaty of 1914 was

Through an agreement signed by the American Secretary of State and the Danish Minister at Washington, on April 9, 1941, and in pursuance of an exchange of notes between those officials (of April 7 and 9, 1941), there was yielded to the United States the right to construct, maintain and operate landing fields, seaplane facilities and radio and meteorological installations in the island of Greenland.[7] The arrangement which made reference to the obligations of the United States under the Act of Habana of July 30, 1940, announced its acceptance of "the responsibility of assisting Greenland in the maintenance of its present status."[8] The Government in Denmark was, at the time of the agreement, "not in a position to exercise sovereign power over Greenland" while the existing military occupation of Denmark by German forces continued.[9] The Danish Government, repudiating the action of its Minister in Washington, denied the validity of the agreement.[10] It is not apparent how that officer in the then existing circumstances could have been deemed to possess authority to bind the Danish sovereign to yield to the United States the privileges in Greenland which the arrangement purported to confer. Nor was there reason for the United States to assume that the Government in Denmark would be permitted by the German occupant of its European domain to approve of a concession which would be sharply at variance with German interests.[11] Perhaps the chief importance of the agreement was the circumstance that it registered some Danish approval doubtless shared by the local rulers of Greenland, of the readiness of the United States to undertake the maintenance of that Island as an area inseparably connected with the common defense of the Western Hemisphere, and as such, within the purview of the Monroe Doctrine. Whether the United States required, in point of law, an agreement with the territorial sovereign of Greenland as a condition precedent to the establishment of appropriate bases within the Island, raises another question which is not discussed.

---

violative of the Nicaraguan Constitution: "To discuss at this time the question of the constitutionality of the Canal Treaty of August 5, 1914, seems to me of doubtful utility. It is self-evident that the provisions of this treaty were not regarded by the Nicaraguan Government which negotiated it as being in conflict with the Constitution. However, this question of the constitutionality of the treaty is, so far as Nicaragua is concerned, clearly one for the appropriate authorities of your country to deal with. . . . I am confident that when and if the United States Government decides to exercise the option granted it under the Treaty, the Government of Nicaragua will not fail to take whatever action may be considered necessary on its part to insure the proper realization of the objectives of the Treaty." (Hackworth, Dig., V, § 485.)

[7] Dept. of State Bulletin, April 12, 1941, 445, and 447.
Also U. S. Executive Agreement Series, No. 204.

[8] Art. 1.

[9] Note of Secy. Hull to the Danish Minister at Washington, April 7, 1941, Dept. of State Bulletin, April 12, 1941, 447.

[10] See the Danish Minister at Washington, to Mr. Hull, Secy. of State, April 13, 1941, Dept. of State Bulletin, April 19, 1941, 470.

[11] See Herbert W. Briggs, "The Validity of the Greenland Agreement," *Am. J.*, XXXV, 506.

## 7

## CONSTITUTIONAL LIMITATIONS OF THE UNITED STATES

### a

§ 495. **Provisions of the Constitution.** The Constitution of the United States declares that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;" [1] also, that "no State shall enter into any Treaty, Alliance, or Confederation;" [2] and that "no State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." [3] It is announced that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [4]

### b

§ 496. **Limitations of the Agreement-Making Power of the United States as a Whole.** When the United States came into being it must be assumed that the State as a whole acquired automatically the full power to conclude agreements which was possessed by other independent States. "As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency — namely, the Continental Congress, composed of delegates from the thirteen colonies." [1] In the Union there existed, as an attribute of its sovereignty, the right to enter into international agreements which was no narrower in scope than that enjoyed and asserted by France or Great Britain.[2]

§ 495. [1] Art. II, Section 2, paragraph 2.
[2] Art. I, Section 10, paragraph 1.
[3] Art. I, Section 10, paragraph 3.
Concerning the restriction on States set forth in Art. I, Section 10, see documents in Hackworth, Dig., V, § 464.
[4] Art. VI, paragraph 2.

§ 496. [1] Mr. Justice Sutherland, in the opinion of the Court in United States *v.* Curtiss-Wright Export Corporation, 299 U. S. 304, 316.
[2] *Id.* The claim to statehood for the new entity and also its capacity to conclude treaties were asserted in the final paragraph of the Declaration of Independence of July 4, 1776, by "the Representatives of the United States of America, in General Congress, Assembled." That the same document pointed to a federated union of which the several members might claim a voice in the making of treaties, did not lessen the significance of the assertion. To the world there was announced the birth of a new State possessed of the usual attributes of statehood embracing the capacity to enter into agreements. The Congress quickly took steps to enable the new Republic to avail itself of that capacity by issuing instructions in September, 1776,

The inquiry arises concerning the extent to which, through the adoption of the Constitution, the United States undertook to restrain itself from agreeing to do or not to do particular things. In a broad sense, this inquiry does not concern the scope of the privilege confided to an agency of the nation such as the President with the aid of the Senate to conclude a treaty in its behalf; and it is obviously unrelated to problems pertaining to the manner and form of contracting. The question is rather concerned with the character or content of agreements which the United States itself may or may not properly conclude.

Discussions of the matter have oftentimes been confused because of the use of the word "power" or of the phrase "treaty-making power," in reference to

---

to commissioners appointed to obtain a much-desired treaty with France. (Secret Journals of the Acts and Proceedings of Congress, II, 27.) The Articles of Confederation agreed to by the Congress in November, 1777, and signed on July 9, 1778, which was declared to be "in the third year of the independence of America," did not become operative until March 1, 1781. They contained a delegation of authority to the federal agency to exercise the treaty-making function in behalf of the nation. Yet the terms of the grant specified a field of treaty-making in which "the United States in Congress assembled" should not enter. It was declared in Article IX that "no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." (It was also provided in Article VI that "no State without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any king, prince or State.") This limitation marked a design not to permit the federal agency to exercise its treaty-making function with respect to all matters in which the nation as a whole obviously possessed the power to contract. Before the adoption of the Articles of Confederation, the Congress had proceeded to conclude and also to ratify two treaties with France, as well as an "Act Separate and Secret Reserving Right of King of Spain to Agree to the Foregoing Treaties," which were signed on February 6, 1778, and ratified by the Congress May 4, 1778. (Malloy's Treaties, I, 468, 479, and 482.) See James Brown Scott, "Treaty-making under the Authority of the United States," *Proceedings,* Am. Soc. Int. Law, 1934. 2. Certain other treaties were concluded and perfected prior to the adoption of the Constitution in 1789. In the course of the interval prior to that event, the opinion was doubtless widespread that authority to exercise the agreement-making function in relation to all of the matters concerning which the Republic might be deemed to have the capacity or power to contract called for the consent of the several States which constituted the Union. It is not necessary to discuss the question whether or to what extent the new entity — the United States of America — could then avail itself of its capacity or power to contract without that consent, or whether that power was in reality a divided one. It is perhaps significant, however, that from the birth of the nation in 1776, until the adoption of the Constitution, thirteen years later, no American commonwealth concluded a treaty with any foreign State. Nevertheless, it was highly desirable that through the instrumentality of the Constitution the federal agency should be permitted to exercise and control the treaty-making function in such a way as to enable it to conclude in behalf of the nation any agreement which the State as a whole possessed the capacity to accept. The terms of that instrument disclosed, in contrast to those contained in the Articles of Confederation, respect for such a design. At least they contained no intimation that the grantee of the delegated authority to exercise the agreement-making function for the nation might not use it in relation to any matter in respect to which the United States as a whole did not through or by the terms of the Constitution purport to incapacitate itself to contract.

In a word, with the coming into being of the new State as a member of the international society there was necessarily to be found in it the broad capacity to contract that was an attribute or incident of its statehood. When through the slow development of its fundamental law final provision was made for the enjoyment of that capacity by clothing a particular agency with authority to conclude treaties in terms that did not intimate what the agency as such could or could not constitutionally do, it became extremely difficult to support the proposition that the authority of the agent was restricted by considerations other than those which constituted a self-imposed limitation upon the principal, or to maintain that the United States had placed itself in a position such that it could not, through the good offices of the treaty-making agent, bind itself to accept any arrangement which it had not itself relinquished the capacity or power to conclude.

two distinct things — the capacity of the United States to contract with other States, and the authority of the Federal Government to act in behalf of the nation.[3] The former, being a normal incident or attribute of independent statehood, perhaps not ineptly referred to as the agreement-making power of the United States as a whole, was inherent in the nation when it entered upon its life as a State and was a possession which although subject to restraint through the fundamental law, was not susceptible to delegation. The latter, pertaining to the exercise of a function, was a possession susceptible to delegation, and was in fact delegated. The courts have oftentimes been seemingly unaware of the distinction, and, accordingly, have not indicated whether, in adverting to constitutional limitations, it was sought to make reference to the former, or to the latter, or to both.[4] Yet the language of the Constitution proclaiming as the supreme law of the land treaties made "under the authority of the United States" in contrast to laws of the United States made "in pursuance of" that instrument, suggests the importance of the distinction and justifies respect for it. It simplifies, moreover, the tests to be employed in determining what the Republic may itself constitutionally agree to do. It points, moreover, to the irrelevancy of a test that introduces the matter of the delegation of authority to function, in passing upon the extent to which the capacity of the nation to contract has been fettered by a self-imposed restriction attributable to the adoption of the Constitution. It must be constantly borne in mind that in judging of the constitutionality of

[3] Declared Mr. Justice Clifford, in the course of the opinion of the court in Holden *v.* Joy, 17 Wall. 211, 242–243: "Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, and inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."

[4] When Chief Justice Waite declared, in the opinion of the court in Baldwin *v.* Franks, 120 U. S. 678, at 682, "that the treaty-making power has been surrendered by the states and given to the United States, is unquestionable," he was referring obviously to the authority to exercise the treaty-making function that had been delegated through the Constitution, as did also Mr. Justice Swayne when, in the opinion of the court in the case of Hauenstein *v.* Lynham, 100 U. S. 483, at 490, he said: "We have no doubt that this treaty is within the treaty-making power conferred by the Constitution." Again, when Mr. Justice Holmes, in the opinion of the court in Missouri *v.* Holland, 252 U. S. 416, declared at 432, that "by Article II, § 2, the power to make treaties is delegated expressly," he was obviously referring to the authority to function in behalf of the nation. See, also, Madison, in 3 Elliott's Debates, 514.

Mr. Justice Field may have been referring, however, to the capacity of the nation to contract when, in the opinion of the court in Geofroy *v.* Riggs, 133 U. S. 258, at 266, he said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear." Likewise, Chief Justice Hughes appears to have been referring to that capacity when in the course of the opinion of the court in the case of Santovincenzo *v.* Egan, 284 U. S. 30, at 40, he said: "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of the property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield." Yet the learned Chief Justice said also (in the sentence preceding the one quoted): "There can be no question as to the power of the Government of the United States to make the Treaty with Persia or the Consular Convention with Italy," and in so expressing himself he may have had reference to the authority of that Government to function as the agency of the nation.

a particular agreement, those possessed of authority to exercise the agreement-making function in behalf of the nation are usually concerned with the inquiry concerning the restriction of the capacity of their principal, rather than with one touching the scope of their own authority.

There must be great reluctance to impute to the framers of the Constitution a design to fetter the United States in such a way as to deprive it of the power or capacity to participate in the regulation by treaty of matters so dealt with by other States as a normal and common incident of international intercourse. Such an inference is not lightly to be deduced from an instrument making provision for the conclusion of agreements and referring in terms to no classes of them which should be deemed to be forbidden. It would be difficult to establish that there was contemplated any restriction upon the power of the nation to contract except in so far as it might be utilized to achieve an end deemed to be forbidden by the terms of the Constitution, or by implications necessarily to be deduced from them. The exception is doubtless a real one, and calls for close examination. As Calhoun once declared, the nation "can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution-making power, or which is inconsistent with the nature and structure of the Government." [5] It may be neither difficult nor unscientific to point to a few limitations which this statement inspires, and of which any disregard is highly improbable.[6] It is of greater moment, however, to observe the extent to which the President with the advice and consent of the Senate, has in the course of treaty-making in behalf of the nation, concluded that the capacity of the United States was unrestricted. In such conclusions, revealed in the texts of an extended series of instruments, is to be found illuminating evidence.

### c

### Matters Pertaining Directly to Affairs of States of the Union.

#### (1)

§ 497. **The Principle Involved.** The question presents itself whether the United States, in consequence of the adoption of the Constitution, relinquished the power or capacity to conclude a treaty pertaining to matters regarded, in a domestic sense, as local to a State of the Union which the Congress could not control, and imposing restraints upon the freedom of a State within its ter-

[5] Works of John C. Calhoun, I, 204.

[6] "A conflict between an international agreement and the Constitution may arise expressly in two cases: (1) where the international agreement is divestitive (a) of any right given or secured to an individual under the Constitution; or (b) of any duty imposed by the Constitution on any branch of the government; or (c) of any power given by the Constitution to any branch or organ of government, including the States, when such power is under the Constitution exclusive and not subject to change by the agency making the international agreement; (2) where the international agreement is investitive (a) of a power not possessed by the Federal Government under the Constitution; or (b) of a right, power, duty, or liability on the part of any person or government body which is denied or prohibited by the Constitution." (Stanley N. Ohlbaum, unpublished report on Constitutional Limitations upon the Content of International Agreements concluded by the United States, Columbia University, 1934.)

ritorial limits.[1] The provisions of that instrument fail to indicate that the existence of such a local interest is necessarily decisive of the solution of the problem. The closeness of the connection of a particular person or thing or activity with the individual State, and the exclusiveness, in a domestic sense, of its privilege of dealing therewith, are not necessarily incompatible with the existence, also, of an essentially international interest in the treatment of such an objective. Accordingly, whenever the United States has shared with a foreign country the view that such an interest existed of which the preservation or advancement demanded the imposition of a restriction within the territorial limits of both sovereigns, the former has been disposed to regard itself as not without power to apply an appropriate restraint, regardless of the fact that by so doing it would check the freedom of an American commonwealth.[2] An extensive series of treaties pertaining to a variety of matters is illustrative. Certain considerations that have been influential in molding the opinion which has proved to be responsible for what has taken place should be noted. These have been the absence of provisions in the Constitution purporting to limit the authority of the federal agency to function according to the character of the objectives sought to be effected, or according to the intimacy of the relationship between the matter to be dealt with and the peculiar interest therein of a particular commonwealth; [3]

§ 497. [1] If it be admitted that the federal agency is unfettered unless its principal, the United States of America, is incapacitated, the problem resolves itself into one pertaining simply to the scope of the constitutional power of the latter.

[2] Otherwise, as has oftentimes been observed, the Republic would find itself prevented by the terms of its own Constitution from concluding engagements of the most ordinary kind, howsoever advantageous to the nation. In such case the United States would be driven to resort to some essentially extra-constitutional procedure in order to avoid its own paralysis.

Declared Mr. Justice Swayne, in the course of the opinion of the court in Hauenstein *v.* Lynham, 100 U. S. 483, 490: "If the national government has not the power to do what is done by such treaties [enabling aliens to take and dispose of lands in the States of the Union], it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const., Art. I, sect. 10."

[3] According to the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"The question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

"To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, Section 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. . . .

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not to be lightly assumed that, in matters requiring national action, 'a power which must belong to and reside somewhere in every civilized government' is not to be found." Holmes, J., in Missouri *v.* Holland, 252 U. S. 416, 432, 433.

It is not believed that this Amendment sheds light on the solution of the question. "The general terms in which the treaty power is given to the United States seem to delegate, as against the States, the power to act upon any subject-matter within the usages of treaty making, and so the Tenth Amendment by its own terms is inapplicable." (James Parker Hall, in *Proceedings,* Academy of Pol. Sc., VII, No. 3, Part 2, 548, 549–550.)

the absence of provision through that instrument for the participation by the States in the conclusion of treaties; [4] and the assumption that through the exercise of the treaty-making function by the agency to which it was confided, the nation should be enabled to contract as freely as other independent States.[5] It has rarely been perceived, however, that the final and inevitable result is

See, also, Chandler P. Anderson, in *Am. J.*, I, 636, 656; *Harvard Law Rev.*, Note, XXXIII, 281, 286–287; C. H. Burr, Treaty-Making Power of the United States, *Proceedings*, Am. Philosophical Soc., LI, No. 206, p. 362.

[4] The provision of Art. I, section 10, paragraph 3, forbidding a State, without the consent of Congress, from entering into "any agreement or compact" with a foreign power, doubtless made provision for a contingency when the Federal Government might acquiesce and permit the conclusion by the States of engagements of minor importance. It is not believed that from the provision restraining a State from entering into "any agreement or compact" without the consent of Congress, is to be inferred a design to permit the States normally to have any voice in the conclusion of treaties regulating matters deemed to be local to them.

"There appears to be no evidence of any intention on the part of the drafting or ratifying conventions to vest or permit to be exercised elsewhere than in the federal government any element in the conduct or control of the country's relations with other countries." (Wallace McClure, International Executive Agreements, New York, 1941, 272.)

[5] See, in this connection, Chandler P. Anderson, "The Extent and Limitations of the Treaty-Making Power under the Constitution," *Am. J.*, I, 636; Charles H. Burr, "The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States," *Proceedings*, American Philosophical Society, LI, No. 206, Philadelphia, 1912; Charles Henry Butler, The Treaty-Making Power of the United States, New York, 1902, II, Chap. XI; C. S. Clancy, "An Organic Conception of the Treaty-Making Power *v.* State Rights as Applicable to the United States," *Mich. Law Rev.*, VII, 19; Samuel B. Crandall, Treaties, Their Making and Enforcement, 2 ed., Washington, 1916, Chap. XVI; Robt. T. Devlin, Treaty Power under the Constitution of the United States, San Francisco, 1908, Chap. VIII; John W. Foster, "The Treaty-Making Power under the Constitution," *Yale Law J.*, XI, 69; James Parker Hall, "State Interference with the Enforcement of Treaties," *Proceedings*, Academy of Pol. Sc., VII, No. 3, Part II, 548; Frank B. Kellogg, "Treaty-Making Power," Am. Bar Assn. (Presidential Address, 1913), *Reports*, XXXVIII, 331; Arthur K. Kuhn, "The Treaty-Making Power and the Reserved Sovereignty of the States," *Columbia Law Rev.*, VII, 172; William E. Mikell, "The Extent of the Treaty-Making Power of the President and Senate of the United States," *Univ. of Penn. Law Rev.*, LVII, 435 and 528; Shackelford Miller, "Treaty-Making Power," *American Law Rev.*, XLI, 527; Elihu Root, "The Real Question under the Japanese Treaty and the San Francisco School Board Resolution," *Proceedings*, Am. Soc. Int. Law, I, 43, also published in *Am. J.*, I, 273; Henry St. George Tucker, Limitations on the Treaty-Making Power, Boston, 1915; Everett P. Wheeler, "The Treaty-Making Power of the Government of the United States in Its International Aspect," *Yale Law J.*, XVII, 151; W. W. Willoughby, The Constitutional Law of the United States, New York, 2 ed., 1929, Chap. XXXVI; Quincy Wright, "Treaties and the Constitutional Separation of Powers in the United States," *Am. J.*, XII, 64.

See, also, *Proceedings*, Am. Soc. Int. Law, I, Charles Noble Gregory (150), Theodore P. Ion (173), William Draper Lewis (194), W. W. Willoughby (201), and Arthur K. Kuhn (211); Library of Congress, List of References on the Treaty-Making Power, compiled under direction of Herman H. B. Meyer, Chief Bibliographer, Washington, 1920.

See, also, in this connection, Julian P. Boyd, "The Expanding Treaty Power," *North Carolina Law Rev.*, VI, 428; John W. Davis, "Treaty-Making Power in the United States," *Am. Bar Assn. J.*, VI, I; E. R. Feidler and R. H. Dwan, "The Extent of Treaty-Making Power," *Georgetown Law Journal*, XXVIII, 184; Abraham Green, "Scope of the Treaty-Making Power with respect to Labor," *New York Law J.*, May 27, 1931, p. 1116; Amos S. Hershey, "The Treaty-Making Power with Special Reference to the United States," *Indiana Law J.*, I, 261; Jay Loyd Jackson, "The Tenth Amendment Versus the Treaty-Making Power under the Constitution of the United States," *Virginia Law Rev.*, XIV, 331 and 441; Pitman B. Potter, "Inhibitions upon the Treaty-Making Power of the United States," *Am. J.*, XXVIII, 456; James Brown Scott, "Treaty-Making under the Authority of the United States," *Proceedings*, Am. Soc. Int. Law, 1934, 2; Joseph Whitla Stinson, "Treaties Made or Which Shall Be Made Under the Authority of the United States," *Minn. Law Rev.*, VII, 113; Ivan M. Stone, "The House of Representatives and the Treaty-Making Power," *Kentucky Law J.*, XVII, 216; L. L. Thompson, "State Sovereignty and the Treaty-Making Power," *California Law Rev.*, XI, 242; also, Power of the President to Negotiate Treaties and Methods of Recognizing a New State, A Reprint of Various Public Documents and Reports, 1921, Senate Doc. No. 16, 67 Cong., 1 Sess.

attributable to the fact that the only limitations upon the capacity or power of the United States to contract were those implied from articles of the Constitution which did not deal with the authority of the federal agency to make treaties, and to the circumstance also that the authority of that agency to bind the nation was not marred by any constitutional intimation that it was insufficient to effect the conclusion of any treaty which the United States had not itself relinquished the capacity to accept.

(2)

§ 498. **Instances of Treaties Concerning Matters Normally under State Control.** The United States has concluded several treaties which in varying terms permit the nationals of other contracting powers to succeed to and dispose of movable or immovable property within the territories of the several States.[1] These agreements have, whenever occasion so required, been judicially upheld and applied. By Article V of the convention with Switzerland of November 25, 1850, nationals of either party who were successors to real estate in the territory of the other, and who could not, on account of alienage, hold such property in the State or Canton in which it was situated, were permitted to sell the property and to withdraw and export the proceeds thereof.[2] In the course of an opinion concerning the construction of the convention, Mr. Justice Swayne declared that the Supreme Court had no doubt that the convention was within the treaty-making power conferred by the Constitution.[3] That Tribunal announced in 1890, through an opinion by Mr. Justice Field, that it was "clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries." [4] Again, in 1930, the Supreme

§ 498. [1] Art. IX of the Jay Treaty of Nov. 19, 1794, Malloy's Treaties, I, 597, and in this connection, Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603, 627; also Orr *v.* Hodgson, 4 Wheat. 453; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464.

See Art. VII of convention with France of Sept. 30, 1800, Malloy's Treaties, I, 498, and in this connection, Chirac *v.* Chirac, 2 Wheat. 259; also Geofroy *v.* Riggs, 133 U. S. 258.

Concerning the treaty policy of the United States in relation to the matter, see Private Ownership and Control of Property, *supra,* § 203.

[2] Malloy's Treaties, II, 1765–1766.

[3] Hauenstein *v.* Lynham, 100 U. S. 483, 490.

[4] Geofroy *v.* Riggs, 133 U. S. 258, 266.

"It is not now an open question that the removal of alien disability to inherit and dispose of real property is a proper subject of treaty regulation and within the treaty-making power, and that treaty stipulations to this effect override any inconsistent State legislation. This principle has been asserted not less clearly by the State than by the Federal courts." (Crandall, Treaties, 2 ed., 250.)

Declared Mr. Elihu Root in 1907: "Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any State, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No State can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No State can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of

Court declared to be "not tenable" a "view of the treaty-making power" that the treaties of the United States "could not affect the operation of the laws of the several States of the Union with respect to the inheritance of land." [5]

(*a*)

§ 499. **The Same.** As has been observed, the United States has concluded several conventions conferring upon foreign consular officers important privileges in relation to the affairs of deceased countrymen, and with respect to matters normally under the control of the States. These privileges have embraced the right of notification of the deaths of fellow-countrymen by local authorities, that of the temporary possession of the assets of an estate, and that of administration.[1] It has been noted that while certain conventions have, by reason of their phraseology, been interpreted by American courts as not conferring a right of administration in conflict with that fixed by the statutory laws of the States, the United States has on more than one occasion concluded treaties which appeared to clothe consular officers with a superior right.[2]

The United States has concluded numerous treaties making appropriate provision to safeguard the nationals of the contracting parties against various forms of adverse discrimination in the country of residence. The arrangements have, for example, dealt with the matter of pursuits and occupations,[3] taxation,[4] and benefits under so-called workmen's compensation acts. Thus, the treaty of Friendship, Commerce and Consular Rights concluded with Germany December 8, 1923, announced that

> With respect to that form of protection granted by National, State or Provincial laws establishing civil liability for injuries or for death, and

---

the State for the judgment of the President and Senate in exercising a power committed to them and prohibited to the States by the Constitution." (*Proceedings,* Am. Soc. Int. Law, I, 41, 54–55.)

[5] Chief Justice Hughes, in the opinion of the Court in Todak *v.* Union State Bank, 281 U. S. 449, 453. See also Sullivan *v.* Kidd, 254 U. S. 433.

Declared James Parker Hall: "Plainly the Federal decisions upholding alien treaty rights to inherit land do not go upon the ground that the treaty is merely a circumstance that affects the result only if the State law is given a certain rather violent construction. They assume that the treaty has a legally controlling force of its own which annuls the State law, and which no construction of the latter could avoid. This is explicitly stated in Geofroy *v.* Riggs, and seems the only rational ground of decision." (*Proceedings,* Academy of Pol. Sc., VII, No. 3, Part 2, 554.)

*Cf.* Henry St. George Tucker, in his Limitation of the Treaty-Making Power, Boston, 1915, § 128.

§ 499. [1] It has been noted that the consular right of notification frequently embraced in conventions calls for affirmative action by local authorities, and that those authorities, in the estimation of the Department of State, are the agencies of the several States of the Union. See Consuls, Notification of the Deaths of Fellow-Countrymen, *supra,* § 478. Also *id.,* § 479.

[2] Consuls, Administration of Estates, *supra,* § 480.

See especially, Santovincenzo *v.* Egan, 284 U. S. 30, interpretative of Art. VI of the treaty with Persia of Dec. 13, 1856, which under certain conditions precluded an appropriate local administration of the estate of a national of either contracting party dying within the domain of the other and which declared that his effects should "be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen."

[3] See Pursuits and Occupations, *supra,* § 204.

[4] See Art. VII, treaty with Denmark of April 26, 1826, Malloy's Treaties, I, 375, and as interpretative thereof, Nielsen *v.* Johnson, 279 U. S. 47.

See, also, Art. I, treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either of the High Contracting Parties and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.[5]

By such processes the several States of the Union have found their freedom of action restrained in relation to what was of peculiar concern to them.

It should be observed that in the course of adjudications concerning the constitutionality of State statutes discriminating against aliens, decisons of the courts have at times rested upon the ground either that a particular treaty which was invoked did not purport to forbid a discrimination which the statute embodied, or that the law marked a violation of the Fourteenth Amendment.[6] The Supreme Court of the United States has been far from intimating a disposition to question the constitutionality of relevant treaties on the ground that by express design or by necessary implication a State was forbidden to discriminate against aliens in matters pertaining to their residence or economic life within its borders.

(*b*)

§ 500. **The Same.** The United States and Great Britain concluded, August 16, 1916, a convention for the protection of migratory birds, in order to prevent the extermination of many species of great value as a source of food, or as a means of destroying insects injurious to forests and crops in both the United States and Canada.[1] To that end it was agreed that closed seasons should be established in certain regions of the United States and Canada with regard to game birds, insectivorous birds, and non-game birds.[2] With respect to specified birds a continuous closed season was established for a period of years.[3] The taking of nests or eggs of migratory game or insectivorous or non-game birds was prohibited, except for scientific or propagating purposes.[4] The regulation of shipping and export was agreed upon,[5] and there was an engagement to propose to the respective appropriate law-making bodies of the contracting parties, the necessary measures for insuring the execution of the convention.[6] The direct purpose of the agreement was to prevent the commission of acts in States of the Union, as well as in certain parts of Canada, deemed to be detrimental to the welfare of both the United States and the Dominion. An Act of Congress of

[5] *Id.*, Art. II. This provision was incorporated in numerous subsequent conventions. See, for example, Art. II, treaty with Poland of June 15, 1931, U. S. Treaty Vol. IV, 4573.

*Cf.* the less comprehensive provisions of Art. III of the convention with Italy of Feb. 25, 1913, amending Art. III of the treaty of commerce of Feb. 26, 1871, U. S. Treaty Vol. III, 2699, and as interpretative thereof, Liberato *v.* Royer, 270 U. S. 535.

[6] See Pursuits and Occupations, *supra*, § 204.

§ 500. [1] U. S. Treaty Vol. III, 2645.

[2] Art. II.

[3] Art. III.

[4] Art. V.

[5] Art. VI.

[6] Art. VIII.

July 3, 1918, gave appropriate effect to the convention.[7] This legislation and the treaty responsible for it were sustained by the lower Federal courts.[8] Their action was affirmed by the Supreme Court in April, 1920.[9]

It may be observed that Secretary Hull found occasion to declare in 1935: ". . . The previous administration, after a careful study of precedents established by the ratification of recent treaties and by decisions of the Supreme Court, arrived at the conclusion that the position theretofore taken by our Delegates in Geneva had not been well founded, and that the treaty making power of this Government clearly includes the power to enter into an international convention, under which this Government would be obligated to establish such a measure of supervision and control of the manufacture of arms and implements of war within its jurisdiction as was then under discussion. The present administration maintains the position taken by its predecessor."[10]

(3)

§ 500A. **Relationship to International Concerns.** Declared the Honorable Charles E. Hughes in the course of a discussion before the American Society of International Law, April 26, 1929:

[7] 40 Stat. 755. See also Act of Feb. 18, 1929, 45 Stat. 1221; Act of March 16, 1934, 48 Stat. 451; Act of June 15, 1935, 49 Stat. 378.

Concerning the Migratory Birds Act of March 4, 1913, Chap. 145, 37 Stat. 847, and the cases attacking its constitutionality, and the effectiveness of the Act of 1918, in consequence of the convention, see *Harvard Law Rev.*, Note, XXXIII, 281, Dec., 1919; E. M. Borchard, "Treaty-Making Power as Support for Federal Legislation," *Yale Law J.*, XXIX, 445, Feb., 1920.

[8] United States *v.* Thompson, 258 Fed. 257; United States *v.* Samples, 258 Fed. 479; United States *v.* Selkirk, 258 Fed. 775; United States *v.* Rockefeller, 260 Fed. 346.

In the course of his opinion in United States *v.* Thompson, 258 Fed. 257, 263, Trieber, J., declared: "To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of this nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries."

Also opinion of Mr. Griggs, Atty. Gen., 22 Ops. Attys. Gen., 214, in which he advised the Secretary of State that the United States could by treaty deprive the riparian States of the power of control and regulation over the fisheries in the waters within their respective jurisdictions coterminal with the boundary between the United States and Canada. He declared that the regulation of fisheries in navigable waters within the territorial limits of the several States, "in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction."

Declaring the Migratory Birds Treaty Act to be not retroactive in its operation, see United States *v.* Fuld Store Company, 262 Fed. 836.

[9] Missouri *v.* Holland, 252 U. S. 416. Declared Mr. Justice Holmes in the course of the opinion of the Court: "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Cary *v.* South Dakota, 250 U. S. 118." (*Id.*, 435.) Mr. Justice Van Devanter and Mr. Justice Pitney dissented.

See also Convention with Mexico, providing for the Protection of Migratory Birds and Game Mammals, signed at Mexico City, Feb. 7, 1936, U. S. Treaty Vol. IV, 4498.

[10] Communication to Representative Tinkham, Jan. 24, 1935, MS. Dept. of State, file 500A14 /731, Hackworth, Dig., V, § 463.

See Manley O. Hudson, "The Treaty Making Power of the United States in Connection with the Manufacture of Arms and Ammunition," *Am. J.*, XXVIII, 736.

> What is the power to make a treaty? What is the object of the power? The normal scope of the power can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns. . . . This is a sovereign nation; from my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.[1]

These words seem to imply that by the adoption of the Constitution the Republic as a State relinquished the capacity to conclude treaties designed or calculated to restrict the American people in their purely internal concerns, as with respect to matters having no relation to international affairs, and that the existence of an international relationship is to be taken as a test of unrelinquished power.[2] It is believed to be highly unlikely that the federal agency in exercising the treaty-making function would endeavor to cause the nation to accept an arrangement involving any undertaking or restriction which that agency did not deem to possess the requisite international significance or interest or value.[3] Moreover, it is also highly unlikely that the Supreme Court of the

§ 500A. [1] *Proceedings,* Am. Soc. Int. Law, 1929, 194–196. Adverting to the unwillingness of the Delegation of the United States of America at the Sixth International Conference of American States at Habana, in 1928, to accept the de Bustamante Code of Private International Law, Mr. Hughes declared that "it was not necessary to hold that it was beyond the treaty-making power, but it was thought to be inadvisable to attempt to press the treaty-making power in such a novel exercise and that to bring a treaty of that sort to the consideration of the Senate would be a grave mistake." (*Id.,* 195.) For the text of the Declaration of the Delegation, see Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, Appendix 6, 167. See, also, Declaration of the same Delegation in relation to the Resolution on Emigration and Immigration which may have been dictated by reasons of expediency rather than by a sense of doubt touching the capacity of the United States to accept the terms of the resolution. (*Id.,* 271.)

[2] In a word, the United States, by the adoption of the Constitution, relinquished the capacity to conclude a treaty, which, apart from express prohibitions set forth in that instrument, purported to deal with matters not to be deemed to pertain to external relations.

[3] In declining to accept the provisions of certain multi-partite conventions emanating from the League of Nations, the American Government has at times invoked the constitutional plan of the United States as a reason for its stand. In so doing, it has not in terms stated that in consequence of the Constitution the nation necessarily lacked the power or capacity to accept the proferred arrangements. See, for example, statement by the American delegate, Mr. Gordon, in the International Conference on the Treatment of Foreigners, at Paris, Nov. 6, 1929, League of Nations Doc. No. C.97.M.23.1930.II, 49. See, also, announcement of the position of the United States in declining to accept the conventions of 1910 and 1921 for

United States would be inclined to take issue with such a conclusion if there were any grounds on which it could be reasonably supported. Such grounds were evidently regarded as existent by the Executive when, by and with the advice and consent of the Senate, he permitted the United States to accept the convention on Nationality of Women concluded at the Seventh International Conference of American States at Montevideo, December 26, 1933, which announced in Article I that "there shall be no distinction based on sex as regards nationality" in the legislation or practice of the contracting parties.[4] This convention is illustrative of the fact that the advancement of an interest acknowledged to be of international concern may be regarded by the United States as well as by other States as necessitating restrictions upon the conduct of individuals who inhabit their respective territories in relation to activities which would appear normally to lack international significance and to possess a purely domestic aspect. Thus matters of occupation, conditions of labor, the production and manufacture, and even the transportation of particular articles, may suddenly attain an international aspect and so become appropriate objectives of a treaty of the United States.[5] The constitutionality of the result is not affected by the circumstance that the federal agency is enabled, through treaty-making, to accomplish what the Congress may remain impotent to achieve.

(4)

§ 501. **Cessions of State Territory. Boundaries.** Whether the nation is possessed of the capacity or power to agree to transfer by cession to a foreign country territory within the limits of a State of the Union presents a question that still remains to be decided.[1] The undertaking of the United States under the Constitution to guarantee to each State a republican form of government, and to protect it against invasion,[2] may serve to encourage a negative response. It

---

the Suppression of the Traffic in Women and Children, announced in 1932, League of Nations Doc. No. C.T.F.E. 542, April 1, 1932, p. 3. See, in this connection, Pitman B. Potter in *Am. J.* XXVIII, 456.

[4] U. S. Treaty Vol. IV, 4813, 4814. In signing the convention the Delegation of the United States made the reservation that "the agreement on the part of the United States is, of course and of necessity, subject to congressional action." (*Id.*, 4814.)

According to Article 2 of the convention concerning Slavery, signed at Geneva, September 25, 1926, and to which the United States has adhered: "The High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps: (a) To prevent and suppress the slave trade; (b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms." (U. S. Treaty Vol. IV, 5022, 5026.)

[5] It may be noted that in a Memorandum for President Roosevelt, of May 27, 1936, Secretary Hull "expressed doubt as to whether the treaty-making power properly extended to" the five labor conventions adopted in 1935, by the annual conference of the International Labor Organization. (Hackworth, Dig., V, § 463.) "The United States, however, ratified, . . . upon the advice and consent of the Senate, five draft conventions dealing with maritime labor, and registered ratifications with the Secretariat of the League on Oct. 29, 1938." (*Id.*, footnote.) See also Hackworth, Dig., V, § 471.

§ 501. [1] See documents in Moore, Dig., V, 171–175; Crandall, Treaties, 2 ed., § 99, and documents there cited; C. H. Burr, Treaty-Making Power of the United States, *Proceedings*, Am. Philosophical Soc., LI, No. 206, 300–301.

[2] Constitution, Art. IV, Section 4.

appears to have been the view of Thomas Jefferson in 1792, and likewise that of Mr. Justice White a century later, that in case of necessity occasioned by war, a treaty of cession might be concluded.[3] There is evidence that Chief Justice Marshall as well as Mr. Justice Story were of opinion that the nation did not lack the power to have recourse to cession if the national safety so required.[4]

It is understood that the Solicitor for the Department of State concluded in 1910 that the United States could probably cede territory belonging to a State, although discretion would forbid doing so without the State's consent.[5]

If the adoption of the Constitution served to incapacitate the Republic to cede territory within its domain that was also within the limits of a particular State, it might still be possible through some extra-constitutional (as distinguished from unconstitutional) process to remove the incapacity by virtue of the consent and approval of the State whose territory it was sought to transfer.[6]

[3] In his instructions to Messrs. Carmichael and Short, commissioners to negotiate a treaty with Spain, under date of March 18, 1792, Mr. Jefferson, Secy. of State, declared: "Suppose that the United States, exhausted by a bloody and expensive war with Great Britain, might have been willing to have purchased peace by relinquishing, under a particular contingency, a small part of their territory, it does not follow that the same United States recruited and better organized, must relinquish the same territory to Spain without striking a blow. The United States, too, have irrevocably put it out of their power to do it, by a new Constitution, which guarantees every State against the invasion of its territory. A disastrous war, indeed, might, by necessity, supersede this stipulation (as necessity is above all law), and oblige them to abandon a part of a State; but nothing short of this can justify or obtain such an abandonment." (Am. State Pap., For. Rel. I, 252.)

Declared Mr. Justice White, in the course of his opinion in Downes *v.* Bidwell, 182 U. S. 244, 317: "True, from the exigency of a calamitous war or the necessity of settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of."

[4] In response to an inquiry from Edward Everett, then Governor of Massachusetts, Mr. Justice Story replied on April 17, 1838: "That he could not admit it to be universally true that the Constitution of the United States did not authorize the government to cede to a foreign nation territory within the limits of a State, since such a cession might, for example, be indispensable to purchase peace, or might be of a nature calculated for the safety of both nations or be an equivalent for a like cession on the other side. The learned justice added that he had some years previously had a conversation on the subject with Chief Justice Marshall. 'He was,' said Mr. Justice Story, 'unequivocally of opinion, that the treaty-making power did extend to cases of cession of territory, though he would not undertake to say that it could extend to all cases; yet he did not doubt it must be construed to extend to some.'" (Moore, Dig., V, 173, *quoting* Story, Life of Joseph Story, II, 286–289. The volume cited is The Life and Letters of Joseph Story, edited by his son, W. W. Story, Boston, 1851.)

"Treaties made under such compulsion are, except in form, no more the exertion of the ordinary constitutional powers of a State than the yielding of a watch under the pistol of a highwayman is an exercise of the victim's power freely to dispose of his property; and all arguments based upon the assumed effect of such treaties are fallacious." (J. P. Hall, "State Interference with the Enforcement of Treaties," *Proceedings,* Academy of Pol. Sc., VII, No. 3, Part 2, 548, 556.)

[5] Memorandum of Mr. Clark, the Solicitor, Nov. 24, 1910, MS. Department of State, file 711.1215/191, Hackworth, Dig., V, § 462.

[6] In the settlement of the Northeastern Boundary dispute, the consent of the States of Maine and Massachusetts was secured preliminary to concessions made to Great Britain of lands claimed by those States. See Moore, Arbitrations, I, 147–150. To the treaty of Aug. 9, 1842, describing the boundary line, the United States and Great Britain alone were signatories. That agreement provided in Art. V that the proportion of the so-called "disputed territory fund" due to the States of Maine and Massachusetts, and any bonds or securities appertaining thereto, should be paid to the Government of the United States, and that the

It has been declared in behalf of the Supreme Court of the United States to be "a sound principle of national law," applicable "to the treaty-making power of this Government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty," and that "to the exercise of these high functions by the Government, within its constitutional powers, neither the rights of a State nor those of an individual can be interposed." [7]

If the adjustment assumes the form of a compromise, either party, in agreeing to yield possession, may in fact cede land to which it has an indisputable title. If, however, a treaty provides for the ascertaining of a boundary of which the nature or direction is a matter of dispute, the line of demarcation finally ascertained, as by a judicial inquiry, may be said to constitute merely a joint recognition of what territory rightfully belonged to either State concerned.[8] Hence a relinquishment pursuant to the award or finding of the tribunal would not indicate the transfer of any legitimate right of property and control which had been enjoyed by the relinquisher. Thus it may be contended that the adjustment by arbitration of an international boundary controversy affecting the territory of a State of the Union would not necessarily involve, in the event of an award adverse to the pretensions of that State, any sacrifice of territory which the United States was obliged under the Constitution to safeguard.

(5)

§ 502. **Some Conclusions.** What the President and Senate have deemed to be a proper subject for international agreement has never been otherwise regarded by the Supreme Court of the United States. When the federal agency has felt it advantageous for the nation to regulate by treaty a matter affecting economic or other conditions within the several States, it has not been regarded as neces-

latter should receive and pay over to those States their respective portions of the fund, and further, pay and satisfy those States, respectively, "for all claims for expenses incurred by them in protecting the said heretofore disputed territory and making a survey thereof in 1838." The same Article referred to the Government of the United States as "agreeing with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the Government of Her Britannic Majesty." (See Malloy's Treaties, I, 654.) "Great Britain, however, disclaimed all responsibility for any matters between the United States and the several States." (See statement in Moore, Dig., V, 173–174.) It should be noted that Mr. Webster, then Secretary of State, declared that although he entertained "not the slightest doubt of the just authority of this government to settle this question by compromise, as well as in any other way, yet in the present position of affairs" he supposed it not to be prudent "to stir, in the direction of compromise without the consent of Maine." (See communication to Mr. Kent, Gov. of Maine, Dec. 21, 1841, C. H. Van Tyne's Letters of Daniel Webster, New York, 1902, 248, Moore, Dig., V, 174.)

"It would not be contended that it [the treaty power of the United States] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525, 541." (Field, J., in the opinion of the court in Geofroy *v.* Riggs, 133 U. S. 258, 267, *quoted* by James B. Thayer, in his Cases on Constitutional Law, I, 373, note 1.)

[7] McLean, J., in Lattimer *v.* Poteet, 14 Pet. 4, 14.

"A treaty for the determination of a disputed line operates not as a treaty of cession, but of recognition." (Crandall, Treaties, 2 ed., 226.)

[8] Chappell *v.* Jardine, 51 Conn. 64; Elphick *v.* Hoffman, 49 Conn. 331.

sary to secure their consent as a condition precedent to a valid arrangement. The course pursued has inspired the statement of Secretary Root that "the treaty-making power is not distributed; it is all vested in the National Government; no part of it is vested in or reserved to the States." [1]

The Republic as a contracting party has not, through the adoption of the Constitution, found itself without capacity to enter into any engagement which it has proved to be desirable to conclude. Tests of incapacity have not been sought in the mere restraining effect of particular provisions upon the conduct of the several States when at least the solution of an international problem of common interest to the contracting parties was at stake. In no instance have the terms of a treaty lacked an obvious connection with a matter of international concern. The scheme that confided authority to the federal agency to exercise the treaty-making function in behalf of a Republic that showed no disposition to impair its inherent capacity to contract save in situations where the provisions of its fundamental law pointed to well-defined limitations, has proved to be fully responsive to the conventional needs of the United States.

## d

## Other Problems of Constitutionality

### (1)

§ 503. **Agreements Calling for Legislative or Other Action or Inaction.** A treaty concluded by the United States is not necessarily unconstitutional by reason of the fact that it calls for action or inaction on the part of the legislative or other departments of the Government. Numerous conventions have embodied such demands. They have, for example, provided for the payment of money, thereby necessitating an appropriation by the Congress; [1] they have exacted the performance of specified administrative acts by local officials; [2] they have imposed restraints serving to check the exercise of the war-making function by those possessed of it. As illustrative, the United States has concluded treaties of guarantee imposing a contingent obligation to employ force in order to safeguard foreign territory,[3] and conversely, it has entered into arrangements de-

§ 502. [1] *Proceedings*, Am. Soc. Int. Law, I, 41, 49.

§ 503. [1] See convention with Russia for the cession of Alaska of March 30, 1867, Malloy's Treaties, II, 1521.

See, in this connection, a well-considered paper by Quincy Wright on "Treaties and the Constitutional Separation of Powers in the United States," *Am. J.*, XII, 64. That writer declares: "It must always be borne in mind that in most cases powers were given to Congress in pursuance of a scheme of distribution between Congress and State legislatures. Where no distribution between Congress and the treaty-making power was intended, none was made. If a ratified treaty covers a subject-matter appropriate for international negotiation, the fact that it concerns matters within the powers of Congress enumerated by the Constitution does not affect its validity. The only question that can arise is whether or not it is self-executing."

[2] See, for example, Art. XVI of consular convention with Italy of May 8, 1878, imposing a duty upon "the local competent authorities" to give notice to consular officers of the deaths of fellow-countrymen, Malloy's Treaties, I, 982; Art. XXIV, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4201.

[3] See, for example, Art. XXXV of treaty with Colombia (New Granada) of Dec. 12, 1846, Malloy's Treaties, I, 312. Also Art. I of convention with Panama, of Nov. 18, 1903, de-

manding, under certain conditions, abstention from war,[4] and even a refraining from mobilization of military forces on a frontier.[5]

Such agreements are based upon the assumption that the Constitution does not forbid the incurring of a particular obligation involving the performance or non-performance of acts of which the commission, according to the terms of that instrument, is confided to a particular department of the Government, such as the Congress.[6]

In 1937, the United States accepted the International Convention for the Unification of Certain Rules relating to Bills of Lading, which had been concluded at Brussels on August 25, 1924, and which had been signed in behalf of the United States on June 23, 1925.[7]

In practice, no real difficulty presents itself where the affirmative action to be taken by the United States in pursuance of a treaty is not looked upon as abnormal or unusual, such, for example, as the appropriation of money in payment of territory acquired by cession.[8] A more serious problem may arise, however, if a treaty imposes upon the nation a legal obligation to take steps, through Congressional action, which the United States has rarely taken save under grave necessity. An agreement obliging the United States to become, under certain circumstances, a belligerent is of such a character, even though the validity of the undertaking be not open to question.[9] The danger lest popular opinion demand that the Congress refrain from exercising the war-making function yielded to it by the terms of the Constitution and so subject the United States to the charge of a breach of faith serves to deter the United States from agreeing to become a belligerent under conditions when Congressional acquiescence may be highly problematical.[10] The distinction between the inexpediency of the imposi-

---

claring that "the United States guarantees and will maintain the independence of the Republic of Panama," *id.*, II, 1349.

See agreement for the defense of Iceland by United States forces, effected by arrangement with Iceland of July 1, 1941, U. S. Executive Agreement Series, No. 232.

See also The Act of Habana and Convention of July 30, 1940, *supra*, § 94B.

[4] See treaty providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, U. S. Treaty Vol. IV, 5130.

[5] See Art. I, treaty between the United States and other American Republics To Avoid or Prevent Conflicts between the American States, May 3, 1923, U. S. Treaty Vol. IV, 4691, 4692.

[6] "But even if it be accepted that a treaty is valid only if made by a constitutionally authorized organ, it does not follow that the Constitution requires the coöperation of Congress for the international formation of the contract, even though its internal efficacy may require legislation. The contrary is true. It may be advisable to defer ratification until Congress has acted, but Congressional action is not a constitutional prerequisite to the making of the treaty even where it is necessary for its enforcement." (S. A. Riesenfeld, in *Calif. Law Rev.*, XXV, 643, 652–653.)

[7] U. S. Treaty Vol. IV, 4935. See in this connection, Mr. Grew, Acting Secy. of State, to President Coolidge, Feb. 24, 1927, MS. Dept. of State, file 585.7A3/258, Hackworth, Dig., V, § 462.

[8] See Legislation Necessary to Performance, *infra*, §§ 524–525.

[9] In no instance has the United States embarked upon war in pursuance of an obligation imposed by treaty.

[10] Declared Mr. Charles E. Hughes in an address before the Union League Club of New York, March 26, 1919, on the proposed Covenant for a League of Nations: "There is nothing in our history to give assurance that Congress would recognize the authority of the treaty power to bind Congress to declare war in a cause that it did not approve. The decision as to the policy, as to the existence of the duty, and as to the power to create the

tion by treaty upon the Congress of a burdensome and distasteful duty of performance, and the validity of an engagement which the Constitution may not proscribe, needs constantly to be observed. It is at times, however, obscured from view by utterances which appear to confuse constitutional requirements as to modes of performance with constitutional limitations upon the capacity of the Republic to contract.

(2)

§ 504. **Agreements to Refer Differences to International Judicial Tribunals or Commissions.** That the United States may constitutionally agree to refer to an international tribunal future controversies which may not prove to be susceptible of amicable adjustment by direct negotiation, is not to be doubted.[1] If provision be made in an arbitration convention for the adjustment of differences within the limits of a general class, with the understanding that they are justiciable, an engagement that in case of disagreement the tribunal may determine whether a particular dispute falls within such a category, is not believed to be at variance with the Constitution. Any disposition to withhold such authority from such a tribunal would seem to be attributable primarily to a sense of expediency; for the exercise of it appears to involve merely the interpretation of the scope of the agreement to arbitrate — a most ordinary judicial function, neither dependent upon, nor implying a delegation of, the treaty-making authority by the Federal Government.[2]

---

duty, would rest with Congress. Whether or not Congress would feel itself bound to respond, or would take the position that, in so vital a matter as a resort to war, it could not be pledged in advance without its consent, is a question which must be left to the event. . . .

"The point is that Congress would be the judge of its obligation and would determine to its own satisfaction the question whether the treaty power could impose and had imposed upon Congress the duty to act under the provision of the Covenant, although Congress believed that such action would be contrary to the interests of the country. . . .

"It is a very serious matter for the treaty-making power to enter into an engagement calling for action by Congress unless there is every reason to believe that Congress will act accordingly."

§ 504. [1] See, for example, Inter-American Arbitration Treaty between the United States and Other American Republics, Jan. 5, 1929, U. S. Treaty Vol. IV, 4756.

See The United States as a Party to Treaties of General Arbitration, *infra*, §§ 566–567.

[2] See minority report by Mr. Root (for himself and Messrs. Cullom and Burton) from the Senate Committee on Foreign Relations, Aug. 18, 1911, in relation to proposed general arbitration treaties with Great Britain and France, Senate Doc. No. 98, 62 Cong., 1 Sess., 9–10. It was here declared: "The pending treaties also provide that, if the parties disagree as to whether any particular case comes within the description of the class which we have agreed to arbitrate, the question whether that case is one of the cases described shall be submitted to the arbitral decision of a joint commission.

"We see no obstacle to the submission of such a question to decision, just as any other question of fact, or mixed fact and law, may be submitted to decision. Such a submission is not delegating to a commission power to say what shall be arbitrated; it is merely empowering the commission to find whether the particular case is one that the President and Senate have said shall be arbitrated."

See, also, supplemental views of Mr. Burton, *id.*, p. 11, and views of Mr. Rayner, *id.*, 17. See, however, the opposing views expressed in the Committee Report submitted by Mr. Lodge, *id.*, p. 3. It was there stated that the treaty purported to deprive the Senate "of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution," and "that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate." It was said that the Senate had no right to delegate

The constitutionality of a treaty providing for an appeal from the decisions of the American tribunal of last resort to one of an international character has gravely been doubted in the United States. The International Prize Court contemplated by the Hague Convention of 1907, was preëminently a court of appeal, with full power to review the decision of a national court of justice, both as to facts and as to the law applied, and, in the exercise of its judicial discretion, not only to affirm or reverse, in whole or in part, the national decision from which the appeal was lodged, but also to certify its judgment to the national court for proceedings in accordance therewith.[3] The United States made objection to the convention in its original form because an appeal might be taken from a decision of the Supreme Court of the United States, and the judgment of that Tribunal be modified or reversed on appeal.[4] To avoid such a course, which was deemed to be open to constitutional objections, an additional protocol was concluded September 19, 1910, providing for an alternative procedure for States confronted with such constitutional difficulties, and declaring that recourse to the Prize Court could only be exercised against them in the form of an action in damages for the injury caused by the capture.[5] The Prize Court Convention, with the additional protocol of 1910, was not ratified by the United States.[6]

---

its share of the treaty-making power, and it was assumed or intimated that the treaty made provision for such a delegation.

For the text of the proposed general arbitration treaties with Great Britain, of Aug. 3, 1911, and with France, of same date, see, respectively, Senate Doc. No. 93, 62 Cong., 1 Sess., and Senate Doc. No. 94, 62 Cong., 1 Sess.

Art. 4 of the Inter-American Treaty of Arbitration signed at Washington, January 5, 1929, U. S. Treaty Vol. IV, 4758, provided that if an accord had not been reached with regard to the "special agreement" to be formulated in each case as a condition precedent to arbitration before a court to be composed of members of the Permanent Court of Arbitration at The Hague, within a specified period, the agreement should be formulated by the court. The Senate conditioned its approval of the treaty upon the understanding, to be made a part of the ratification, "that the special agreement in each case shall be made only by the President, and then only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur."

[3] The language of the text is that contained in circular note of Mr. Knox, Secy. of State, accompanying communication to Mr. Rives, American Chargé d'Affaires at London, Nov. 3, 1909, For. Rel. 1910, 597, 599.

[4] Mr. Knox, Secy. of State, to the Minister of Nicaragua, Jan. 19, 1911, For. Rel. 1911, 248.

[5] See the Hague Convention of 1907, relative to the creation of an International Prize Court, Charles' Treaties, 249; J. B. Scott, Reports to Hague Conferences, 746; Report of Mr. Renault from the First Commission on the Draft Convention relative to the creation of an International Prize Court, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 180, J. B. Scott, Reports to Hague Conferences, 758; also C. N. Gregory, "The Proposed International Prize Court and Some of Its Difficulties," *Am. J.*, II, 458; Henry Billings Brown, "The Proposed International Prize Court," *id.*, 476; T. R. White, "Constitutionality of the Proposed International Prize Court — Considered from the Standpoint of the United States," *id.*, 490.

See Additional Protocol to the Convention Relative to the Creation of an International Prize Court, Sept. 19, 1910, Charles' Treaties, 262; J. B. Scott, Reports to Hague Conferences, 807; Report of J. B. Scott, American Delegate Plenipotentiary to negotiate additional protocol, to the Secretary of State, *id.*, 811; also For. Rel. 1910, 597–639; For. Rel. 1911, 247–251. Also, in this connection, J. B. Scott, "The International Court of Prize," *Am. J.*, V, 302; Oppenheim, 2 ed., II, 565–579.

See Need of an International Tribunal, American Prize Courts and Procedure, *infra*, § 896.

[6] See Resolution embodying the terms on which the Senate on Feb. 15, 1911, advised and consented to the ratification of the convention of 1907 and the protocal of 1910, Charles' Treaties, 262.

There is little room for doubt that the United States may, without disregarding the Constitution, agree to an inquiry respecting, or an investigation of, a controversy by an international commission, and further agree to withhold action during the period of investigation, and to shape its conduct in relation to its opponent according to the recommendations of the report.[7] It should be observed, however, that the treaties of conciliation to which the United States is a party impose no obligation to accept the recommendations of the commission whose aid is invoked.[8]

e

## The Manner in Which the United States May Contract. Agreements Other than Treaties.

(1)

§ 505. **Preliminary.** It has been observed that the Constitution prescribes that the treaties of the United States shall be made by the President by and with the advice and consent of the Senate, "provided two-thirds of the Senators present concur."[1] That document contains, however, no definition of a treaty, and no statement declaring under what circumstances a conventional arrangement purporting to bind the United States must be dealt with according to the procedure that is mandatory in the case of treaties. The reference to an "agreement or compact" with a foreign power which no State of the Union is permitted to enter into without the consent of Congress,[2] indicates the familiarity of those who framed the Constitution with the habit of States to conclude international engagements of lesser dignity, which by reason of their form or content, as well as the methods employed in perfecting the contractual relationship, were not dealt with as treaties by the persons or countries which found it convenient to have recourse to them.

It has long been the practice of the United States to contract with foreign States in relation to a variety of matters through the medium of so-called executive agreements in the conclusion of which the advice and consent of the Senate has not been sought. In what follows attention is called to a variety of instances that are illustrative of the extent to which such procedure has in fact been followed and which reveal the character of the practice that has grown up.[3]

[7] *Compare* Arts. XII and XV of the Covenant of the League of Nations.

[8] See, for example, Art. 9 of Convention between the United States and Other American Republics on Inter-American Conciliation, Jan. 5, 1929, U. S. Treaty Vol. IV, 4763, 4766.

§ 505. [1] Provisions of the Constitution, *supra*, § 495.

[2] Art. I, Section 10, paragraph 3.

"The use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection of communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." (Taney, C. J., in Holmes *v.* Jennison, 14 Pet. 540, 572.)

[3] See, in this connection, documents in Moore, Dig., V, 210–221; Crandall, Treaties, 2 ed., Chaps. VIII and IX; E. S. Corwin, The President's Control of Foreign Relations, Princeton, 1917, 116–125.

See, also, Simeon E. Baldwin, "The Entry of the United States into World Politics as

(2)

§ 506. **Executive Agreements in Pursuance of Acts of Congress.** The President has entered into numerous agreements with foreign States in pursuance of Acts of Congress. Thus he has concluded engagements concerning commerce and navigation in the form of reciprocal arrangements for the suspension of duties in return for equitable concessions.[1] The President has been deemed in such case to be the mere agent of the legislative department of the Government to ascertain and declare the event upon which its expressed will is to take effect.[2]

By an Act of June 12, 1934 (to amend the Tariff Act of 1930), the President was authorized within a specified period of time "to enter into foreign trade agreements with foreign governments or instrumentalities thereof" and also "to proclaim such modifications of existing duties and other import restrictions,

---

One of the Great Powers," *Yale Rev.*, first series, IX, 399; same writer, "The Exchange of Notes in 1908 between Japan and the United States," *Zeit. Völk.*, III, 456; James F. Barnett, "International Agreements without the Advice and Consent of the Senate," *Yale Law J.*, XV, 18 and 63; John W. Foster, "The Treaty-Making Power under the Constitution," *Yale Law J.*, XI, 69; C. C. Hyde, "Agreements of the United States Other than Treaties," *Green Bag*, XVII, 229; Gaston, Jèze, "*Du rôle des chambres dans l'approbation ou l'exécution des traités internationaux*," *Rev. du Droit Public et de la Science Politique*, XXI, No. 3, p. 455; J. B. Moore, "Treaties and Executive Agreements," *Pol. Sc. Quar.*, XX, 385; W. W. Willoughby, Constitutional Law of the United States, 2 ed., Chap. XXXIV.

Also Hunter Miller, in Miller's Treaties, I (Short Print), 9–14; Wallace McClure, International Executive Agreements, New York, 1941; S. A. Riesenfeld, "The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions," *Calif. Law Rev.*, XXV, 643, 670–675.

See Termination of Treaties, Notice Pursuant to Agreement, *infra*, § 539.

§ 506. [1] The history of legislation pursuant to which some agreements have been made is set forth in Crandall, Treaties, 2 ed., § 62.

Attention is called to § 3, Chap. 1244, of the Tariff Act of Oct. 1, 1890, 26 Stat. 612, and to § 3, Chap. 11, of the Tariff Act of July 24, 1897, 30 Stat. 203. See proclamation of President Roosevelt, Dec. 5, 1907, announcing the conclusion of a commercial agreement with Great Britain under the Act of 1897, Malloy's Treaties, I, 812.

[2] Such was the view expressed by Mr. Justice Harlan in Field *v.* Clark, 143 U. S. 649, 693, with reference to the function of the President under the Tariff Act of 1890.

In the course of the opinion of the Court expressed in 1912, by Mr. Justice Day, in the case of Altman *v.* United States, the following significant statement was made with reference to a commercial agreement with France (30 Stat. 1774) under the authority of the Tariff Act of 1897: "While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President." (224 U. S. 583, 601.)

See also United States *v.* Belmont, 301 U. S. 324, in which it was declared at 330: "A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' *Altman & Co.* v. *United States*, 224 U. S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations." The arrangement here referred to was one between the American and Soviet Governments in 1933, whereby it was agreed, among other things, that the Soviet Government would take no step to enforce claims against American nationals which claims, including a deposit account, were to be assigned to the United States.

See United States Tariff Commission, Summary of the Report on Reciprocity and Commercial Treaties, Washington, 1919.

or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder." [3] In pursuance of such authority, numerous trade agreements were concluded.[4]

In pursuance of like authority, the President has concluded in behalf of the United States agreements respecting international copyright,[5] and for the protection of trade-marks.[6] Through the instrumentality of the Postmaster General he has concluded postal and money order conventions.[7] In consequence of Con-

[3] 48 Stat. 943. It was provided, however, that "no proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists."

See William S. Culbertson, "Legal Aspects of the Trade Agreements Act of 1934," *Am. Bar Assoc. J.*, XXI (1935), 660; Ellery C. Stowell, "Secretary Hull's Trade Agreements," *Am. J.*, XXIX, 280; Green H. Hackworth, "Legal Aspects of the Trade Agreements Act of 1934," Dept. of State Press Releases, July 20, 1935, 63.

[4] See, for example, Reciprocal Trade Agreement with the Belgo-Luxemburg Economic Union, Feb. 27, 1935, U. S. Executive Agreement Series, No. 75; Reciprocal Trade Agreement with Haiti, March 28, 1935, *id.*, No. 78; Reciprocal Trade Agreement with Sweden, May 25, 1935, *id.*, No. 79; Reciprocal Trade Agreement with Brazil, Feb. 2, 1935 (and Supplementary Agreement, April 17, 1935), *id.*, No. 82; also, agreement with the Union of Soviet Socialist Republics on Commercial Relations, effected by exchange of notes, July 13, 1935, *id.*, No. 81.

[5] § 8(*b*), Act of March 4, 1909, 35 Stat. 1077, 17 U.S.C.A. § 8. Pursuant to this Act the President has issued numerous proclamations declaratory of the existence of reciprocal conditions in foreign States and permitting the granting of American copyright protection to the nationals thereof. See, for example, proclamation of President Wilson, April 3, 1918, contained in U. S. Comp. Stat. 1918, § 9524, note.

Also § 1 (*e*) of the same Act, 35 Stat. 1075, 17 U.S.C.A. § 1, with respect to copyright controlling the parts of instruments serving to reproduce mechanically musical work. See, for example, proclamation of President Wilson pursuant to this section, Feb. 9, 1917, in relation to New Zealand, 39 Stat. 1815.

See also, proclamation of President Roosevelt, No. 2095, Aug. 23, 1934, in relation to Argentina, Annual Report of the Register of Copyrights for the Fiscal Year ending June 30, 1935, 27.

See Industrial Property, Trade Marks and Copyrights, *supra*, § 208; list of presidential proclamations contained in "The Copyright Law of the United States of America," Library of Congress, Copyright Office Bulletin No. 14, 1934, pp. 39–40A.

See this author, in *Proceedings*, Am. Soc. Int. Law, 1937, 45, 49.

[6] Act of Feb. 20, 1905, Chap. 592, § 1, 33 Stat. 724 (amended by Acts of May 4, 1906, Chap. 2081, § 1, 34 Stat. 168, and Feb. 18, 1909, § 1, Chap. 144, 35 Stat. 628), 15 U.S.C.A. § 81.

See, in this connection, Crandall, Treaties, 2 ed., § 64.

See For. Rel. 1905, 169–175, and For. Rel. 1906, I, 228–234, for the texts of a series of agreements for the mutual protection of certain trade-marks in China.

[7] Rev. Stat. § 4028, amended Jan. 30, 1889, Chap. 100, § 1, 25 Stat. 654, 39 U.S.C.A. § 712, providing that the Postmaster General may conclude arrangements with the post departments of foreign governments with which postal conventions have been or may be concluded for the exchange, by means of postal orders, of small sums of money, not exceeding one hundred dollars in amount. See, also, Rev. Stat. § 398, 5 U.S.C.A. § 372.

"In virtue of these provisions, postal and money order conventions have been concluded by the Postmaster General with the approval of the President without submission to the Senate. Among these are the general postal union convention signed at Berne, October 9, 1874, and the universal postal union conventions signed at Vienna, July 4, 1891, at Washington, June 15, 1897, and at Rome, May 26, 1906." (Crandall, Treaties, 2 ed., 132.)

See, in this connection, United States *v.* Eighteen Packages of Dental Instruments, 222 Fed. 121; United States *v.* Four Packages of Cut Diamonds, 247 Fed. 354, where Manton, J., declared (358): "The Postal Conventions cannot be deemed treaties, because they are not adopted by the Senate, and they cannot be deemed statutes, because Congress alone has power to adopt statutes, and that power cannot be delegated. They cannot be considered treaties, because the treaty-making power is confined in the President and the Senate by the Constitution. They are but provisions which determine what merchandise may be received

gressional action, the President has, through the medium of the Secretary of the Treasury, entered into agreements for the making of loans to foreign powers; [8] and has, also, through the aid of a particular commission, established by like authority, entered into important arrangements for the refunding of loans made to such powers.[9] With the aid of an appropriate statute the President has entered into arrangements for moratoria with debtor States.[10] He has contracted for the acquisition of territory. By means of Congressional action approved by the President, the independent State of Texas was admitted into the Union.[11] The same process was utilized in the acquisition of Hawaii.[12] It was in pursuance of

---

in the mail." See, also, Four Packages of Cut Diamonds *v.* United States, 256 Fed. 305.

Also, Wallace McClure, International Executive Agreements, 38–40; 75–77.

See Universal Postal Union, Convention of Stockholm, Aug. 28, 1924, 44 Stat. 2221; Universal Postal Union, Convention of London, June 28, 1929, 46 Stat. 2523.

"For various reasons, five postal agreements, dating from 1844 to 1862, were submitted for the advice and consent of the Senate; three of those conventions went into force under the ordinary procedure of treaty making." (Hunter Miller, in Miller's Treaties, I (Short Print), 7.)

See Sec. 320 of the Tariff Act of June 17, 1930, 46 Stat. 590, 696, permitting the Secretary of the Treasury and the Postmaster General, jointly, with the advice and consent of the President, in behalf of the United States, to enter into reciprocal agreements with foreign countries for the entry free of duty in the respective countries of certain forms of advertising matter addressed to individual addressees.

Concerning agreements with Indian tribes, see Moore, Dig., V, 220–221, and documents there cited.

[8] See Act of April 24, 1917, 40 Stat. 35; Act of Sept. 24, 1917, 40 Stat. 288; Act of March 3, 1919, 40 Stat. 1309.

In relation to foreign loans made by the United States to foreign powers in pursuance of this legislation, see Annual Report of the Secretary of the Treasury for the fiscal year ended June 30, 1921, 32–42.

[9] See Act of Feb. 9, 1922, 42 Stat. 363, creating a "World War Foreign Debt Commission" authorized under certain conditions to refund or convert obligations of foreign Governments held by the United States, and amendment thereof, Feb. 28, 1923, 42 Stat. 1325.

See Mr. Mellon, Secy. of the Treasury and Chairman of the World War Foreign Debt Commission, to the British Ambassador at Washington, June 19, 1923, accepting on behalf of the United States a proposal of the British Government regarding the funding of the debt of Great Britain to the United States, Annual Report of the Secretary of the Treasury for the fiscal year ended June 30, 1923, 269; also, in this connection, *id.*, 24–33.

See, also, for example, Act of Dec. 22, 1924, 43 Stat. 720, to authorize the settlement of the indebtedness of the Republic of Poland to the United States.

Pursuant to an Act of Congress, approved May 19, 1926, the President concluded with Brazil, May 10, 1934, an agreement (together with a supplementary agreement effected by an exchange of notes, signed July 21 and 23, 1934), providing for an American Military Mission to Brazil. U. S. Executive Agreement Series, Nos. 64 and 65.

[10] See joint resolution approved Dec. 23, 1931, 47 Stat. 3. See also discussion in Wallace McClure, International Executive Agreements, 117–120.

[11] A treaty for the annexation of Texas, signed April 12, 1844, was rejected by the Senate, June 8, 1844. Brit. and For. State Pap., XXXIII, 258. A joint resolution of the Congress, approved March 1, 1845, announced the terms on which Texas would be received into the Union. 5 Stat. 797. Texas assented to these terms. By a joint resolution approved by the President Dec. 29, 1845, Texas was admitted into the Union as a State. 9 Stat. 108. Objections to the admission of Texas by this process were made in report by Mr. Archer from the Senate Committee on Foreign Relations, Feb. 4, 1845. Reports, Senate Com., For. Rel. VI, 78.

See, also, documents in Moore, Dig., I, 453–457.

[12] "Pending the consideration by the Senate of the treaty signed June 16, 1897, by the plenipotentiaries of the United States and of the Republic of Hawaii, providing for the annexation of the islands, a joint resolution to accomplish the same purpose by accepting the offered cession and incorporating the ceded territory into the Union was adopted by the Congress and approved July 7, 1898." (President McKinley, Annual Message, Dec. 5, 1898, For. Rel. 1898, LVII.) For a text of the joint resolution, see 30 Stat. 750.

Also Moore, Dig., I, 503–512, and documents there cited.

an Act of Congress of March 2, 1901, that agreement was made by the President with Cuba, February 23, 1903, for the lease to the United States of lands in Cuba for coaling and naval stations.[13]

Supported by a joint resolution of the Congress, approved June 19, 1934,[14] the President accepted membership for the Government of the United States in the International Labor Organization on August 20, 1934.[15]

(3)

§ 507. **Adjustment of Claims against Foreign States. Recourse to Arbitration.** In the conduct of the foreign relations of the nation, the President has frequently exercised the right to adjust international controversies by means of agreements not submitted to the Senate. These have oftentimes provided for recourse to arbitration. Such action has been based on the theory that if the executive possessed the right of adjustment, the mode of its exercise, as by arrangement contemplating a reasonable procedure, involved no implied abuse of power. Thus an agreement to invoke the judicial aid of a joint commission or of an arbitral tribunal, has merely indicated the choice by the President of a particular instrumentality incidental to his broad power to deal with the international controversies of the United States.

In the adjustment of pecuniary claims against foreign States the President has frequently acted alone, and his arrangements have often contemplated arbitration.[1] As illustrative of his action in this regard, attention is called to the

[13] Malloy's Treaties, I, 358. This agreement was signed by the President of Cuba, Feb. 16, 1903.

See also the lease to the United States by Cuba of land and water for naval or coaling stations in Guantanamo and Bahia Honda, signed by plenipotentiaries July 2, 1903, and approved by the President Oct. 2, 1903, Malloy's Treaties, I, 360.

[14] 48 Stat. 1182. The joint resolution provided that in accepting such membership, "the President shall assume on behalf of the United States no obligation under the covenant of the League of Nations."

[15] U. S. Treaty Vol. IV, 5531. See Manley O. Hudson, "The Membership of the United States in The International Labor Organization," *Am. J.*, XXVIII, 669.

See statements in Hackworth, Dig., V, §§ 463 and 471, in reference to the fact that certain maritime labor conventions were submitted to the Congress and later, to the Senate, "which gave its advice and consent to ratification, and were ratified by the President." See U. S. Treaty Series, Nos. 950, 951, and 952.

§ 507. [1] Declared Prof. Moore in 1905: "Pecuniary claims against foreign governments have constantly been settled by the President, and no question as to his possession of such a power, apart from discussions as to its possible limitations, appears ever to have been seriously raised." (*Pol. Sc. Quar.*, XX, 385, 403.) See, also, *Green Bag*, XVII, 229; Crandall, Treaties, 2 ed., § 57.

By means of an exchange of notes between General D. E. Sickles, the American Minister to Spain, and Señor Don Christino Martos, the Spanish Minister of State, on February 11 and 12, 1871, an arrangement was made with Spain for the settlement by arbitration of claims of American citizens arising from wrongs and injuries committed by authorities of Spain in Cuba. Moore, Arbitrations, 1019–1053. "The settlement was reported to Congress for its information, appropriations were voted to carry on the arbitration, an international commission was organized, and after nearly twelve years of labor, during which 140 cases were examined, awards against Spain were made to the amount of $1,293,450.50 and duly paid to the United States, all this being accomplished by a mere exchange of notes." (Report of Mr. Foster, Secy. of State, to the President, Dec. 7, 1892, H. Doc. 471, 56 Cong., 1 Sess., 17, cited in Moore, Dig., V, 216.)

The agreement for the adjustment of the so-called Pious Fund claim against Mexico by arbitration before a tribunal at the Hague, was effected by a protocol concluded May 22, 1902, Malloy's Treaties, I, 1194. The arrangements by which the United States, in February

agreement of August 10, 1922, for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of its financial obligations under its treaty with the United States on August 25, 1921,[2] and also to the agreement of November 26, 1924, for the determination of the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921.[3] The President has rarely, if ever, concluded agreements for the adjustment by arbitration of claims against the United States, without the approval of the Senate.[4] He did, however, through a protocol concluded with Mexico, April 24, 1934, and which was not submitted to that body, make arrangement for the appraisal and adjustment through the good offices of commissioners to be appointed by the Governments of the United States and of Mexico of claims that had been presented to the General Claims Commission established by the convention with that country of September 8, 1923.[5] While the final arrangement for the adjustment by a joint commission of the Canadian claim against the United States for reparation in consequence of the sinking of the ship *I'm Alone* in 1929, assumed the form of an executive agreement, it should be borne in mind that that instrument was merely the means of carrying out an undertaking previously created by treaty providing for such mode of adjusting such a claim, and accordingly, fails to mark an exception to an extended practice.[6]

Notwithstanding temporary and provisional arrangements, effected by execu-

---

and May, 1903, became a party to the arbitral adjustment of the preferential treatment of claims against Venezuela were embodied in protocols. See Malloy's Treaties, II, 1870 and 1872. It was by virtue of a claims protocol of Feb. 13, 1909, that arrangement was perfected for the arbitration of the claim of the Orinoco Steamship Company against Venezuela. *Id.*, 1881.

See also protocol of Dec. 1, 1909, between the United States and Chile, for the arbitration of the Alsop Claim, For. Rel. 1910, 186.

[2] U. S. Treaty Vol. III, 2601.

[3] U. S. Treaty Vol. IV, 3928.

See, also, agreement effected through an exchange of notes, Nov. 2, 1929, for the arbitration of the claim of P. W. Shufeldt against Guatemala, Dept. of State, Arbitration Series, No. 3, 9; agreement for the arbitration of the claim of George J. Salem against Egypt, signed Jan. 20, 1931, U. S. Executive Agreement Series, No. 33; Claims agreement with Turkey in settlement of claims of American citizens against that country, signed Oct. 25, 1934, U. S. Executive Agreement Series, No. 73.

[4] See, for example, agreement with Norway, June 30, 1921, for the submission to arbitration of certain claims of Norwegian subjects against the United States, U. S. Treaty Vol. III, 2749; agreement with Sweden, Dec. 17, 1930, for the arbitration of certain claims of a Swedish corporation growing out of the alleged detention of the motor ships "Kronprins Guztaf Adolf" and "Pacific," U. S. Treaty Vol. IV, 4653.

See John W. Foster, in *Yale Law J.*, XI, 69, 77.

It should be observed that an arrangement contemplating the arbitration of claims against a foreign State before an international tribunal necessarily involves the expenditure of funds by the United States as a claimant State, and hence calls for legislation by the Congress as a means of supplying them.

[5] U. S. Executive Agreement Series, No. 57. Provision was made, however, that with respect to cases in which the commissioners might not be able to reach agreement, recourse should be had to arbitration before an umpire and that the provisions in relation to his work should be fixed "in a convention" to be negotiated by the parties. See also agreement with Mexico of Nov. 19, 1941, concerning expropriation of petroleum properties, U. S. Executive Agreement Series, No 234.

[6] See Art. IV of Convention with Great Britain, of Jan. 23, 1924, U. S. Treaty Vol. IV, 4226.

tive agreement through *modi vivendi*,[7] the President has not been disposed to endeavor to bind the nation to make final adjustment by judicial process of territorial differences save by treaty.[8] Thus, the agreement with The Netherlands concluded January 23, 1925, for the arbitration of differences respecting sovereignty over the Island of Palmas assumed the form of a treaty and was submitted, accordingly, to the Senate for its approval.[9] It should be observed that the Senate has been reluctant to consent to general treaties rendering recourse to arbitration obligatory, and contemplating a special agreement or *compromis* as a condition precedent to a particular adjudication, unless provision were made that such agreement should be submitted to that body for its approval.[10] Arrangement for such a submission has usually been embodied in the terms of the several treaties of general arbitration to which the United States has become a party.[11]

(4)

§ 508. **Important Protocols and Other Agreements Concerning Political Affairs.** The President has by executive agreement concluded certain important compacts with respect to political affairs, in some cases establishing the basis of subsequent arrangements. Of such a kind was the protocol signed at Washington August 12, 1898, by the Secretary of State and the French Ambassador, establishing the basis of conditions for peace between the United States and Spain.[1] By means of a protocol signed at Peking September 7, 1901,

[7] See Modi Vivendi, *infra*, § 509.

[8] Thus the agreement providing for the adjustment of the Alaskan boundary by a joint commission, and concluded with Great Britain, Jan. 24, 1903, assumed the form of a convention which was submitted to the Senate. Malloy's Treaties, I, 787.

The special agreement with Great Britain of Jan. 27, 1909, Malloy's Treaties, I, 835, for the submission to arbitration of the controversy respecting the North Atlantic Coast Fisheries, was pursuant to the general treaty of arbitration of April 4, 1908, according to which special agreements on the part of the United States were to be made by the President by and with the advice and consent of the Senate, Malloy's Treaties, I, 814. Therefore, the special agreement of Jan. 27, 1909, was submitted to that body.

[9] U. S. Treaty Vol. IV, 4512.

[10] This was true with respect to a series of treaties concluded in 1905, and submitted by President Roosevelt to the Senate for its approval. They provided that in each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, should conclude a "special agreement" defining clearly the matter in dispute, the scope of the powers of the arbitrators, the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure. For the word "agreement," the Senate substituted the word "treaty," to indicate the nature of the arrangement required to make provision for each case. The President declined to ratify the treaties as thus amended.

[11] See, for example, arbitration convention with France of Feb. 10, 1908, Malloy's Treaties, I, 549.

See the "understanding," made a part of the act of ratification, under which the United States accepted the Inter-American Arbitration Treaty signed at Washington, Jan. 5, 1929, U. S. Treaty Vol. IV, 4756, 4759.

[1] Malloy's Treaties, II, 1688.

LIMITATION OF ARMAMENT ON THE GREAT LAKES. By an exchange of notes, April 28–29, 1817, an arrangement was concluded with Great Britain limiting the naval forces on the Great Lakes. Malloy's Treaties, I, 628. "April 6, 1818, President Monroe, apparently out of abundant caution, communicated the correspondence to the Senate. Am. State Pap., For. Rel., IV, 202. The Senate, on the 16th of the same month, by a resolution in which two-thirds of the Senators present concurred, 'approved of and consented to' the arrangement, and 'recommended that the same be carried into effect by the President.' The President proclaimed the arrangement April 28, 1818. (11 Stat. 766.) The proclamation, however, does not

the United States joined with Austria-Hungary, Belgium, Spain, France, Great Britain, Germany, Italy, Japan, the Netherlands and Russia, in the agreement with China, fixing the basis for the heavy obligations to be undertaken by that State in consequence of the so-called "Boxer" troubles in 1900.[2]

In the formulation and determination in conjunction with the Allied and Associated Powers of the basis of an agreement on which an armistice should be concluded with Germany in 1918, and in the perfecting of an arrangement appropriate to that end in behalf of the United States, the President acted by executive agreement through notes addressed to the Swiss Legation at Washington in charge of German affairs.[3]

In a variety of matters growing out of the participation of the United States in World War I, executive agreements were utilized as appropriate settings of accord. Such was the case, for example, in arrangements for the food rationing of certain neutral countries,[4] and in others relating to details connected with the carrying on of the war.[5]

As has been observed elsewhere,[6] an executive agreement concluded with Haiti, August 7, 1933, for the Haitianization of the Garde, Withdrawal of Military Forces from Haiti, and Financial Arrangement, was the instrument through which the United States made relinquishment of important privileges of control over the affairs of that Republic.[7] That agreement served to modify the additional act of March 28, 1917,[8] which was itself an executive agreement, employed for the purpose of enabling the United States as well as Haiti to extend for a

---

appear ever to have been officially communicated to the British government, and no exchange of ratifications took place." (Moore, Dig., V, 204–215.) See report of Mr. Foster, Secy. of State, to the President, Dec. 7, 1892, Senate Ex. Doc. No. 9, 52 Cong. 2 Sess., published also by Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 2, Washington, 1914. Also J. M. Callahan, Neutrality of the American Lakes, Baltimore, 1898, Chap. IV. See exchanges of notes between the American and British Governments in 1939 and 1940, revealing understandings or interpretations of the Agreement of 1817, as set forth in Dept. of State Bulletin, March 29, 1941, 366–372; also *supra*, § 186.

By a protocol signed Dec. 9, 1850, by the American Minister at London, Mr. Abbott Lawrence, and Viscount Palmerston, Great Britain ceded to the United States a portion of the Horse Shoe Reef in Lake Erie, on condition that the latter should maintain a lighthouse thereon. Malloy's Treaties, I. 663. "Congress appropriated money for the erection of a lighthouse which was built; and the United States thus possesses and exercises full jurisdiction over territory acquired by cession from a foreign power without a treaty." Report of Mr. Foster, Secy. of State, to the President, Dec. 7, 1892, and quoted in Moore. Dig., V, 215.

Concerning the arrangement effected by an exchange of notes in 1859 and 1860, in behalf of the United States and Great Britain, contemplating the joint occupation of San Juan Island, see Wallace McClure, International Executive Agreements, 71–73.

[2] Malloy's Treaties, II, 2006.

[3] See correspondence between the United States and Germany regarding an armistice, in October and November, 1918, For. Rel. 1918, Supplement 1, Vol. I, 337–498, especially Mr. Lansing, Secy. of State, to Mr. Sulzer, Swiss Minister at Washington, Nov. 5, 1918, *id.*, 468.

[4] See agreement with Norway, of April 30, 1918, For. Rel. 1918, Supp. Vol. I, 117.

[5] A notable instance is the arrangement concluded in 1918, in behalf of the United States, Great Britain, and France, with the Soviet régime at Murmansk. See For. Rel. 1918, Russia, Vol. II, 492, Wallace McClure, International Executive Agreements, 110.

[6] See Haiti, *supra*, § 22A.

[7] U. S. Executive Agreement Series, No. 46. See, also, agreement with Haiti, July 24, 1934, concerning the Withdrawal of Military Forces from Haiti, and modifying the agreement of Aug. 7, 1933, U. S. Executive Agreement Series, No. 68.

[8] U. S. Treaty Vol. III, 2677.

period of twenty years the life of the important convention between the two Republics that had been concluded September 16, 1915.[9]

Through an exchange of notes between the United States and Japan, November 30, 1908, an agreement was made declaratory of the policy of the contracting parties in the Far East, embracing among other things an expression of determination to support the independence and integrity of China, and the principle of equal opportunity for the commerce and industry of all nations in that Empire.[10] By the same process, through the so-called Lansing-Ishii agreement of November 2, 1917, the United States made further agreement with Japan, recognizing that territorial propinquity creates special relations between countries, and declaring that the United States also recognized that Japan had "special interests in China, particularly in the part to which her possessions are contiguous." [11] The agreement was cancelled by an exchange of notes on April 14, 1923.[12]

"When the Government of Muscat wished to change its tariff so as to exceed the five percent allowed under the treaty of 1833 between Muscat and the United States, 1 Treaties, etc. (Malloy, 1910) 1228, the United States indicated willingness to make such an alteration by a new treaty but said: '. . . In view of constitutional requirements, however, the United States is not in a position to enter into an exchange of notes the purpose of which is to amend an existing treaty.' " [13]

The "Silver Agreement," entered into by the delegates of India, China and Spain as holders of large stocks or users of silver, and of Australia, Canada, the United States, Mexico and Peru as principal producers of silver, concluded, with supplementary undertakings, at the Monetary and Economic Conference at London in July, 1933, was, in so far as concerned the United States, dealt with as an executive agreement.[14]

[9] U. S. Treaty Vol. III, 2673.

[10] Malloy's Treaties, I, 1045. See, in this connection, Simeon E. Baldwin, "The Exchange of Notes in 1908 between Japan and the United States," *Zeit. Völk.*, III, 456, 459, where it is stated that there was "no precedent in the history of American diplomacy for such a declaration of an international entente as that found in notes in question," and expressing doubt as to the duty of the United States, after the retirement of President Roosevelt, to adhere to the policy marked out in the notes. *Id.*, 465.

It may be observed that executive agreements need not always be expressed in writing. The important understanding effected by Mr. Root, Secy. of State, and the Japanese Ambassador at Washington in 1907, with respect to the limitation and control to be exercised by Japan over the emigration of laborers to the United States, was perfected without the aid of an exchange of notes or the execution of a protocol. See reference to this understanding in declaration by the Japanese Ambassador, Feb. 21, 1911, U. S. Treaty Vol. III, 2718; also in Report of the Commissioner General of Immigration for the year ending June 30, 1907. See, also, Mr. Hanihara, Japanese Ambassador at Washington, to Mr. Hughes, Secy. of State, April 10, 1924, For. Rel. 1924, II, 369, and in this connection, The Admission of Aliens, *supra*, § 60.

[11] U. S. Treaty Vol. III, 2720. See statement of Mr. Lansing, Secy. of State, concerning this agreement at a hearing of the Senate Committee on Foreign Relations, Aug. 11, 1919, Senate Doc. No. 106, 66 Cong., 1 Sess., 223, and following.

[12] U. S. Treaty Vol. III, 3825.

[13] Mr. Castle, Under Secy. of State, to the British Chargé d'Affaires *ad interim*, Oct. 10, 1931, Hackworth, Dig., V, § 509. See also numerous other documents in the same section illustrative of the principle stated in the text.

[14] U. S. Executive Agreement Series, No. 63. According to Article 8: "The Government of the United States is requested to take such steps as may be necessary for the purpose of the conclusion of this agreement."

It is not without significance that it was seemingly regarded as feasible for the United States, by executive agreement, to participate in 1931, in an armaments truce, and in 1933, in a tariff truce, which were initiated by the League of Nations.[15]

The Conference on the Limitation of Armament assembled at Washington in 1921–1922,[16] the negotiations in 1933, productive of the recognition by the American Government of the Soviet régime as the Government of Russia,[17] as well as conferences of representatives of the American Republics at Lima in 1938,[18] at Panama in 1939,[19] and at Habana in 1940,[20] proved to be occasions

[15] See, Wallace McClure, International Executive Agreements, 122–125, and documents there cited.

Among arrangements of lesser importance which have not been dealt with as treaties by the United States, there may be noted the agreement for the Execution of Letters Rogatory, effected by an exchange of notes with the Union of Soviet Socialist Republics, Nov. 22, 1935, U. S. Executive Agreement Series, No. 83; arrangement effected by exchange of notes with the Dominion of Canada concerning Quarantine Inspection of Vessels Entering Puget Sound and Waters Adjacent Thereto or the Great Lakes via the St. Lawrence River, Oct. 10 and 23, 1929, *id.*, No. 1; arrangement effected by exchange of notes with the Dominion of Canada for the Admission of Civil Aircraft, the Issuance of Pilots' Licenses and the Acceptance of Certificates of Airworthiness for Aircraft Imported as Merchandise, Aug. 29, 1929, and Oct. 22, 1929, *id.*, No. 2; agreement by Diplomatic Representatives in China of the United States of America, Brazil, France, Great Britain, Netherlands, and Norway, with the Minister for Foreign Affairs of China, concerning Chinese Courts in the International Settlement at Shanghai (with attached notes and a unilateral declaration), Feb. 17, 1930, *id.*, No. 37; agreement extending the duration of the agreement and attached notes of Feb. 17, 1930, by Diplomatic Representatives in China of the United States of America, Brazil, France, Great Britain, Netherlands and Norway, with the Minister for Foreign Affairs of China, Feb. 8, 11, and 12, 1933 (and unilateral declaration renewing the unilateral declaration of Feb. 17, 1930, Feb. 8, 1933), *id.*, No. 45; arrangement with Sweden effected by exchange of notes concerning the Reciprocal Exemption of Pleasure Yachts from All Navigation Dues, Oct. 22 and 29, 1930, *id.*, No. 21; arrangement with Denmark effected by exchange of notes, concerning Reciprocal Treatment of Passenger Motor Vehicles, Sept. 4, and Oct. 27, 1928, and Feb. 2, 1929, effective Feb. 1, 1929, *id.*, No. 61; arrangement effected by exchange of notes between the Acting Legal Adviser of the Secretariat of the League of Nations and the American Consul at Geneva, concerning Registration of Treaties and Other International Agreements of the United States of America with the Secretariat of the League of Nations, Jan. 22 and 23, 1934, effective Jan. 23, 1934, *id.*, No. 70; agreement between the United States and Other Powers and protocol of signature, concerning Statistics of Causes of Death, June 19, 1934, effective June 19, 1934, *id.*, No. 80.

The following arrangements, effected by executive agreement, are typical of numerous others of like purport concluded by the United States with various countries: arrangement concerning Relief from Double Income Tax on Shipping Profits, effected by exchange of notes with Japan, March 31 and June 8, 1926, U. S. Executive Agreement Series, No. 3; arrangement concerning Air Navigation, effected by exchange of notes with Italy, Oct. 13 and 14, 1931, *id.*, No. 24; arrangement concerning Reciprocal Recognition of Certificates of Airworthiness for Imported Aircraft, effected by exchange of notes with the Union of South Africa, Oct. 12 and Dec. 1, 1931, *id.*, No. 28; agreement concerning Mutual Recognition of Ship Measurement Certificates, effected by exchange of notes with Estonia, Aug. 21 and Nov. 30, 1926, *id.*, No. 9; arrangement concerning Reciprocal Recognition of Load-Line Certificates, effected by exchange of notes with Japan, Feb. 13, March 19 and 30, Aug. 25, and Sept. 7, 1931, *id.*, No. 25; arrangement concerning Pilot Licenses to Operate Civil Aircraft, effected by exchange of notes with Sweden, Sept. 8 and 9, 1933, *id.*, No. 48; arrangement concerning Radio Communications between Amateur Stations on Behalf of Third Parties, effected by exchange of notes with Peru, Feb. 16 and May 23, 1934, *id.*, No. 66.

[16] See Resolution Regarding Extraterritoriality in China, adopted by the Conference on Dec. 10, 1921, U. S. Treaty Vol. III, 3131. See other Resolutions, *id.*, 3132–3140. *Cf.* form of engagement Limiting Naval Armament, concluded March 29, 1922, *id.*, 3100.

[17] See Recognition of New Governments, Recognition of the Russian Government in 1933, *supra*, § 45B. See also United States *v.* Belmont, 301 U. S. 324.

[18] See The Declaration of Lima, 1938, *supra*, § 94A.

[19] See The Declaration of Panama, *infra*, § 888B.

[20] See The Act of Habana and Convention of July 30, 1940, *supra*, § 94B.

when important engagements were consummated by executive agreement.[21]

By an executive agreement of September 2, 1940,[22] certain American destroyers were to be given over by the United States to the United Kingdom, in exchange for the right to lease important naval and air bases in certain British areas in the Western Hemisphere.[23] By like process, registered in an agreement effected by the President of the United States and the Prime Minister of Canada, and announced on August 18, 1940, arrangement was made for the establishment of a Permanent Joint Board of Defense.[24]

In the course of a memorandum by Mr. Hackworth, the Legal Adviser of the Department of State, and submitted by the Secretary of State to the Attorney General March 13, 1941, in reference to the Great Lakes–St. Lawrence waterway project, the view was expressed that an arrangement between the United States and Canada concerning the project could be effected "by a simple agreement between the two countries and approval of the agreement by legislation in the United States and in Canada." [25] This view was concurred in by the Attorney General on March 14, 1941.[26]

Through an executive agreement between the United States and Iceland, effected on July 1, 1941, the former undertook to defend that country by United States forces.[27]

[21] See also variety of instances in Wallace McClure, International Executive Agreements, 125–189. Among them may be noted the so-called wheat agreements with Brazil and with Germany of 1930 and 1931, respectively (157–159), the Cotton-Wheat Purchase loan to China in 1933 (*id.*, 159–161), and the agreement for International Wheat Control concluded at the World Monetary and Economic Conference at London, Aug. 25, 1933. (*Id.*, 161–162.)

[22] Dept. of State Bulletin, Sept. 7, 1940, 199–201.

[23] See The Transfer of Destroyers to the United Kingdom in 1940, *infra*, § 848A, and data there given in a footnote concerning the authority of the President to enter into the arrangement.

See, in relation to the leased naval and air bases, agreement and exchanges of notes between the United States and Great Britain, and protocol between the United States, Great Britain and Canada concerning the defense of Newfoundland, signed March 27, 1941, U. S. Executive Agreement Series, No. 235.

[24] Dept. of State Bulletin, Aug. 24, 1940, 154.

As has been noted elsewhere (*supra*, § 494), effort was made in April, 1941, by executive agreement effected by an exchange of notes, to secure for the United States important seaplane, radio and meteorological privileges in the Island of Greenland.

[25] Dept. of State Bulletin, March 29, 1941, 364, where reference was made to a memorandum by the same officer, under date of Feb. 10, 1939. Mr. Hackworth said in part: "The improvement of the Great Lakes–St. Lawrence Basin for navigation and other purposes would seem clearly to fall within the commerce clause of the Constitution, giving the Congress the authority to regulate interstate and foreign commerce. Where the undertaking with respect to interstate and foreign commerce involves boundary waters over which this country does not have exclusive jurisdiction, there would seem to be no reason why the Congress should not within its Constitutional power enact legislation, contingent upon a like legislative enactment in the other country, signifying its approval of a joint undertaking signed by both Governments. The signing of an agreement by the two Governments would be but a convenient way of bringing about in advance of legislative enactments a joint understanding by the two Governments on a complicated question which could hardly be handled without such advance understanding. The agreement would contain provisions which might otherwise be incorporated in a treaty, but would not take the treaty form or follow the treaty process. It would not constitute a binding international agreement until Congress and the Canadian Parliament had indicated their approval." (*Id.*, 365.)

[26] *Id.*, 365.

See message of the President to Congress, of March 21, 1941, and text of an agreement of March 19, 1941, as set forth in Dept. of State Bulletin, March 22, 1941, 307.

[27] U. S. Executive Agreement Series, No. 232.

(5)

§ 509. ***Modi Vivendi.*** "There is a well defined type of agreement, known as the *modus vivendi,* which has been regarded as falling within the President's powers. As the name indicates, a *modus vivendi* is in its nature a temporary or working arrangement made in order to bridge over some difficulty pending a permanent settlement." [1] Thus pending the consideration by the Senate of a convention with the Dominican Republic, signed February 7, 1905, providing for the collection and disbursement of the customs revenues of that State,[2] the President, through a *modus vivendi* expressed in an exchange of notes March 31, and April 1, 1905, arranged with that Republic for the collection, temporary deposit, and ultimate distribution of Dominican revenues by an American receiver.[3] The Executive has entered into numerous other agreements of the same general character. It was found on several occasions to be feasible to employ them to enable American fishermen to exercise certain fishing privileges within British territorial waters prior to the final adjustment by arbitration of the controversy concerning the North Atlantic Coast Fisheries.[4]

The *modus vivendi* may, in a broad sense, be regarded as further illustrated by arrangements for the temporary and provisional delimitation of the Panama Canal Zone, and of boundaries between territory of the United States on the Isthmus of Panama and the Republic of Panama, concluded on March 15, 1904.[5]

The United States continues to enter into *modi vivendi* in relation to commercial and other matters, and the provisional arrangements which register accord assume the form of executive agreements.[6]

(6)

§ 509A. **Some Conclusions.** The recourse to executive agreements revealed in the foregoing sections, however impressive in scope and development, fails to

§ 509. [1] J. B. Moore, in *Pol. Sc. Quar.,* XX, 385, 397.

[2] For. Rel. 1905, 342.

[3] For. Rel. 1905, 365–366.

[4] See, for example, *modus vivendi,* expressed in an agreement effected by an exchange of notes at London, Oct. 6–8, 1906, Malloy's Treaties, I, 805, also renewals, *id.,* 811, 832, and 844.

See, also, agreement with Spain effected by exchange of notes, to Preserve the Status Quo with respect to Mines or Mining Rights in Mexico, July 26, 1914, U. S. Treaty Vol. III, 2840.

[5] U. S. Treaty Vol. III, 2752–2756; also Note, *id.,* 2756, on "Agreement Serving as Modus Operandi During the Period of the Construction of the Panama Canal." *Cf.* Boundary Convention of Sept. 2, 1914, *id.,* 2770.

See, also, arrangement effected by exchange of notes between the United States and Great Britain, in July, 1907, concerning the administration and lease of certain small islands on the North Bornean Coast by the British North Bornean Company, U. S. Treaty Vol. III, 2605, and the Convention Delimiting the Boundary between the Philippine Archipelago and the State of North Borneo, Jan. 2, 1930, U. S. Treaty Vol. IV, 4261.

[6] See, for example, provisional agreement concerning Commercial Relations concluded with Chile by exchange of notes, Sept. 28, 1931, U. S. Executive Agreement Series, No. 26; provisional agreement concerning Commercial Relations concluded with Bulgaria by exchange of notes, Aug. 18, 1932, *id.,* No. 41; agreement concerning Commercial Relations concluded with Czechoslovakia, amending the Commercial Agreement of Oct. 29, 1923, as prolonged by the agreement of Dec. 5, 1924, signed March 29, 1935, *id.,* No. 74.

See, also, provisional commercial agreement concerning Most-Favored-Nation Treatment concluded with Rumania, Aug. 20, 1930, U. S. Executive Agreement Series, No. 8.

show that the Government has in fact acted on the theory that the President, with or without the aid of Congress, may conclude in behalf of the United States any arrangement which could be concluded through the instrumentality of a treaty. There have been, moreover, instances where a Secretary of State has felt that for purposes of agreement the use of a treaty was obligatory.[1]

At the time of the adoption of the Constitution treaties, themselves distinguishable under the then existing practice from arrangements of lesser dignity, were the usual settings that were employed in the making of compacts of largest import and longest endurance.[2] This circumstance strengthens the view that the exact provisions of the Constitution concerning the making of treaties did more than prescribe the manner in which they were to be concluded. The declaration that the President "shall have Power by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," [3] sustains the conclusion that it was not to be rendered abortive by recourse to a different procedure for the use of which no provision was made, and that there were to be found tests of improper evasion in the character of what was sought to be achieved despite the absence of a specific textual prohibition.[4] Otherwise, the scheme for the coöperative action of the President and the Senate would have been a relatively valueless injunction, and the solitary constitutional guide for contracting would have been of slight worth.

Acceptance of this conclusion that finds in the provision quoted not merely a ruling as to the method of treaty-making, but also a direction that some arrangements must be concluded as treaties are to be concluded, has vast implications.[5]

§ 509A. [1] Declared Secy. Hughes, on Feb. 4, 1922, as Chairman of the Conference on the Limitation of Armament assembled at Washington in 1921–1922: "Engagements which it is deemed require the sanction of a treaty are put in the form of a treaty and proposed for execution by the Powers. In other cases, the Resolutions are of a character not requiring such sanction in the form of a treaty, and are deemed to be binding upon the Powers according to their tenor when adopted by the Conference." (U. S. Treaty Vol. III, 3130.)

[2] Declares Dr. S. A. Riesenfeld: "As early a writer as Grotius distinguished between international contracts and "*sponsions*," the latter being agreements entered into by a public officer and similar persons under the authority of the sovereign. The distinction was adopted by later writers, as for instance, Rutherford. Vattel likewise distinguished treaties and other accords and conventions. To him, however, the distinction was not based upon the presence or absence of authorization by the sovereign, but upon the nature of the compact. Accords or conventions, in his view, concern transitory affairs in contrast to treaties which have a more permanent nature. This seems to have become international practice. There is on the one hand the bulk of solemn international instruments designated as treaties, and on the other a vast amount of less formal agreements, spoken of as protocols, *modi vivendi*, etc." (*Calif. Law Rev.*, XXV, 671.)

[3] Art. II, Section 2, paragraph 2.

[4] A different view is entertained by Dr. Wallace McClure, who declares that "since no division or limitation of the subject matter of international acts is laid down, there is, *prima facie*, no reason to deny the existence of constitutional authorization for the use of executive agreements relating to whatever subjects may be dealt with by the treaty-making power." (International Executive Agreements, 32.)

[5] It would of course be difficult to impute with confidence to the framers of the Constitution a conscious design to permit executive agreement-making throughout the broad field within which it has long since been utilized. This fact is not in itself, however, suggestive of impropriety of conduct in numerous situations where such a policy has been followed and concerning which the Supreme Court has given no token of disapproval. In the management of its foreign relations in so far as they have demanded the conclusion of contractual arrangements, the bare absence of thought or anticipation on the part of those who drafted the Constitution should not be deemed to bar the nation from the use of easy and simple methods of contracting which States have generally and increasingly become disposed to

It demands that the executive probe in every case the question whether a prospective arrangement falls on one side of the line or the other, and that in so doing he seek and apply correctly the final test of his own freedom. That burden, however difficult, thus rests squarely upon the executive who must pass on the constitutionality of the procedure which he elects to follow. Accordingly, he must be expected to be influenced by the character or gravity of the sacrifice which in the particular case is sought to be imposed upon the United States. When that sacrifice entails the giving up of title to, or sovereignty over, something of great value which belongs to the nation, such as part of its own domain, the President may well deem it necessary to proceed by treaty. Through such action he may, moreover, avoid the danger of raising a regrettable issue with the judicial department of the Government.

---

utilize in a variety of situations. This circumstance together with the very latitude which it inspires has perhaps rendered difficult of apprehension the real test of the American constitutional limitation.

# TITLE C

## NEGOTIATION AND CONCLUSION

### 1

§ 510. **Persons Capable of Signing Agreements.** Any one may be appointed an agent of a State for the purpose of negotiating and signing an international agreement in its behalf. Treaties may be concluded by the heads of States. The compact known as the Holy Alliance, of September 14–26, 1815, was signed by the Emperors of Austria and Russia, and by the King of Prussia.[1] The Treaty of Versailles of June 28, 1919, was signed by President Wilson, "acting in his own name and by his own proper authority," as well as by the Prime Minister of Great Britain, the President of the Council of the French Republic, the Presidents of the Councils of Ministers of Greece, of the Polish Republic, of Roumania and of the Czecho-Slovak Republic, and by numerous other plenipotentiaries of the Principal Allied and Associated Powers.[2]

Ordinarily bi-partite agreements are signed by the Minister of Foreign Affairs of the State where negotiations are conducted, and by a plenipotentiary (usually the accredited diplomatic representative) of the other contracting party. Not infrequently special commissioners are appointed for such a purpose.[3]

The nationality of the individual who negotiates and signs a treaty is unimportant. He may be a national of the State with which he seeks to conclude an agreement. On more than one occasion an American citizen has, in behalf of a foreign power, signed a treaty with the United States.[4] No instance is recalled, however, where the President has authorized an alien to sign a treaty in behalf of the United States.

§ 510. [1] *Nouv. Rec.*, II, 630.

The preliminaries of peace agreed upon at Villafranca, July 11, 1859, were signed by the Emperors of Austria and France. *Nouv. Rec. Gén.*, XVI, Part 2, p. 516.

[2] Preamble of the treaty, as contained in U. S. Treaty Vol. III, 3331.

The agreement between the United States and Cuba of Feb. 16, 1903, for the lease to the former of lands in Cuba for coaling and naval stations, was signed by the Presidents of the contracting States. Malloy's Treaties, I, 358.

[3] Thus, for example, President McKinley appointed five commissioners to meet at Paris not later than Oct. 1, 1898, to conclude a treaty of peace with commissioners representing Spain. See instructions to the American Commissioners, Sept. 16, 1898, For. Rel. 1898, 904.

[4] Thus Mr. Anson Burlingame, an American citizen, who had been formerly in the diplomatic service of the United States, signed, in behalf of China, a treaty concluded with the United States July 28, 1868. Malloy's Treaties, I, 234.

Mr. Herbert W. Bowen, American Minister to Venezuela, was permitted by the United States to act as the Venezuelan plenipotentiary in concluding agreements with the United States at Washington, Feb. 17, and May 7, 1903. Malloy's Treaties, II, 1870 and 1872.

See, also, Foreign Service Regulations of the United States, Chap. XI, on the "Negotiation of Treaties," as of January, 1941.

See, especially, Mr. Barnes, Chief of Treaty Division, Dept. of State, to Miss Mildred Gilbert, April 30, 1938, MS. Dept. of State, file 711.00/924, Hackworth, Dig., V, § 465.

2

§ 511. **Full Powers.** It has long been the practice of States to confer what are described as full powers upon the agent entrusted with the task of negotiating and signing an instrument such as a treaty. In early times, when a monarch possessed the entire agreement-making power of the country over which he reigned, he sometimes delegated large authority to his agent who was thus enabled, by reason of the fullness of his power to bind his sovereign by signing a treaty in his behalf.[1] At the present time, however, the constitutional or fundamental law of contracting States usually confers upon the legislative department of the governments concerned a share in the exercise of the agreement-making function, and so prevents the delegation to a plenipotentiary of authority, at least with respect to the more important classes of agreements, which assume the form of treaties, to perfect the contractual obligation in behalf of his country.[2] Quite apart, however, from any constitutional requirements, it seems to be acknowledged to be inexpedient to permit the agent who signs an instrument to bind his principal in relation to numerous matters of large import concerning which international agreement is sought. Danger of the abuse of authority, and of the magnitude of the public injury which may result therefrom, has, therefore, long been regarded as justifying a limitation of the authority confided in the negotiators and signers of treaties.[3] Save for the purpose of concluding arrangements of lesser dignity which the head of a contracting State is himself empowered to perfect by the act of signing, and which he also is desirous of perfecting by such process, the negotiators and signers of instruments that register international accord are not commonly empowered to bind the States for which they act. Thus, the full powers with which such individuals are clothed, merely betoken authority to negotiate and sign, and imply that further steps need to be taken in order to perfect the contractual relationship between the States concerned.[4]

In order to facilitate the negotiation and signature of a treaty, it is still customary to confer full powers on the plenipotentiaries who are commissioned to

§ 511. [1] "In the time of Grotius it was thought that a diplomatic representative bound his constituent by whatever agreement he concluded within the terms of his credentials." (Westlake, 2 ed., I, 290–291, *citing* Grotius, I, 2, c. 11, § 12.)

[2] See Ratification of Treaties: Methods and Procedure in Foreign Countries Relative to the Ratification of Treaties (containing also extracts from the Executive Journal of the Senate relative to proceedings in cases of treaties rejected by the Senate), Senate Doc. No. 26, 66 Cong., 1 Sess.

[3] Numerous executive agreements to which the United States is a party contemplate ratification. See, for example, Art. VI of agreement with Austria and Hungary, Nov. 26, 1924, U. S. Treaty Vol. IV, 3929.

[4] Hall, Higgins' 8 ed., § 110, where it is said: "It was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a State, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognised by Bynkershoek as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign."

engage in such action. In the case of the United States, "when circumstance or convenience make it desirable to negotiate and conclude a treaty at the capital of the other contracting power, the American diplomatic agent will be furnished with a full power from the President authorizing him to negotiate, conclude, and sign the treaty"; [5] if negotiations and signature take place at Washington, that power will be conferred upon the Secretary of State.

In the course of agreement-making, the full powers of the negotiators and signers in behalf of one State are duly communicated to those who are exercising such functions in behalf of such other State or States as expectant signatory powers.[6] In the conclusion of treaties at Washington, the requisite inspection of the powers of a foreign plenipotentiary has at times been effected by a submission of them by the government of his country to the American diplomatic mission at the capital thereof, which has in turn notified the Department of State by telegraph of the sufficiency of the authority conferred upon him.[7] In case of the death of the donor of full powers prior to the exercise of them, they cease to be efficacious and fresh powers need to be issued by a new donor.[8]

The government of a contracting State may in fact decline to have negotiations with a foreign plenipotentiary who is unable to assure it that his powers suffice to betoken his possession of requisite authority to negotiate and sign.[9] In

[5] Foreign Service Regulations of the United States, XI–1, as of January, 1941.

"Where an international Act requiring ratification is to be signed on the part of the United States, full powers to sign are invariably issued by the President to the American plenipotentiary, whether he be the Secretary of State or some other person. It is required also that full powers be produced by the plenipotentiary of the other Contracting Party. The respective full powers may be either exhibited or exchanged as the foreign plenipotentiary may elect. If they are merely exhibited, it is customary for the Department of State to be supplied with a copy of the instrument issued to the foreign plenipotentiary." (Mr. Kellogg, Secy. of State, to the Italian Ambassador at Washington, Nov. 26, 1928, MS. Dept. of State, file 711.00/316. Hackworth, Dig., V, § 467.)

[6] See, for example, the reference to the matter in the preamble of the treaty between the United States and Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

"Full powers may be either exchanged or exhibited by the plenipotentiaries at the time of signature as may be preferred by the foreign plenipotentiary. If exchanged, the original full power of the foreign plenipotentiary shall be forwarded to the Department with the United States' original of the signed treaty. If the plenipotentiaries retain their own full powers, the foreign plenipotentiary should be requested to furnish to the plenipotentiary of the United States a photostat or certified copy of his full power in lieu of the original. This is the practice in Washington." (Foreign Service Regulations of the United States, XI–4, as of January, 1941.)

[7] Such a course was pursued in assuring the Government of the United States of the sufficiency of the powers conferred upon the Counselor of the Swedish Legation at Washington to enable him to sign the convention concluded with the United States May 22, 1924, for the Prevention of Smuggling of Intoxicating Liquors, U. S. Treaty Vol. IV, 4647.

Again, in 1928, the Japanese Minister for Foreign Affairs showed the American Ambassador in Tokio the full powers for the Japanese Ambassador in Washington to sign the convention concerning the smuggling of intoxicating liquors between the United States and Japan, of May 31, 1928 (U. S. Treaty Vol. IV, 4389), and the convention was duly signed upon receipt of a telegram from the American Ambassador at Tokio, indicating that he had there examined the full power and found it to be in proper form. "The full power was forwarded to Washington and was submitted to the Department of State by the Japanese Embassy, a photostat was made and filed with the convention; and the original was returned to the Japanese Embassy." (Statement in Hackworth, Dig., V, § 467.)

[8] The death of President Harding, August 2, 1923, served to nullify full powers which he had conferred upon the Secretary of State to negotiate and sign a certain series of treaties. The Secretary of State was, accordingly, obliged to await the issuance of fresh powers by President Coolidge.

[9] See attitude of Japanese plenipotentiaries in declining to accept the powers of the Chinese

correspondence with Germany in October, 1918, regarding an armistice, President Wilson declared it to be his duty to say that the world did not and could not trust the word of those who had been the masters of German policy, and to point out that the Government of the United States could not deal "with any but veritable representatives of the German people who have been assured of a genuine constitutional standing as the real rulers of Germany." [10] From assurances of the German Foreign Office, the President appeared to be satisfied that those who sought to act in behalf of Germany fulfilled this condition.[11]

## 3

## FORMALITIES

### a

§ 512. **Language.** "Until about the beginning of the eighteenth century treaties between European powers were generally written in Latin, but it has since been customary for negotiators of countries which do not use the same language to prepare their treaties in both languages." [1]

It is customary for States at the present time to give expression to their written bi-partite agreements in their respective languages, in case they differ. Such is the practice of the United States.[2] The treaty of peace between Japan

---

plenipotentiaries who met them with a view to concluding peace in 1894, Moore, Dig., V, 179–180, For. Rel. 1894, Appendix I, 97–106.

Concerning the attitude of the United States as to the wisdom of entering into negotiations with Earl Li Hung Chang and Prince Ching as plenipotentiaries of China after the Boxer movement in 1900, see For. Rel. 1900, 291–293. The view of Germany was expressed in a memorial filed with the American Embassy at Berlin, Sept. 22, 1900, *id.*, 336–337; that of Austria-Hungary, *id.*, 306–307; that of Russia, *id.*, 375–376.

[10] See communication of Mr. Lansing, Secy. of State, to Mr. Oederlin, Swiss Chargé d'Affaires *ad interim,* Oct. 23, 1918, For. Rel. 1918, Supp. 1, Vol. I, 381.

[11] Communication from the German Government, of Oct. 27, 1918, transmitted to Mr. Lansing, Secy. of State, by the Swiss Chargé d'Affaires *ad interim,* Oct. 28, 1918, For. Rel. 1918, Supp. 1, Vol. I, 395.

§ 512. [1] Mr. Fish, Secy. of State, to Miss Fraser, Nov. 18, 1874, 105 MS. Dom. Let. 221, Moore, Dig., V, 180, note.

[2] The treaties concluded by the United States with France, Feb. 6, 1778, Miller's Treaties, Nos. 1 and 2, were expressed in the French and English languages, the plenipotentiaries declaring, however, with respect to each instrument, that "the present Treaty was originally composed and concluded in the French language." Notwithstanding this statement, Mr. Hunter Miller adverts to the fact that much of the language of the English text (of the treaty of Amity and Commerce) was that of the "plan of a treaty" voted by Congress on September 17, 1776. Notes to Document No. 1, Miller's Treaties, II, 29.

Mr. Jay, Secretary for Foreign Affairs, in a communication to the President of the Congress, June 23, 1785, declared that it seemed to be expedient "to provide that, in future, every treaty or convention which Congress may think proper to engage in should be formally executed in two languages, viz., the language of the United States, and such other language as the party contracting with them may prefer." (1 MS. Am. Let. 311, Moore, Dig., V, 180.)

The original text of the treaty concluded by the United States with Turkey, May 7, 1830, Miller's Treaties, No. 69, was in the Turkish language. Concerning the matter of French and English, translations thereof and the declaration of Mr. Porter, American Chargé d'Affaires at Constantinople, September 26, 1831, in relation to the authoritative quality of the Turkish original as compared with a French translation thereof, see Miller's Treaties, III, 557–598; also, Moore, Dig., II, § 284, and documents there cited.

It may be noted that the arbitration treaty between the United States and Finland, con-

and Russia, signed by their plenipotentiaries at Portsmouth, August 23, 1905, was, however, expressed in the French and English languages.[8] In order to exclude possible inaccuracies due to errors in translation, it is often provided that a particular version shall be authoritative. Thus in the Treaty of Portsmouth, it was agreed that the French text should govern. According to Article XVII of the treaty between the United States and China of October 8, 1903, set out in both English and Chinese, "the sense as expressed in the English text" was to be held the correct one "in the event of there being any difference of meaning" between the two versions.[4] According to Article III of the arbitration treaty between the United States and China of June 27, 1930, which referred to the fact that the instrument was expressed in English, Chinese and French, the English and Chinese texts were to have equal force, but in case of divergence the French text was to prevail.[5]

Multi-partite conventions to which numerous States are signatory are generally expressed in a single language which is usually French.[6] A recent instance is the International Telecommunication Convention concluded at Madrid, December 9, 1932.[7] The Treaty of Peace between the Principal Allied and Associated Powers and Germany, concluded at Versailles, June 28, 1919, was set forth in the French and English languages, both of which were declared to be authentic.[8] The treaties of peace concluded with Austria at Saint Germain-en-Laye, September 10, 1919,[9] with Bulgaria at Neuilly-sur-Seine, November 27, 1919,[10] and with Hungary at Trianon, June 4, 1920,[11] were alike in being expressed in the French, English and Italian languages, and in making provision that "in case of divergence" the French text should prevail except in Parts I

---

cluded June 7, 1928, U. S. Treaty Vol. IV, 4135, was signed in duplicate in the English language.

The treaty of Friendship, Commerce and Consular Rights between the United States and Norway, concluded June 5, 1928, U. S. Treaty Vol. IV, 4527, was executed in duplicate in the English and Norwegian languages.

[3] For. Rel. 1905, 824.

[4] Malloy's Treaties, I, 269.

[5] U. S. Treaty Vol. IV, 4021, 4022. According to Art. XII of the extradition treaty between the United States and Turkey, Aug. 6, 1923; "The present Treaty, in French, English and Turkish, shall be ratified. In case of divergence the French text shall prevail." (U. S. Treaty Vol. IV, 4663, 4666.)

[6] See, for example, General Act of the International Conference at Algeciras, of April 7, 1906, Malloy's Treaties, II, 2157. See, also, the several conventions of the Hague Peace Conferences of 1899 and 1907.

General international conventions are frequently set forth in a single copy which, by agreement, is to remain deposited in the archives of a particular government, with the understanding that duly certified copies are to be sent through the diplomatic channel to the contracting parties. See, for example, Art. XCVII of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2245.

"French has quite generally superseded Latin as the common language of international intercourse where States resort to another language than their own, and most of the multipartite instruments of the nineteenth century were drawn in French. Since the Peace Conference at Versailles in 1919, however, though French has continued to be the sole official language of various conferences which continue series antedating that time, French and English, the two official languages of the League of Nations, have come into common use, and numerous multi-partite instruments of the last decade are drawn in these two languages." (Hudson, Int. Legislation, I, lviii.)

[7] U. S. Treaty Vol. IV, 5379.

[8] Art. 440.

[9] Art. 381.

[10] Art. 296.

[11] Art. 364.

(Covenant of the League of Nations) and XIII (Labour), where the French and English texts were to be of equal force. The Treaty of Peace concluded with Turkey at Lausanne, July 24, 1923, was expressed in the French language.[12]

The agreement between the United States and other powers concerning the Nonapplication of Most-Favored-Nation Clause in respect of Certain Multilateral Economic Conventions, which was opened for signature July 15, 1934, and signed *ad referendum* in behalf of the United States September 20, 1934, was a single document in English, Spanish, Portuguese and French, all of which texts were declared to be "equally authoritative." [13] In these four languages were set forth the general conventions concluded at the Sixth, Seventh and Eighth International Conferences of American States held, respectively, at Habana in 1928, at Montevideo in 1933, and at Lima in 1938.[14] Such was also the case with respect to the conventions emanating from the Inter-American Conference for the Maintenance of Peace which assembled at Buenos Aires in 1936.[15]

b

§ 512A. **Description of the Parties.** The law of nations does not demand that even formal agreements between States describe or refer to the contracting entities in any particular fashion. That a monarch once personified, or had good reason to regard himself when concluding a treaty as the real contracting party rather than the spokesman thereof, was responsible for the practice of referring to the head of a contracting State or entity as though he were a party to an arrangement designed to affect and bind his country.[1] Nor was such a reference illogical when or so long as the full measure of the agreement-making power was lodged in such an individual who could lawfully exercise it with little or no domestic restraint. With the growth, however, both of the understanding and acceptance of the political theory that States themselves were the parties to arrangements that purported to bind and operate upon them, and with the development of national institutions that yielded no unrestricted authority to a single individual to bind his State even though he were the head thereof, the retention of the ancient mode of description amounted oftentimes to the retention also of a fiction.[2]

With the passing of the years there has been a tendency to depart from the old style and to describe the parties to international agreements in other terms.[3]

[12] League of Nations Treaty Series, XXVIII, 11.

[13] Art. IV, U. S. Treaty Vol. IV, 5546, 5547.

[14] See, for example, convention on Commercial Aviation of Feb. 20, 1928, U. S. Treaty Vol. IV, 4729. It may be noted that the seal of the Sixth International Conference of American States was affixed to the instrument.

See, also, convention on Nationality of Women of Dec. 26, 1933, U. S. Treaty Vol. IV, 4813.

See Program and Regulations of the Eighth International Conference of the American States, Regulations, Art. 40, Pan American Union, Congress and Conference Series, No. 25, p. 10.

[15] See Convention on Good Offices and Mediation, of Dec. 23, 1936, U. S. Treaty Vol. IV, 4827.

§ 512A. [1] See, for example, as an early instance, treaty between Spain and Portugal, of Tordesillas, June 7, 1494, Martens, *Rec., Supp.*, I, 372–388.

[2] See Jules Basdevant, "*La Contexture des Traités*," *Recueil des Cours* 1926, V, 553, 563–564; Hudson, Int. Legislation, I, xli.

[3] See, however, treaty of commerce and navigation between the United Kingdom and

In some instances the governments of the contracting powers have been designated as the parties.[4] There is believed to be oftentimes little reason for such a course, inasmuch as a government is merely the agent of the State or country for which it professes to act. Moreover, such a designation is barren of the historical background that remains a potent influence in sustaining deference for a form that once associated the head of a State with that which was his own. Unless, therefore, an agreement is in fact concluded between government and government, rather than between State and State, the reference to the agents rather than the principals as the contracting parties merits slight commendation.

If at the present time it is sought to bind States as such by treaty or other agreements of lesser dignity, it is believed to be desirable, under normal conditions, that the instrument which registers accord should, in its description of the parties to bi-partite agreements make close response to the facts, and accordingly designate the States concerned as the contracting parties. After World War I, such a course was for a time followed in respect to some important multipartite treaties. That of Versailles of June 28, 1919, was an impressive instance.[5] Arrangements emanating from the League of Nations were also for a period of years couched in like fashion.[6] Subsequently, however, they commonly reflected the earlier style,[7] which seemingly indicated a renewed preference for its use in

---

Turkey, of March 1, 1930, in the old style, *Am. J.*, XXVII, *Official Documents*, 95, Great Britain, Treaty Series, No. 40 (1930); also Convention between the United States and Great Britain of Jan. 2, 1930, concerning the Boundary between the Philippine Archipelago and the State of North Borneo, U. S. Treaty Vol. IV, 4261.

[4] See, for example, treaty between the British Government and that of Afghanistan, of Nov. 22, 1921, British Treaty Series No. 19 (1922); Protocol between the Governments of the United States and Italy of March 27, 1918, relative to Radio Service, U. S. Treaty Vol. III, 2707; Modus Vivendi respecting the Fur-Seal Fisheries in Behring Sea, between the United States and Great Britain, of June 15, 1891, Malloy's Treaties, I, 743.

[5] U. S. Treaty Vol. III, 3331. The other treaties of peace, such, for example, as that of Saint Germain-en-Laye with Austria, of Sept. 10, 1919, *id.*, 3149, and that of Trianon with Hungary, of June 4, 1920, *id.*, 3539, referred to the contracting States as parties. See also treaties due to the negotiations of the Paris Peace Conference, contained in U. S. Treaty Vol. III, Appendix II.

[6] Dr. A. D. McNair has adverted to the fact that the practice observed in the peace treaties "produced increasing inconvenience for the Governments of the United Kingdom and the Dominions" and that eventually on March 9, 1927, the Council of the League of Nations was informed that the acceptance by the Governments of the British Empire of treaties negotiated under the auspices of the League would be facilitated if a change could be made in the form in which such instruments were drawn up. It was said: "It has been the practice for League treaties to be made in the form of treaties between States. The common practice before the Treaty of Versailles was for treaties or conventions to be made in the form of an agreement between heads of States. The Governments of the British Empire hope that instead of continuing the novel form adopted for the first time in the Treaty of Versailles future treaties concluded under the auspices of the League may be made to conform to the general practice followed in the case of other treaties and may be expressed as an agreement between heads of States." (League of Nations, *Official Journal*, 1927, 377.) Dr. McNair observes that "this request was favourably received, and accordingly it is now customary for League and other general treaties to take the form of agreements between heads of States, unless they are inter-Governmental agreements." (A. D. McNair, The Method of the Conclusion of Treaties & other International Engagements, 1932, 5.) It should be noted that notwithstanding the statement of March 9, 1927, in almost all of the more important treaties concluded by the United States with Great Britain, embracing the Definitive Treaty of Peace, of Sept. 3, 1783 (Malloy's Treaties, I, 586), the agreement has purported to be between the State, in the case of the former, and the Crown, in the case of the latter.

[7] See, for example, International Convention Relating to Economic Statistics, of Geneva, Dec. 14, 1928, League of Nations Treaty Series, CX, 171; also, International Convention for

agreements designed for acceptance by several States.[8] It should be observed, however, that the treaties concluded at the Washington Conference for the Limitation of Armament, of 1921–1922, assumed the form of agreements between States.[9]

The United States has not pursued an altogether uniform course in relation to the matter. In some agreements reference has been made to the President as a contracting party,[10] and in others the Government of the United States has been declared to be the contracting party.[11] In, however, the more important bi-partite treaties, such as those of friendship and commerce, from early days of the Republic down to the present time, the document has usually declared the United States itself, rather than the President or Government thereof, to be a contracting party.[12] Frequently the other contracting State, especially if one of Latin-America, has also pursued a like course.[13] The position or preference of the United States in relation to the matter of form has, nevertheless, stood out in contrast to that of European or Asiatic countries, so that in numerous treaties to which the former is a party the contracting entities have been described in differing styles.[14] The United States has not hesitated to yield to the traditional form when a signatory to multi-partite conventions in which the heads of the several powers professed to be the contracting parties.[15]

---

the Suppression of Counterfeiting Currency, of Geneva, April 20, 1929, League of Nations Treaty Series, CXII, 371.

*Cf.* Agreement Concerning the Preparation of a Transit Card for Emigrants, of Geneva, June 14, 1929, League of Nations Treaty Series, No. 2148.

[8] See, for example, Agreement of Understanding and Co-operation between France, Germany, Great Britain and Italy, initialed at Rome, June 7, 1933, British White Paper, Cmd. 4342, Misc. No. 3 (1933), Dept. of State, Treaty Information Bulletin No. 45, June, 1933, 42; The Little Entente Pact, of Feb. 16, 1933, *Am. J.*, XXVII, *Official Documents*, 117. Also Hudson, International Legislation, Intro., § 17.

[9] See, for example, that concluded by the United States, the British Empire, France, Italy, and Japan, of Feb. 6, 1922, Limiting Naval Armament, U. S. Treaty Vol. III, 3100.

[10] See, for example, treaty of friendship and commerce with Persia, of Dec. 13, 1856, Malloy's Treaties II, 1371; arbitration convention with Norway, of April 4, 1908, *id.*, II, 1306; convention with the Dominion of Canada concerning Establishment of Tribunal to Decide Questions of Indemnity and Future Régime, Arising from Operation of Smelter at Trail, British Columbia, April 15, 1935, U. S. Treaty Vol. IV, 4009.

[11] See, for example, naturalization convention with North German Confederation, of Feb. 22, 1868, Malloy's Treaties, II, 1298.

[12] See, for example, the Jay Treaty with Great Britain, of Nov. 19, 1794, Malloy's Treaties, I, 590; treaty of commerce and navigation with Italy, of Feb. 26, 1871, *id.*, I, 969; treaty of friendship, commerce and consular rights with Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191; treaty of friendship, commerce, and consular rights, with Norway, of June 5, 1928, U. S. Treaty Vol. IV, 4527; Extradition treaty with Greece, of May 6, 1931, U. S. Treaty Vol. IV, 4290.

[13] See, for example, treaty of peace, amity, commerce and navigation with Chile, of May 16, 1832, Malloy's Treaties, I, 171.

[14] This has been generally the case in respect to treaties with Great Britain. See, also, for example, treaty of friendship and general relations with Spain, of July 3, 1902, Malloy's Treaties, II, 1701; treaty as to commercial relations with China, of Oct. 8, 1903, *id.*, I, 261.

[15] Such was the case in relation to the conventions emanating from the Peace Conferences at The Hague, of 1899 and 1907. See, also, for example, Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, of Sept. 23, 1910, U. S. Treaty Vol. III, 2943; Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, of July 27, 1929, U. S. Treaty Vol. IV, 5209; Convention concerning the Regulation of Whaling, of Sept. 24, 1931, U. S. Treaty Vol. IV, 5372; Treaty for the Renunciation of War as an Instrument of National Policy, of Aug. 27, 1928, U. S. Treaty Vol. IV, 5130; Treaty for Limitation and Reduction of Naval Armament, of London, of April 22, 1930, U. S. Treaty Vol. IV, 5268.

c

§ 513. **The Alternat.** In drawing up international agreements it is the practice of States "to vary the order of naming of the parties, and of the signatures of the plenipotentiaries, in the counterparts of the same treaty, so that each party is first named, and its plenipotentiary signs first in the copy possessed and published by itself." [1] This is known as the principle of the alternat, and is observed by plenipotentiaries of the United States under standing instructions of the Government.[2]

d

§ 514. **Protocols.** In the process of making agreements of large scope, requiring numerous conferences of plenipotentiaries, it is common to embody the results of each meeting in a document known as a protocol. The contents of such instruments are read, approved and signed by the several negotiators, and constitute an exact record of the steps leading up to signature. They embrace a statement of all the views expressed verbally, or in writing, at each conference. Frequently there are appended to a protocol briefs in support of contentions of law or fact, or in justification of a policy. Protocols may serve to manifest the accord of the negotiators on certain clauses of a convention in process of negotiation. Such partial or temporary bases of agreement are not to be taken as manifesting any duty on the part of the plenipotentiaries to acquiesce in the terms of a convention which gives expression to them.[1]

---

*Cf.* General Convention of Inter-American Conciliation concluded at Washington, Jan. 5, 1929, U. S. Treaty Vol. IV, 4763; likewise General Treaty of Inter-American Arbitration, of like date, U. S. Treaty Vol. IV, 4756, in both of which the contracting parties were described as the governments of the interested States.

§ 513. [1] Mr. Adams, Secy. of State, to Mr. Rush, Minister to Great Britain, Nov. 6, 1817, MS. Inst. U. S. Ministers, VIII, 152, Moore, Dig., V, 181.

[2] See Foreign Service Regulations of the United States, XI–2, as of January, 1941.

"In the case of the Treaty of Ghent, Great Britain took priority over the United States in both copies, and the American plenipotentiaries signed under those of Great Britain. In order that this might not be made a precedent, it was thought proper in the exchange of ratifications to advert to the circumstance and to say that it was not intended to imply any waiver by the United States of the rule that each sovereign should take priority over the other in the copy retained by his government. . . .

"It should be remarked, however, that both in the preliminary and in the definitive treaty of peace with Great Britain of 1782 and 1783, and in the Jay Treaty of 1794, Great Britain was permitted to take rank of the United States in the text of both copies; so also in the convention of March 15, 1798, and of Jan. 8, 1802. In the commercial convention of July 3, 1815, the alternat was observed, as has always since been the case." (Moore, Dig., V, 181.)

In order to furnish a foreign plenipotentiary with a fair copy of a treaty to be signed by him at Washington, as well as by the Secretary of State, when the version expressed in the language of the plenipotentiary called for the use of a script that differed in form from that in which the English language manifests itself, the Department of State at least on one occasion permitted a person attached to the staff of the plenipotentiary to prepare the texts to be expressed in the language of his country.

§ 514. [1] The twenty-two protocols of the conferences at Paris of the American and Spanish Commissioners appointed to conclude a treaty of peace in 1898, are contained in Senate Doc. No. 62, Part 1, 55 Cong., 3 Sess., 12–271.

At the Peace Conference which concluded the Treaty of Versailles of June 28, 1919, the so-called Council of Four, known as the Council of the Principal Allied and Associated Powers (which became five in number when Japan was represented thereon) was in constant session, and recorded its daily action in a *procès-verbal,* which was not read over and compared, but which was preserved. The matters discussed were summarized, and the conclusions

Protocols of meetings are chiefly important as a means of keeping distinct the several questions confronting the negotiators, and as thus affording opportunity to perceive the precise grounds of any divergence of opinion. In case of subsequent disagreement between the parties, concerning the interpretation of a treaty, the protocols of the plenipotentiaries preliminary to its conclusion may shed light respecting the intention of those individuals as well as of their governments at the time of negotiation.[2]

e

§ 515. **Signature. Seal.** Upon agreeing to the terms of a treaty, the negotiators subscribe their names and attach their seals thereto.[1] Upon the completion of these acts the work of those individuals is, in an international sense, accomplished. "All signatures may be affixed at the same time or at different times, depending upon whether, by agreement of the parties, the document is kept open for signature. Bilateral agreements are usually signed by the parties at the same time; multi-partite agreements are sometimes kept open for signature for an agreed period of time. In some instances, where a number of agreements are drawn up at a single conference those agreed upon are included in a final act, signature of which, unless otherwise stated, constitutes signature of the several instruments." [2]

There is doubtless also a domestic burden resting upon the negotiators to make explanatory reports to their respective governments.[3] Thus, the Secretary of State, after having signed a treaty in behalf of the United States, may, after the instrument has been submitted to the Senate, appear before the Committee on Foreign Relations of that body for the purpose of explaining the significance of terms on which agreement is sought.[4]

---

reached were so recorded. Copies were distributed within twenty-four hours, and were open to correction by any conferee. President Wilson thought there was serious objection against communicating these *procès-verbaux* to the Senate Committee on Foreign Relations pending the consideration of the treaty by the Senate. See Conference of Senate Committee on Foreign Relations at the White House Aug. 19, 1919, Senate Doc. No. 106, 66 Cong., 1 Sess., p. 521.

[2] See Interpretation of Treaties, Sources of Interpretation, *infra*, § 531.

§ 515. [1] See, in this connection, opinion of Mr. Lee, Atty. Gen., July 23, 1796, where it was declared that the authority of the commissioners appointed in pursuance of Art. V of the treaty with Great Britain (of 1794) could not be duly and legally executed by a majority of them. He said, "They must all agree in their decisions, which must be signed and sealed by them all." It should be noted that this requirement was laid down with respect to the duties of the commissioners to whom was entrusted the task of determining what river was the river St. Croix, intended by the treaty of peace of 1782–1783. Mr. Lee did not purport to announce such a rule with respect to the duties of plenipotentiaries entrusted with the negotiation of a treaty. 1 Ops. Attys. Gen., 66.

A plenipotentiary, in appending his signature and seal to a treaty, may doubtless annex simultaneously thereto an expression of his views dissenting from the provisions contained in it. Concerning the several seals affixed to the treaty between the United States and Tripoli, signed Nov. 4, 1796, and Jan. 3, 1797, see Hunter Miller, in Miller's Treaties, II, 374–376.

[2] Statement in Hackworth, Dig., V, § 468.

[3] See, for example, Report of the American Delegates to the Second Hague Peace Conference of 1907, For. Rel. 1907, II, 1144.

See Report of the Delegates of the United States of America to the Seventh International Conference of American States, December 3–26, 1933, Department of State Conference Series No. 19.

The exchange of ratifications, being a distinct and subsequent transaction, is likely to be effected through the medium of other agents.

[4] See Cargo and Tonnage Duties, *supra*, § 207A, in relation to the appearance of the Secretary of State before the Senate Committee on Foreign Relations, Feb. 2, 1925.

No rule of law obliges contracting States to cause to be signed in their behalf an instrument such as a treaty which records the terms of a prospective agreement. There is evidence that States are increasingly availing themselves of their freedom in this regard.[5] Possibly the signing of a text oftentimes serves a useful purpose; but the exercise of that function in the existing practice of States is largely reminiscent of an ancient habit of contracting monarchs who were frequently disposed and able to bind themselves through the signatures of their plenipotentiaries. At the present time, the fact of signature possesses slight international significance, except in the conclusion of agreements of minor import, where the signing of the text is permitted and acknowledged to bind the parties. The point to be observed is that the law of nations does not forbid States to employ such methods as they see fit to utilize in preparing the way to the final and decisive step that perfects the contractual relationship.

## 4

## RATIFICATION

### a

§ 516. **Its Place in Treaty-Making. Freedom to Withhold It.** In the art of treaty-making two distinct steps need to be taken after negotiation, signing and sealing. The first is the formal confirmation and approval of the written instrument. The second is the formal reciprocal communication of the fact of confirmation and approval by the contracting parties one to another. Ratification is the term that is employed to describe the first of these steps.[1] Confusion of thought is likely to arise if that term is used to refer to both steps, and to embrace by implication the entire action to which a State may have recourse as a means of accepting a treaty signed in its behalf. Modes of ratification as well as the agencies entrusted with the task of giving voice to it are matters which are left to the discretion of the individual contracting States; no rule of international law demands respect for a particular procedure.

It is natural and not illogical that when the procedure of treaty-making ordinarily contemplates the signing of an instrument, the next step on the part of a State that is endeavoring to contract should manifest itself in conduct that is essentially confirmatory of what has taken place and that should be described by a word that reveals its character. Nevertheless, it should be borne in mind

[5] See Arts. 405–406 of the treaty of peace with Germany, concluded at Versailles June 28, 1919 (embraced in Part XIII in relation to Labour), contemplating the ratification of unsigned draft-conventions, U. S. Treaty Vol. III, 3508–3509; also, Art. 43 of General Act for the Pacific Settlement of International Disputes, adopted at Geneva, Sept. 26, 1928, Hudson, Int. Legislation, No. 207. See comment by Professor Hudson, *id.*, I, xliii, § 19. *Cf.* F. O. Wilcox, The Ratification of International Conventions, London, 1935, 26–28.

See, also, Attorney-General for Canada *v.* Attorney-General for Ontario and Others, *Am. J.*, XXXI, 348, 352.

§ 516. [1] According to Article 6 of the Harvard Draft Convention on The Law of Treaties: "(a) As the term is used in this Convention, a ratification of a treaty is an act by which the provisions of the treaty are formally confirmed and approved by a State." (*Am. J.*, XXIX, *Supplement*, October, 1935, 657.)

See Fernand Dehousse, *La Ratification des Traités*, Paris, 1935.

that the conduct by which a State resolves to accept and make binding upon itself the provisions of a prospective agreement do not necessarily involve confirmatory action. If signature be unnecessary and does not in fact take place, the action that follows the negotiation and drafting of an acceptable arrangement is confirmatory of what has taken place only in the sense that the contracting power proceeds to stamp with its official approval the proposed bases of accord. As time goes on, the art of concluding bi-partite arrangements is likely to be greatly simplified. Instruments may be left unsigned, there may be no essentially ratifying conduct in behalf of contracting parties, and the formal resolution by a State to bind itself may be seen to have no confirmatory aspect and may not even be described as though it had.[2]

That confirmation and approval, manifested through ratification, is one of the steps to be taken after the signing and sealing of a treaty before the agreement becomes a binding one is believed to be apparent in the following situations as enunciated in the Harvard Draft Convention on The Law of Treaties: "(a) when the treaty so stipulates; or (b) when the treaty provides for ratification by a State and does not provide for its coming into force prior to such ratification; or (c) when ratification was made a condition in the full powers of the State's representatives who negotiated or signed the treaty; or (d) when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification." [3]

It has been observed that States constantly enter into arrangements of a kind which when concluded in behalf of the United States are referred to as executive agreements by reason of the fact that they are not submitted by the President to the Senate, and are not, therefore, dealt with as treaties.[4] Such arrangements may, nevertheless, by their terms contemplate ratification in behalf of the contracting parties.[5] It should be observed, however, that the President may, through the medium of an executive agreement, deem it expedient to clothe a plenipotentiary who signs in behalf of the United States with power to perfect the con-

[2] No requirements of international law will interfere with the improvement of practice or with progress in thinking. The nomenclature employed in relation to treaty-making may, however, be expected to continue to confuse statesmen and to cause them to be slow to abandon a familiar term however inept it may become.

[3] Art. 7, *Am. J.*, XXIX, *Supplement*, October, 1935, 658.

According to Art. 5 of the Convention on Treaties concluded at the Sixth International Conference of American States at Habana, Feb. 20, 1928: "Treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself." (Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 197.)

See, also, Judgment No. 16, Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Publications, Permanent Court of International Justice, Series A, No. 23, p. 20.

*Cf.* G. G. Fitzmaurice, "Do Treaties Need Ratification?" *Brit. Y.B.*, 1934, 113; F. O. Wilcox, Ratification of International Conventions, London, 1935, 28–31.

[4] See *supra*, §§ 505–509.

[5] See, for example, Art. VI of agreement between the United States and Austria and Hungary of Nov. 26, 1924, U. S. Treaty Vol. IV, 4318.

It should be obvious that a provision in an agreement to which the United States is a party contemplating ratification is not indicative of an obligation on the part of the President to deal with the arrangement as a treaty and to submit the instrument that is expressive of accord to the Senate for the approval of that body.

tractual relationship in its behalf by the act of signing.[6] The other parties to the arrangement may seek to pursue a like course and proceed to do so. In such a situation, ratification is neither anticipated nor given. By such means, the contracting States may be enabled to yield their formal and common consent at a desired time, and under circumstances when indefinite delay to be anticipated from the giving of time for ratification might be expected to undermine bases of accord and frustrate the conclusion of an agreement. The advantage to the United States from the possession by the President of the power to authorize Mr. Rockhill, the American Commissioner, to consent in behalf of the nation to the Final Protocol between the several Powers on the one hand, and China on the other, September 7, 1901, was a real one.[7] Nevertheless, from the authority lodged in the agency of a State possessed of the treaty-making function to cause some classes of agreements to become binding upon the principal through the act of signature, and from the disposition of that agency, under certain circumstances, to exercise its power so as to produce that result, there is not to be derived the conclusion that formal confirmation and approval of a signed treaty are to be dispensed with or are not contemplated.

If an international agreement is of a character such as to call for ratification as one of the steps to be taken before the contractual relationship shall have been perfected, it is not apparent how a legal duty to ratify results from the mere signature of the instrument.[8] A State embarked upon the task of ultimately and appropriately binding itself, must be regarded as legally free to withhold assent until it takes the final step which is to be deemed formally to manifest it. This freedom is accentuated in the case of a treaty which, according to the

[6] See, for example, Art. V of provisional agreement between the United States and the Kingdom of Saudi Arabia concerning Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation, Nov. 7, 1933, U. S. Executive Agreement Series, No. 53.

[7] Malloy's Treaties, II, 2006.

"In such cases the foreign minister of the latter country also has usually been a real party to the negotiation, by his despatches addressed to his ambassador and communicated by him to the other side; and the very terms of the notes to be exchanged have usually been settled in that correspondence. The result therefore is that at which the two contracting authorities have already arrived, and there is no need of ratification, nor is such a formality used." (Westlake, 2 ed., I, 292.)

[8] See Mr. Hughes, Secy. of State, to Mr. Kellogg, Ambassador to Great Britain, Jan. 3, 1925, For. Rel. 1924, II, 127.

See also discussion in Hall, Higgins' 8 ed., § 110; opinions of writers in Moore, Dig., V, 184–188; J. E. Harley, "The Obligation to Ratify Treaties," *Am. J.*, XIII, 389.

"A right of ratification implies a right of refusal. Accordingly, the qualification imposed by some writers, that, when the negotiator has acted within his powers and specific instructions, ratification may be refused only for real and substantial reasons, is of good faith only; and it can have no application unless the powers and instructions of the plenipotentiary are given by the full treaty-making organ of the State." (Crandall, Treaties, 2 ed., § 3.)

"It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with foreign nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; for, though such treaties, being, on their part, made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation, until approved by the government." (President Washington, Special Message, Sept. 17, 1789, Richardson's Messages, I, 61, Moore, Dig., V, 188.)

constitutional law of a contracting party, is not to be ratified save with the approval of the legislative department of the government.[9] Yet the situation is not different in point of law in a case where ratification may be effected by or in behalf of a contracting State without legislative approval, so long as the instrument purports to require such action.[10] As Judge Moore declared, in the course of his dissenting opinion in the case of the Mavrommatis Palestine Concessions, in 1924: "The doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past." [11] Again, it must be constantly borne in mind that the act of ratification is not the final step that serves to bind the ratifying State.[12]

It may be that the government of a State whose plenipotentiaries have with the approval of that government signed an agreement embodying terms acceptable to and possibly proposed by itself, has taken a position such that its opposition to ratification (even in pursuance of the constitutional law of the country) is inconsistent with and difficult to reconcile with the stand which it previously took in negotiations with the government of the other signatory State. Such conduct does not, however, serve to deprive the former State as such of its freedom to withhold a consent not previously given in its behalf.[13]

[9] See, in this connection, Mr. Adams, Secy. of State, to Mr. Rush, Nov. 12, 1824, MS. Inst. U. S. Ministers, X, 215, Moore, Dig., V, 191. Also Mr. Evarts, Secy. of State, to Mr. Delmonte, Feb. 19, 1880, MS. Notes to Dominican Republic, I, 41, Moore, Dig., V, 191.

[10] *Compare* the attitude of Mr. Adams, Secy. of State, contained in communication to Mr. Lowndes, Dec. 16, 1819, Am. State Pap., For. Rel., IV, 673, Moore, Dig., V, 189, where it was declared that inasmuch as the King of Spain had solemnly promised "to *approve, ratify,* and *fulfill*" the compact to be concluded by his plenipotentiary with the United States, by the full power given that individual, the King was bound to ratify the treaty of Feb. 22, 1819, "by the principles of the law of nations applicable to the case."

[11] Publications, Permanent Court of International Justice, Series A, No. 2, 57. See, also, Art. 8 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement,* October, 1935, 658, and Comment, *id.*, 769.

Declared President Coolidge in his award of March 4, 1925, as Arbitrator in the Tacna-Arica controversy between Chile and Peru, with respect to the unfulfilled provisions of the treaty of peace of October 20, 1883: "As the special protocol was to be made by sovereign States, it must also be deemed to be implied in the agreement set forth in Article 3 [of the treaty of October 20, 1883, known as the Treaty of Ancon] that these States should act respectively in accordance with their constitutional methods, and bad faith is not to be predicated upon the refusal of ratification of a particular proposed protocol deemed by the ratifying authority to be unsatisfactory." (*Am. J.*, XIX, 393, 398.)

[12] See Exchange of Ratifications, *infra,* § 520.

[13] On January 22, 1903, Secretary Hay, in behalf of the United States, and Dr. Herran, Chargé d'Affaires of Colombia, in behalf of his government, signed at Washington an isthmian canal treaty, the ratification of which was duly advised by the Senate of the United States, and given by the President. Secretary Hay on June 2, 1903, instructed Minister Beaupré by telegram: "You should, when the time seems opportune, in so far as you discreetly and properly may, exert your influence in favor of ratification." (For. Rel. 1903, 145–146.) On June 9, 1903, Secretary Hay telegraphed the Minister: "The Colombian Government apparently does not appreciate the gravity of the situation. The canal negotiations were initiated by Colombia, and were energetically pressed upon this Government for several years. The propositions presented by Colombia, with slight modifications, were finally accepted by us. In virtue of this agreement our Congress reversed its previous judgment and decided upon the Panama route. If Colombia should now reject the treaty or unduly delay its ratification, the friendly understanding between the two countries would be so seriously compromised that action might be taken by the Congress next winter which every friend of Colombia would regret. Confidential. Communicate substance of this verbally to the Minister of Foreign Affairs. If he desires it,

## b

## Ratification by the United States

### (1)

§ 517. **The President.** As has been observed, the Constitution confers upon the President "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." [1] The power to ratify is thus lodged in him. He may, therefore, and on occasion does, refuse to exercise that power except on such conditions as he deems advisable. He may withhold from the Senate a treaty already signed. He may suggest to that body the incorporation of amendments. He may refuse to ratify a treaty in case the Senate in consenting to ratification imposes conditions of which he disapproves. He may withdraw a treaty from the Senate at his discretion.[2] There appears to be no means by which a treaty can be concluded in behalf of the United States without the approval of the Executive.

Although frequently in consultation with its members, the President has long since ceased to seek and obtain the advice of the Senate preliminary to the ne-

---

give him a copy in form of memorandum." (*Id.*, 146.) On June 18, 1903, Mr. Rico, the Colombia Minister for Foreign Affairs, replied in part: "The previous requisite of legislative approval is indispensable for the exchange of ratifications, and before this is done the treaty is but a project which, according to the law of nations, has no rights and obligations, and for the same reason, according to that law, to reject or delay its ratification is not cause for the adoption of measures tending to alter the friendly relations between the two countries." (*Id.*, 153–154.) On August 12, 1903, the treaty was rejected by the Senate of Colombia. *Id.*, 179. General Reyes on a special mission to the United States in behalf of Colombia, in a communication to Secretary Hay, Dec. 23, 1903, after calling attention to the fact that according to its terms, the convention was to be ratified in conformity with the laws of the two countries, said: "It follows that the Congress of Colombia, which is vested according to our laws with the faculty or power to approve or disapprove the treaties concluded by the Government, exercised a perfect right when it disapproved the Hay-Herran convention." (*Id.*, 284–285.) In reply January 5, 1904, Secretary Hay said: "The Department is not disposed to controvert the principle that treaties are not definitely binding till they are ratified; but it is also a familiar rule that treaties, except where they operate on private rights, are, unless it is otherwise provided, binding on the contracting parties from the date of their signature, and that in such case the exchanging of ratifications confirms the treaty from that date. This rule necessarily implies that the two governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation but also to do nothing in contravention of its terms." (For. Rel. 1903, 299.)

It may well be doubted whether, from the rule as to the date of the operation of treaties, there is to be implied a legal obligation on the part of a State not to oppose the consummation of an unratified convention purporting to require ratification. Doubtless Secretary Hay had especially in mind the attitude of the Government of Colombia rather than that of all those who were possessed of the treaty-making power of that State. It is not perceived how the motives impelling the Government of Colombia to oppose the Hay-Herran convention, or how the relationship which that Government thereby assumed towards the United States by such opposition, affected the legal right of the Republic of Colombia not to ratify an agreement which was not to become binding until ratified.

See Aspects of Personal or Governmental Undertakings, *infra*, § 521A.

§ 517. [1] Art. II, Section 2, paragraph 2. See also Foreign Service Regulations of the United States, XI–5, as of January, 1941.

[2] See numerous instances recorded in Crandall Treaties, 2 ed., §§ 51–54.

On Jan. 17, 1920, the Senate returned to the President at his request, the convention signed Sept. 2, 1919 (and submitted to the Senate the following day), with Great Britain providing effective measures for the protection, preservation and propagation of the salmon fisheries in the waters contiguous to the United States and the Dominion of Canada, and in the Fraser River system. The withdrawal of the treaty was for the purpose of securing the revision of Art. II. *Cong. Record*, LIX, Jan. 17, 1920, 1645.

gotiation of treaties.[3] He not infrequently, however, makes vigorous effort to secure the approval by that body of a treaty submitted to it, and on such terms as he approves.[4]

(2)

§ 518. **The Senate.** The Senate exercises freely its constitutional right in the advising and consenting to treaties submitted to it. It may withhold its approval at will. Thus the Senate may formally reject a treaty or fail to act upon it.[1] It is not uncommon for that body to make amendments,[2] or to declare that its approval is with the understanding that the act of ratification shall be subject to reservations which are prescribed.[3] As Mr. Grew, Under Secretary of State, declared in 1926:

> . . . The practice followed in negotiating treaties pursuant to the provisions of the Constitution cited has varied. In some instances the Chief Executive formally conferred with the Senate before initiating negotiations with foreign governments looking to the concluding of treaties. The prevalent practice in recent years, however, has been for the Executive to negotiate treaties with foreign governments without conferring with the Senate in advance regarding them, although it is not unusual for the Executive to keep the Senate informed of the progress of negotiations with foreign

[3] Gradually the practice of consulting the Senate, by special message, in advance of the negotiation and conclusion of treaties fell into disuse, and it has since the administration of Jefferson only occasionally been resorted to. But it may be superfluous to say that personal consultations, by the President or the Secretary of State, with individual Senators have not been and are not uncommon." (Moore, Dig., V, 197.)

[4] See, for example, letter of President Wilson to Senator Hitchcock, with respect to Art. X of the treaty of peace with Germany then before the Senate, March 8, 1920, *Cong. Record,* LIX, March 9, 1920, 4051–4052.

See also Hackworth, Dig., V, § 469, and documents there cited.

§ 518. [1] On November 19, 1919, the Senate rejected, both with and without reservations, the Treaty of Versailles of June 28, 1919, setting forth terms of peace with Germany. *Cong. Record,* LVIII, 8786; 8802; 8803. Again, that body, on March 19, 1920, failing to agree to a resolution of ratification of the treaty under reservations (*Cong. Record,* LIX, 4599) which were supported by Senator Lodge and some twenty-seven other Republican Senators, agreed to a resolution returning the treaty to the President, and informing him of its inability to yield the requisite constitutional approval of the instrument. *Cong. Record,* LIX, March 19, 1920, 4600. The treaty was returned to the President on March 20, 1920. See H. B. Learned, "The Attitude of the United States Senate towards the Versailles Treaty: 1918–20," in Temperley, VI, 391; W. Stull Holt, Treaties Defeated by the Senate, 1933, Chap. X; D. F. Fleming, The United States and the League of Nations, 1918–1920, 1932.

See Extracts from the Executive Journal of the Senate relative to proceedings in cases of treaties rejected by that body, contained in Ratification of Treaties, Senate Doc. No. 26, 66 Cong., 1 Sess., 85–280.

[2] Such, for example, was the action taken in regard to the proposed treaty with France of Aug. 3, 1911, extending the scope and obligation of the policy of arbitration adopted in the arbitration treaty concluded with that State Feb. 10, 1908.

[3] See, for example, resolution of the Senate with respect to the ratification of the Algeciras convention of April 7, 1906, Malloy's Treaties, II, 2183; resolution of the Senate April 2, 1908, with respect to the ratification of the Hague Convention of 1907, for the Settlement of International Disputes, *id.,* 2247; resolution of the Senate with respect to the ratification of the Hague Convention of 1907, for an International Prize Court, Charles' Treaties, 262.

See terms of Senate resolution of Feb. 10, 1925, advising and consenting to the ratification of the treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4204; also terms on which the Senate, on April 1, 1935 (legislative day, March 13, 1935), advised and consented to the ratification of the treaty concerning Inter-American Arbitration, signed at Washington, Jan. 5, 1929, U. S. Treaty Vol. IV, 4756, 4759.

governments by personal interviews with Senators, chiefly members of the Committee on Foreign Relations of the Senate. While, as has been indicated above, the President can, under the Constitution of the United States negotiate and sign treaties with foreign governments without the prior approval of the Senate or of Congress, treaties negotiated and signed by the Executive cannot be ratified or made effective on the part of the United States without the advice and consent of the Senate, two-thirds of the Senators present concurring. The Senate, therefore, has power to disapprove treaties negotiated and signed by the President or to advise and consent to ratification with or without amendments. If the Senate advises and consents to the ratification of a treaty without amendment the Executive is at liberty to proceed with the exchange of ratifications and promulgation of the treaty. If, on the other hand, the Senate advises and consents to ratification with amendments, it is necessary that the foreign government concerned agree to the amendments before a treaty can be ratified and put into effect.[4]

The procedure followed in the various situations that arise reveals both the freedom of the Senate in yielding requisite approval of a treaty on such terms as it may see fit, as well as its inability to cause the President to take such steps as may be necessary to perfect such an arrangement. There must be concurrence of both agencies in order to bind the nation when the agreement assumes the form of a treaty.[5]

### c

## Aspects of Reservations

### (1)

§ 519. **In General.** A reservation to a treaty is a formal statement made by a prospective party for the purpose of creating a different relationship between that party and the other parties or prospective parties than would result should the reserving State accept the arrangement without having made such a state-

[4] Communication to the Minister of Norway at Washington, July 21, 1926, Hackworth, Dig., V, § 471.

Declared the Department of State in a communication to Mrs. C. M. Kelehan, June 25, 1931:

"The regular procedure is for the President to send the signed treaty, which he desires to ratify, to the Senate, and for the Senate, if it is willing to give its advice and consent to ratification, to pass a resolution to that effect. Occasionally, the Senate has passed resolutions in advance of signature, authorizing the President to enter into a treaty as particularly described in the resolution. An example of this latter procedure occurred when the conventions signed between the United States and Mexico on August 16, 1927 and August 17, 1929, extending the duration of the claims commissions provided for in earlier conventions, were authorized by the Senate prior to adjournment and the authorization was acted upon by the President during the recess of the Senate." (Hackworth, Dig., V, § 471.)

[5] See numerous illustrative documents in Hackworth, Dig., V, § 471, especially Memorandum by Mr. J. Reuben Clark, Jr., the Solicitor for the Department of State, Aug. 5, 1911.

The function of the Senate in participating in the conclusion of treaties by the United States has in recent years engaged the close attention of numerous commentators whose views in relation to the matter it is unnecessary to discuss. See R. J. Dangerfield, In Defense of the Senate, Norman, Oklahoma, 1933; D. F. Fleming, The Treaty Veto of the American Senate, New York, 1930; Ralston Hayden, The Senate and Treaties, 1789–1817, New York, 1920; W. S. Holt, Treaties Defeated by the Senate, Baltimore, 1933; Lindsay Rogers, The American Senate, New York, 1926; Charles C. Tansill, "The Treaty-Making Powers of the Senate," *Am. J.*, XVIII, 459.

ment.[1] A mere interpretative declaration made by a prospective party without such a design, and with a view merely to accentuate a common understanding, is not to be regarded as a reservation, unless another party or prospective party deems it to be productive of a different relationship between the State issuing the declaration and the other parties or prospective parties than would result were the declaration not made.[2] In a word, whether an interpretative statement is to be regarded as a reservation and dealt with as such depends in practice upon the place which the States to which it is addressed are disposed to assign to it.[3] British acquiescence in the understanding placed by the Senate of the United States upon provisions of the Convention Concerning Boundary Waters between the United States and Canada, concluded on January 11, 1909, saved the understanding from becoming a reservation.[4] The difficulty involved in making a statement that shall remain unchallenged does not detract from the reasonableness of the attempt to make one, or obscure the distinction between a correctly interpretative declaration and a reservation.[5]

At any time in the course of the negotiation of a treaty statements may be made by representatives of either or any party which may pertain to any aspect of the matter on which agreement is sought to be had. These may be made at the time of signature, or be submitted with ratification, or be incorporated in

§ 519. [1] *Cf.* Art. 13 of the Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 659; also, definition by Miller in Miller's Reservations to Treaties, 76; and in Hudson, Int. Legislation, I, l–li.

[2] "If a reservation, as a part of the ratification, makes a material addition to, or a substantial change in, the proposed treaty, other parties will not be bound unless they assent. It should be added that where a treaty is made on the part of a number of nations, they may acquiesce in a partial ratification on the part of one or more. Where there is simply a statement of the interpretation placed by the ratifying State upon ambiguous clauses in the treaty, whether or not the statement is called a reservation, the case is really not one of amendment, and acquiescence of the other parties to the treaty may readily be inferred unless express objection is made after notice has been received of the ratification with the interpretative statement forming a part of it." (Letter of Mr. Charles E. Hughes to Senator Hale, July 24, 1919, proposing reservations to the Covenant of the League of Nations, *Cong. Record,* LVIII, part 4, p. 3302.)

[3] See For. Rel. 1921, Vol. 1, 270–279, concerning the acceptance by Austria of the "understandings" under which, as demanded by the Senate, the United States accepted the treaty with that country, signed on Aug. 24, 1921, U. S. Treaty Vol. III, 2493, 2496.

[4] See Proclamation by President Taft, May 13, 1910, U. S. Treaty Vol. III, 2615.

[5] After the Senate had, on August 13, 1914, advised the ratification of the treaty between the United States and The Netherlands, for the Advancement of Peace, signed December 18, 1913, and following the ratification of the instrument by the President on March 14, 1917, doubts arose whether Article I thereof was designed to be applicable to all disputes between the contracting parties existing at the time of the taking of effect of the treaty, as well as to those arising thereafter. Fearing lest acknowledgment that that Article should be deemed to have such scope might be regarded as amendatory of the text as the Senate had comprehended it, the United States withheld the exchange of ratifications, and proceeded to conclude with The Netherlands a declaration said to be interpretative of Article I, which was signed February 13, 1928, and duly submitted to the Senate. That body advised the ratification of the interpretative declaration on February 24, 1928, and ratifications of the treaty were exchanged on March 10, 1928. U. S. Treaty Vol. IV, 4504. The procedure thus followed paid due deference to the constitutional privilege of the Senate to advise and consent to the terms of a treaty purporting to bind the United States, which was properly deemed to embrace the privilege of passing on any amendatory proposal, howsoever described, that was not before that body when the instrument was submitted to it for approval. See, in this connection, Quincy Wright, Control of American Foreign Relations, 46.

See, in this connection, Raoul Genet, "*Les 'Réserves' dans les Traités,*" *Rev. Droit Int. de Sc. Dip. et Pol.* X, 95 and 232; Boris Shatsky, "*La Portée des Réserves dans le Droit International,*" *Rev. Droit Int.*, 3 *sér.*, XIV (1933), 216.

minutes of particular meetings of plenipotentiaries, or constitute a declaration possibly contemporaneous with signing, or be embodied in notes exchanged on that occasion, or after signature, pending ratification. Again, they may assume the form of memoranda prepared and submitted by a committee to a body clothed with the task of advising and consenting to ratification by one of the contracting parties, such as the Senate of the United States. Such statements are not necessarily amendatory of the instruments to which they refer. They are oftentimes dealt with as merely indicative of either a common understanding, or of a design which there is willingness to tolerate, rather than of evidence of an endeavor to modify a supposed basis of accord.[6]

A statement from a prospective party that may be sharply critical of the character or content of the text of an instrument as interpreted by a group of States which may have already signed it does not necessarily constitute a reservation; and it is not to be so regarded unless it embodies an essentially amendatory term, and that term is proclaimed or communicated in such a way as to leave no room for doubt that it is to be deemed a condition under which the State from which it emanates accepts the arrangement.[7]

The practice of States seemingly rejects the conclusion that a reservation must be confined to a proposal or condition that lessens the scope of burdens set forth in a text in relation to the reserving State.[8] There are instances where a reserva-

[6] Numerous instances are recorded in Hackworth, Dig., V, § 484.

[7] The note of the Soviet Government to the French Ambassador at Moscow, of August 31, 1928, in relation to the contemplated adherence by that Government to the so-called Treaty for the Renunciation of War signed at Paris, August 27, 1928 (U. S. Treaty Vol. IV, 5130), was critical of the terms of the arrangement, as well as of the procedure under which Russian adherence had been invited. It was stated that the terms under which the British Government in a note of May 19, 1928, had proposed to condition acceptance of the treaty could not be regarded as binding on the Soviet Government because that note had not been communicated to it, "any more than the other restrictions concerning the pact that are mentioned in the diplomatic correspondence of the original signatories are binding on the Soviet Government," although that Government was seemingly aware of those terms and restrictions. (Treaty for the Renunciation of War, Dept. of State Publication No. 468, 1933, 266, 270–271.) Nevertheless, on September 6, 1928, the Soviet Government delivered an "instrument of adherence" to the French Ambassador at Moscow (*id.*, 272–273), which was received at the Department of State through the French Embassy at Washington, September 27, 1928. While the note of September 6, 1928, contained a recital of reference to the note of August 31, 1928, there was no formal statement made by the Soviet Government that it conditioned its acceptance of the treaty on views expressed in that note; and the text of the declaration of adherence made no mention of it. It may be doubted, therefore, whether the Soviet Government accepted the treaty under reservation. In a word, no action on the part of that Government made it clear to the group of States which signed the instrument, August 27, 1928, under limitations that were understood by all, that Russian acceptance was conditioned on any amendatory terms to be derived from the note of August 31, 1928.

[8] "The reservation may (1) place a greater obligation upon one or more of the existing parties than would have been placed upon them if the reserving State had made no such statement, (2) affect the relationships of the existing parties among themselves (citing fifth reservation enunciated by the Senate in 1926, as a condition to its consent to the adhesion by the United States to the Protocol of Signature of Dec. 16, 1920, of the statute for the Permanent Court of International Justice, *Am. J.*, XX, *Official Documents,* 73), or (3) without materially affecting the obligations or relationships of the existing parties, create a greater (citing statement by The Netherlands in accepting the option in Art. 9 of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, signed Nov. 8, 1927, so as to include as arbitrable certain matters not included as such by the general terms of the convention, League of Nations Treaty Series, XCVII, 393), or lesser obligation upon the reserving State than would have been created had no such statement been made." ("Reservations to Multi-partite Treaties," a Memorandum by Walter Hollis, W. C. Chambliss and F. J. Knauer, New York, 1935.)

tion has served to modify by enlargement obligations to be borne by other parties or prospective parties in relation to the reserving State.[9]

The process of negotiating a convention normally embraces a series of offers and counter-offers; and in the case of a bi-partite arrangement the signature of the instrument usually indicates that differences between negotiators (and presumably also between the governments appointing them) have been removed and proposals amendatory of initial offers have been fully dealt with, so that the signed instrument is to be regarded as at least a basis of accord. Thus, in a bi-partite treaty it is the modifications that either party proposes after signature that first attain significance as amendatory thereof.[10]

What constitutes acceptance of a fresh proposal embodied in a reservation depends upon the implications necessarily to be drawn from the conduct of the party to which it is addressed. The reserving State may seek to remove all doubt by demanding that acceptance be acknowledged by some appropriate statement.[11] In case there be no such demand, and regardless of the form or character of the proposal, the party to which a reservation is addressed, in the course of the conclusion of a bi-partite arrangement, will be indisposed to proceed to take the final steps that serve to perfect the contractual relationship unless prepared to acquiesce; and if opposed to the change it will be unlikely to pursue a course from which acquiescence may be fairly implied. Thus, room for uncertainty whether acceptance is to be regarded as having been yielded may prove

[9] The accession of Turkey on Aug. 24, 1907, to the Geneva Convention of July 6, 1906, for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, was "with the reservation that she would use in her armies the emblem of the red crescent for the protection of her ambulances." British Treaty Series (1907), No. 38, Cd. 3781. This condition was calculated to modify by enlargement the obligations of the other contracting States.

[10] The situation may be otherwise in the case of a multi-partite arrangement which has been drafted by an international conference, and in relation to which initial differences have not been dissolved so that the text proposed for signature does not in fact reveal such a basis of accord among interested States as is ordinarily seen in the case of a bi-partite agreement. For that reason, prospective parties to a multi-partite treaty may see fit, in connection with the act of signing, to initiate fresh proposals which assume the form of so-called reservations. See reservations under which certain States signed the general convention of Inter-American Arbitration at Washington, Jan. 5, 1929, U. S. Treaty Vol. IV, 4756.

See Memorandum of Mr. Nielsen, the Solicitor for the Department of State, April 18, 1921, Hackworth, Dig., V, § 481.

See statement in Hackworth, Dig., V, § 480, concerning the action of the Hungarian Government in accepting reservations made by the Senate of the United States under which it advised and consented to the ratification of the commercial treaty of June 24, 1925, between the United States and Hungary. See also U. S. Treaty Vol. IV, 4328–4329.

[11] The Senate resolution of February 10, 1925, advising and consenting to ratification of the treaty of Friendship, Commerce and Consular Rights between the United States and Germany of December 8, 1923, declared that the "reservations and understandings" under which it gave its approval should be "set forth in an exchange of notes between the high contracting parties so as to make it plain that this condition is understood and accepted by each of them." (U. S. Treaty Vol. IV, 4204.)

See also the terms of advice and consent of the Senate to the ratification of the convention for the cession to the United States of the Danish West Indies, signed Aug. 4, 1916, U. S. Treaty Vol. III, 2563.

It may be observed that according to his proclamation of June 24, 1916, the President announced that the reservation or understanding under which (pursuant to the action of the Senate) the United States conditioned its ratification of the convention with Nicaragua of Aug. 5, 1914, for the construction of a ship canal, had been "accepted by the Government of Nicaragua." 39 Stat. 1664.

to be slight.[12] Current practice reveals the tendency to clarify acquiescence by formal statements indicative of the fact.[13]

A reservation to a bi-partite arrangement may assume any one of a variety of forms, and call for the performance of particular acts in the process of perfecting the contractual relationship. Thus it may exact the commission of a unilateral act by the reserving State as a condition precedent to ratification,[14] or it may demand that an exchange of notes interpretative of the agreement be included in the ratification.[15]

(2)

519A. **Reservations to Multi-Partite Agreements.** The consequences of the endeavor to accept multi-partite agreements under reservation are dependent upon a variety of considerations.[1] The matter has proved to be one of such complexity that interested States are disposed at times to close the door against acceptance under reservation of particular arrangements. This is true with respect to conventions emanating from conferences of the International Labor Organization.[2] States that are the initiators and managers of a multi-partite

[12] This is illustrated by the correspondence between the United States and Great Britain following the amendment by the Senate of the first Hay-Pauncefote convention of Feb. 5, 1900. The British Government was informed of the attitude of the Senate and hope was expressed that the amendments would be found acceptable to that Government. On Feb. 22, 1901, Lord Lansdowne instructed the British Ambassador at Washington to give to Secretary Hay a memorandum indicating the reasons why Great Britain felt unable to accept the convention in its amended form. Diplomatic History of the Panama Canal, Senate Doc. No. 474, 63 Cong., 2 Sess., 6–17.

The amendment of the Jay treaty of Nov. 19, 1794, by the incorporation of an additional Article, was expressly acquiesced in and noted with approval in the ratification by the King on Oct. 28, 1795. See Great Britain, Parliamentary Register, 1795, 105. This document was called to the attention of the author by Mr. A. P. C. Griffin, Chief Assistant Librarian of Congress.

[13] See numerous illustrative documents in Hackworth, Dig., V, § 481.

[14] The Senate resolution of June 24, 1918, advising and consenting to the ratification of the convention of June 3, 1918, providing for reciprocal military service of citizens of the United States in Great Britain and of British subjects in the United States, U. S. Treaty Vol. III, 2652, demanded that ratifications should not be exchanged until the Government of the United States by the President, should, by a general certificate in accordance with the provisions of Article III, exempt from military service citizens of the United States in Great Britain who were outside the ages of military service specified in the laws of the United States, for the time being. See statement in relation to the matter in Hackworth, Dig., V, § 482.

[15] See For. Rel. 1909, 275–283, concerning the requirement of the Senate resolution advising and consenting to the ratification of the special agreement of Jan. 27, 1909, with Great Britain, providing for the arbitration of the North Atlantic Coast Fisheries.

§ 519A. [1] The author acknowledges his indebtedness to an unpublished memorandum on "Reservations to Multi-partite Treaties," by Messrs. Walter Hollis, W. C. Chambliss, and F. J. Knauer, members of a seminar in Columbia University, 1934–1935, which is the ablest discussion of the matter that has been brought to his attention.

See comment by Professor Garner, Reporter, on Arts. 14, 15 and 16 of the Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 870–912. See, also, Miller's Reservations to Treaties, October 1, 1919; Marjorie Owen, "Reservations to Multilateral Treaties," *Yale L.J.*, XXXVIII, 1086; W. H. Malkin, "Reservations to Multilateral Conventions," *Brit. Y.B.*, 1926, 141; Manley O. Hudson, "Reservations to Multipartite International Instruments," *Am. J.*, XXXII (1938), 330; William Sanders, "Reservations to Multilateral Treaties at Ratification or Adherence," *Am. J.*, XXXIII, 488.

[2] See Memorandum by the Director of the International Labor Office, June 15, 1927, League of Nations, *Official Journal*, 1927, 882. See, also, action of the Council, June 17, 1927, in relation to the report of M. Zaleski, concerning the admissibility of reservations to general conventions, and concerning the report (League of Nations Doc. No. C.266.(2)1927.V.) of

treaty designed for general acceptance may, after having reached an accord concerning the limited scope and character of its provisions, proceed to submit it to other States that by various processes have been made aware of that limited scope and character, for their approval; and in so doing, the managers may reveal no willingness that adherence be yielded under conditions serving to modify in any way the obligations set forth in the text as defined and understood by the managers when they sent forth the treaty on its way.[3] The terms on which States that are interested in the negotiation of multi-partite arrangements may wisely restrict acceptance under reservation suggest a problem that has engaged the attention of scholars who have offered proposals designed to facilitate its solution.[4] In the absence of conventional arrangement, a few generalizations are believed to be warranted.

If a State be permitted to sign or deposit its ratifications of a treaty under a reservation that lessens rather than enlarges obligations which such State is pre-

---

the Committee of Experts for the Progressive Codification of International Law on the same question, *id.*, 800. See Hudson, Int. Legislation, I, §§ 25–26.

[3] Secretary Kellogg, in an address before the American Society of International Law, on April 28, 1928, announced that there was nothing in the American draft of the proposed treaty for the Renunciation of War as an Instrument of National Policy which restricted or impaired in any way the right of self-defense. (*Proceedings,* Am. Soc. Int. Law, 1928, 141, 143.) The German Government had expressed a somewhat similar view on April 27, 1928 (Treaty for the Renunciation of War, Dept. of State Publication No. 468, 1933, 40, 41), as did also the British Government on May 19, 1928 (*Id.,* 43), when it not only adverted with approval to the views expressed by both Secretary Kellogg and by the German Government, but also announced that there were certain regions of the world the welfare and integrity of which constituted a special and vital interest for the British peace and safety, and that their protection against attack was to the British Empire a matter of self-defence. It was added: "It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect." (*Id.,* 45.) When the treaty was signed at Paris on August 27, 1928, there had in substance been written into it a term of which the existence was known to all of the signatories to the effect that the obligations enunciated in the pact were not designed to interfere with privileges of self-defense possessed by the contracting parties. (See note of the American Government to the Governments of Belgium, Czechoslovakia, France, Germany, Great Britain, Irish Free State, Italy, Japan, and Poland, June 23, 1928, *id.,* 56.) It would have been reasonable for the managers and original signatories to decline to permit other States to accept the arrangement under reservation. They failed, however, to do so. Possibly in consequence of that failure certain so-called adhering States made known a readiness to accept the arrangement under conditions which they specified. Egypt did so in a note of September 3, 1928. *Id.,* 168. The Egyptian instrument of adherence, which made no mention of those conditions, was under date of March 28, 1929, and was received at the Department of State on May 9, 1929. *Id.,* 170–171. Turkey laid down conditions in a note of September 6, 1928. *Id.,* 297. The Turkish instrument of adherence, which made no mention of those conditions, was under date of May 20, 1929, and was deposited at the Department of State, July 8, 1929. *Id.,* 298–299. Persia also announced conditions of adherence on October 3, 1928. *Id.,* 239. A Persian declaration of adherence, subject to ratification, was announced on November 23, 1928, and that ratification took place in April, 1929. *Id.,* 242. The Persian instrument of adherence of April 28, 1929, which made no mention of conditions of acceptance, was deposited with the Department of State on July 25, 1929. *Id.,* 8. The treaty became effective on July 24, 1929.

[4] Arts. 14, 15 and 16 of the Harvard Draft Convention on The Law of Treaties give expression to such a proposal. *Am. J.,* XXIX, *Supplement,* October, 1935, 659–660. According to Professor Garner these articles are designed to give effect, in so far as is practicable, to the following general principle: "A State which wishes to make a reservation to a treaty may do so only if all other States which are parties to the treaty, or which, as signatories, are likely to become parties, consent to its so doing; lacking such consent, the State desirous of making the reservation must either abandon that desire and accept the treaty without the reservation or else remain outside the treaty entirely." (*Id.,* 870.)

pared reciprocally to accept,[5] and at a time before the arrangement has become binding upon any of the other signatories or prospective parties, it is reasonable to conclude that if the latter with knowledge of the fact proceed, without more ado, to make the instrument binding upon themselves, as by deposit of ratifications, their conduct amounts to acceptance of the reservation.[6] Under such circumstances, and in special view of the character of its reservation, there is given to the reserving State reason to demand that affirmative steps be taken by such other parties as would reject its proposal.[7] This is not the case, however, where the reservation purports to enlarge rather than diminish reciprocal burdens sought to be imposed by the treaty, even though the action of the reserving State precedes such action by any of the other parties as may be necessary to cause the instrument to become binding upon themselves. Inaction on their part in relation to such a reservation would probably not be deemed to constitute acceptance of it.[8] Thus the implications in relation to acceptance of a reservation

[5] See Miller's Reservations to Treaties, 94.

[6] This conclusion does not imply that acceptance of the reservation is effected by the mere permitting of a signing or adherence or deposit of ratifications under reservation. There is no acceptance of the terms of a multi-partite convention, howsoever sought to be modified by reservation, until the prospective parties take the final steps which, according to the terms of the arrangement shall serve to render it binding upon them (such as, for example, the deposit of ratifications with a specified depository by a minimum number of States). Thus the broadest reasonable deduction to be drawn from permitting a State to accept a treaty under a reservation of the type referred to above, at a time when the agreement has not in fact become binding upon any of the prospective parties is one that, in view of all the circumstances, attributes acceptance of the reservation to the subsequent acceptance of the treaty without formal disapproval of the reservation. Inasmuch as the mere deposit of ratifications by a prospective party may not be irrevocable or serve to bind it until at least its action coupled with that of a requisite number of others suffices to perfect the contractual bond between or among them, the inference derivable from a permitted reservation seems to be applicable in any case where by whatsoever process the making of the reservation takes place before the treaty has become binding upon any of the States that proceed to become parties to it, provided, of course, that they are duly and fully apprised of the fact, and in ample time to register disapproval before the arrangement becomes binding upon them.

Permission to accept a treaty under reservation may not, however, be given; or it may be given on terms that are laid down in the instrument. See, for example, those contained in Art. 67 of the Convention on Sanitary Aerial Navigation, concluded at The Hague, April 12, 1933, U. S. Treaty Vol. IV, 5504, as well as the reservations under which the instrument was signed in behalf of the United States, on April 6, 1934, *id.*, 5506. That signature was effected after all of the signatories had expressed their assent. See statement in Hackworth, Dig., V, § 480.

[7] Where numerous powers participate in the deposit of ratifications which serves through their collective effort to cause the particular treaty to become binding, they may be regarded as accepting the reservations made by any of their number then participating in that action. See Miller's Reservations to Treaties, 140–141, in relation to the deposit of ratifications of the first Hague Convention of 1907, on Nov. 27, 1909.

[8] If the record of the Soviet Government in relation to the Treaty for the Renunciation of War of August 27, 1928 is regarded as establishing that Russia was permitted to accept that agreement under a reservation evidenced by the content of its note of August 31, 1928, addressed to the French Ambassador at Moscow, and which referred to a distinct enlargement of reciprocal burdens which the managers and original signatories of the treaty had indicated a readiness to accept, it does not follow that subsequent inaction by those parties constituted acceptance of the Soviet proposal. In view, however, of the great difficulty which one encounters in concluding that the Soviet action in relation to the treaty amounted to acceptance of the arrangement under reservation, it may be unnecessary to endeavor to ascertain what might have been the legal consequences of a Soviet reservation of the character and scope suggested by its note of August 31, 1928. See Treaty for the Renunciation of War, Dept. of State Publication No. 468, 1933, 8, 266, 272 and 273.

It will be recalled that on December 2, 1929, Secretary Stimson announced that he had

under which a prospective party announces a willingness to make binding upon itself the terms of a multi-partite treaty before the perfecting of the contractual relationship as between or among any of the other parties, appear to depend upon the character of the condition which the reserving State endeavors to project.[9]

The Department of State has found occasion to declare that reservations to a multi-partite treaty should be made and recorded at the time of signature in order that all the parties to the treaty may, previous to and in considering ratification, understand to what extent each signatory is bound by the terms of the agreement.[10]

After a treaty has become binding upon two or more parties, as in consequence of the deposit of ratifications by a minimum number of States sufficient to produce that effect, it is doubtless desirable that no State should thereafter be permitted to sign or deposit its ratifications under reservation until the terms of its proposal have been formally approved by the existing parties or prospective parties. When the instrument of ratification of the Convention Revising the General Act of Berlin of February 26, 1885, and the General Act and Declaration of Brussels of July 2, 1890, which was signed at Saint Germain-en-Laye, September 10, 1919, was offered by the United States to the French Government (being the headquarter government), "that Government suspended acceptance of the deposit on the ground that as the reservation to which the ratification was made subject involved a modification of an article of the convention, it was necessary first to obtain acceptance of the reservation by the other signatory powers, which acceptance it was stated the French Government would request." [11] In consequence of the receipt of information from the French Foreign Office in September, 1934, that the several signatories had notified the French Government of their acceptance of the reservations made by the United States, the American Ambassador to France was duly instructed to deposit with the French Government the instrument of ratification by the United States.[12] He did so on October 29, 1934.[13]

If, however, a State be permitted, as by the headquarter government, to sign or deposit its ratifications after the treaty has become binding upon other parties,

---

in view of the course of events in the relations between China and Russia, reminded the Governments of both of those countries as signatories to the Treaty for the Renunciation of War of their obligations thereunder in respect to the amicable adjustment of the controversy then existing between them. See Dept. of State Press Releases, Dec. 7, 1929, 83.

[9] It may be extremely unwise to permit a State to sign under a reservation which substantially modifies, as by enlargement, obligations embodied in a treaty. Nevertheless, a permitted reservation of such a kind, while not serving to impose upon the other prospective parties affirmative action as a means of safeguarding them from the charge of having accepted the arrangement as amended by the reservation, may enable the reserving State to maintain that it is not obligated to respect the treaty until the terms on which it conditioned its acceptance shall have been accepted by the other parties.

[10] See Mr. Colby, Secy. of State, to Mr. Wallace, American Ambassador to France, April 12, 1920, Hackworth, Dig., V, § 480.

[11] Communication of Mr. C. M. Barnes, Chief, Treaty Division, Dept. of State, to the author, Feb. 5, 1934.

[12] Dept. of State, Treaty Information Bulletin, No. 60, September, 1934, 4. See also statement in Hackworth, Dig., V, § 482.

[13] U. S. Treaty Vol. IV, 4849.

it may be greatly doubted whether the reservation, regardless of its purport, need be made the object of affirmative disapproval as a means of safeguarding the existing parties [14] to the arrangement from the imputation of acceptance.[15] Practice is not uniform; and it is to be anticipated that the existing or prospective parties to a treaty that is binding upon any of their number will be disposed to register a protest against permitted reservations in which they are not prepared to acquiesce.[16]

The following statement by Mr. Hackworth is worthy of note:

> If reservations are not made at the time of signing a multilateral treaty, ratifications with reservations in order to be binding must be brought to the knowledge of the other contracting powers and receive their approval, unless otherwise specified in the treaty, since they constitute a modification of the agreement. As to signatories whose ratifications had been deposited prior to the receipt by them of notice of the deposit of a ratification with reservations, acceptance by such states of the reservations by some positive act would seem to be necessary in order to give the treaty binding force as between the parties who had already deposited their ratifications and the party subsequently ratifying with reservations. There is authority for the proposition that failure to object to a reservation should be regarded as acceptance thereof. The better view, however, would appear to be that the mere failure to object to a reservation, in the absence of some act by the party which has already deposited its ratification indicating that it regards the treaty as operative between it and the party making the reservation, does not constitute acceptance of the reservation. As to signatories whose ratifications are deposited subsequent to the receipt by them of notice of the deposit of a ratification with reservations, acceptance of the reservations would seem to be implied from failure to object.[17]

If existing practices reveal confusion of thought and inadequate guidance in situations where conventional arrangements in relation to reservations are not explicit, and so inspire a common effort to create a simple and uniform procedure

[14] Perhaps there may be embraced within the same category other parties that subsequently adhere to the arrangement.

[15] Declared the Department of State in relation to certain reservations under which the Dominican Republic was permitted by the Pan American Union to deposit its ratification of the Convention on Consular Agents concluded at the Sixth International Conference of American States, Feb. 20, 1928: "Moreover, these reservations are new and were not before the United States at the time of its ratification and were not considered in that ratification either by the Senate or the President. The same is true in respect of the other countries which have deposited their ratifications with the Pan American Union, namely, Brazil, Mexico, Nicaragua and Panama. Among these four countries and the United States the convention is in force *in toto,* and the acceptance of the Dominican reservations would result in the application as between the United States and the Dominican Republic of a treaty greatly at variance with the treaty between the United States and the four countries above mentioned." (Dept. of State, Treaty Information Bulletin No. 68, November, 1932, 24.)

[16] See comment by Professor Garner, Reporter, on Arts. 15 and 16 of Harvard Draft Convention on The Law of Treaties, *Am. J., Supplement,* October, 1935, XXIX, 890–912, in the course of which it is observed at p. 910, that "the Secretariat of the League of Nations acts in accordance with the principle laid down in this article, in that it apparently does not regard an accession which is subject to reservations as definitively deposited until those reservations have been communicated to and accepted by the States signatories of or parties to the treaty concerned."

[17] Statement in Hackworth, Dig., V, at beginning of § 482.

calculated to prevent the frustration of multi-partite agreements through amendatory endeavors of reserving States, they point also to the need of making close appraisal of the variety of conditions under which reserving States attempt to accept such agreements, as well as exact appreciation of the effect of the character of a particular reservation upon the solution of the question whether inaction is to be regarded as constituting acceptance.[18]

A State obviously enjoys the right to endeavor to accept and gain the benefits of a multi-partite convention on such terms as it may desire. The conduct of the United States has frequently exemplified the exercise of that right. Its experience has revealed the varying aspects of the responses of signatory States. These have commonly shown that whether the conditions of American acceptance were or were not approved, the decision generally manifested itself with such clearness as to leave little room for doubt, and hence to remove from the horizon the legal question whether, under the circumstances of the particular case, acquiescence should be implied.

d

§ 520. **Exchange of Ratifications. Deposit of Ratifications.** As has been observed above,[1] it is the formal reciprocal communication of the fact of confirmation and approval by the contracting parties one to another that serves to perfect the contractual relationship between them. The requisite communication may be made in various ways; and these depend in part upon the character and form of the agreement concerned. Thus, if the President of the United States, in pursuance of his constitutional authority and in conjunction with the duly authorized agents of other States, purports to enter into an agreement in behalf of his country which by common design is to become binding upon signature, the act of signature may be said to embody a sufficient communication of the fact of confirmation and approval.[2]

[18] The deposit on Aug. 25, 1937, in behalf of the United States, of the instrument of ratification of the Convention Concerning the Coördination, Extension, and Fulfillment of Existing Treaties between the American States, signed Dec. 23, 1936, was subject to a declaration, made a part of such ratification, as follows: "The United States of America holds that the reservations of this Convention do not constitute an amendment to the text, but that such reservations, interpretations, and definitions by separate governments are solely for the benefit of such respective governments and are not intended to be controlling upon the United States of America." (U. S. Treaty Vol. IV, 4837.)

§ 520. [1] See Ratification: Its Place in Treaty-Making, *supra*, § 516.

"Exchange of ratifications is effected by the plenipotentiary of the United States handing to the plenipotentiary of the foreign government a copy of the United States' original of the treaty ratified by the President and the plenipotentiary of the foreign government handing to the plenipotentiary of the United States a copy of the foreign government's original of the treaty ratified by the head of the foreign government. A protocol attesting the exchange of ratifications should be signed by the two plenipotentiaries at the time the exchange is made. The protocol should be signed in duplicate originals, one for each government, in which the principle of the *alternat* is observed the same as in the treaty.

"Before making the exchange of ratifications the diplomatic agent of the United States shall satisfy himself that the texts in the two languages as incorporated in the instrument of ratification of the foreign government are, with the exception of the observance of the *alternat*, in exact conformity with the two texts as contained in the President's instrument of ratification." (Foreign Service Regulations of the United States XI–6, as of January, 1941.)

[2] See, for example, Final Protocol of Sept. 7, 1901, entered into between the Plenipotentiaries of Various Powers at the conclusion of the so-called "Boxer" Troubles in China, Malloy's Treaties, II, 2006.

In the conclusion of a treaty contemplating the taking of certain steps after ratification and leading up to its final consummation, such as the exchange of ratifications in the case of a bi-partite convention, or the deposit of ratifications in the case of a multi-partite convention, the requisite communication of the confirmation and approval of the agreement is not apparent until such steps have been taken.[3] Consequently, until they have been taken, the prospective parties do not appear to be legally bound by the terms of the arrangement.[4] So long as they are not so bound, they remain, therefore, free from the obligation of performance.[5]

The provisions of a treaty or other agreement contemplating an exchange of ratifications must be regarded as impressive evidence of design that such exchange is to be the means of consummating the arrangement.[6] When an instrument containing such provisions declares also that certain of its terms are to become operative at a time antecedent to such exchange, there is evidence of a special additional understanding that may be deemed to be independent of the

---

According to Article 6 of the agreement of June 19, 1934, between the United States and other powers concerning Statistics of Causes of Death: "The present agreement shall bear this day's date, and shall come into force immediately." (U. S. Executive Agreement Series, No. 80.)

[3] See Crandall, Treaties, 2 ed., § 155; also comment by the Reporter on Art. 9 of Harvard Draft Convention on The Law of Treaties, *Am. J., Supplement,* XXIX, October, 1935, 780.

See, in this connection, Brown, J., in Dooley *v.* United States, 182 U. S. 222, 230.

From a letter of President Washington to Gouverneur Morris, March 4, 1796, it appears that the formal ratification by the King of the Jay Treaty of Nov. 19, 1794, had not been received by the United States. There being, however, "sufficient and official evidence of the fact, both from Mr. Deas and the British Chargé d'Affaires," the treaty was proclaimed Feb. 29, 1796, as the law of the land. Writings of George Washington, collected and edited by Worthington C. Ford, New York, 1892, XIII, 172, 173. It should be observed, however, that on March 1, 1796, the President announced to the Congress that the ratifications of the treaty had been exchanged at London, Oct. 28, 1795. Annals of Fourth Cong., 1 Sess., 48. Thus it appears that the note to Mr. Morris had reference merely to the receipt in the United States of the text of the King's ratification. See, in this connection, Miller's Treaties, II, 273.

[4] *Cf.* Kuhelj *v.* Grom, in which the Italian Court of Cassation, on May 25, 1927, concluded that Art. 4 of the convention between Italy and Yugoslavia, of April 6, 1922, acquired, through promulgation in Italy by a royal decree of December 13, 1923, full and absolute legal effects within the Kingdom of Italy independently of the fact whether or not an exchange of ratifications had taken place. McNair and Lauterpacht, *Annual Dig.,* 1927–1928, Case No. 275, with critical comment in a note on p. 401.

[5] Mr. Olney, Secy. of State, in a communication to Mr. Terrell, Minister to Turkey, Oct. 15, 1896, with reference to the naturalization convention concluded with that country Aug. 11, 1874, and amended by the Senate Jan. 22, 1875, adverted to the fact that when the ratifications of the amended convention were exchanged at Constantinople, April 22, 1875, the protocol of exchange was accompanied by a Turkish memorandum giving to the amended text of Art. II an interpretation believed to be at variance with the intent of the Senate as to the amendment. Secretary Olney declared that "Mr. Fish treated the exchange of ratifications, at Constantinople, as invalid, in view of the construction placed by the amended text of Article II by the Turkish memorandum, and declared that there had been in fact no real exchange of ratifications. The treaty was, in consequence, not proclaimed." (For. Rel. 1896, 933, 934.)

[6] The design of the parties is a matter of fact and must obviously be derived from evidence that is both external and internal to the instrument concerned. When the form of a text implies a two-fold purpose utmost care must be taken to ascertain how the parties themselves essayed to give it effect.

See Judgment in the Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Sept. 10, 1929, Publications, Permanent Court of International Justice, Series A, No. 23, p. 20.

scheme for the final consummation of the treaty as such.[7] Yet the two plans may be so closely intertwined as to compel the conclusion that the agreement for the performance of particular acts prior to the exchange of ratifications was merely expressive of a design that if the main treaty were to be consummated, endeavor would be made to perform those acts at the times specified in the instrument.

The terms of a treaty may provide that the exchange of ratifications is to take place within a specified period of time after a particular event, such as the last ratification.[8] In such case, the parties appear definitely to bind themselves to exchange ratifications, and doubtless may do so if the agreement-making agencies of the contracting parties possess the requisite authority.[9] Yet here also, the agreement respecting the date of exchange of ratifications may in the particular case strongly suggest that it was merely an incident of the larger plan for which the treaty itself made provision, and that there might be no duty to exchange those ratifications, in case either signatory decided not to do its part to consummate the treaty.

Doubtless after signature or ratification, a prospective party may in a variety of ways take a stand that is inconsistent with the provisions embodied in a treaty, and to an extent that may sharply modify the basis of accord set forth therein.[10] By such process it may give cause of umbrage to another prospective party and inspire it to withhold the communication of its final approval of the arrangement. The action of the former State should not, however, be confused with a breach of a perfected contractual obligation attributable to a consummated treaty,[11] unless, of course, what is done is at variance with a particular commitment that by the terms of the instrument was to become operative prior to the exchange of ratifications. It may be observed generally that if a State expects another prospective party to proceed to make a treaty binding upon itself as by an exchange of ratifications, the former must not have recourse to conduct which inspires such other party to pursue a different course.[12]

[7] See For. Rel. 1915, 445–461, concerning the methods sought to be applied whereby the treaty between the United States and Haiti, of Sept. 15, 1915 (U. S. Treaty Vol. III, 2673), should go provisionally into full effect.

[8] According to Art. XX of the treaty of arbitration between Guatemala and Honduras of July 16, 1930: "The present Treaty shall be submitted, as soon as possible, in Guatemala and in Honduras, for ratification in the manner provided by their constitutions; and the exchange of ratifications shall take place in this city of Washington, capital of the United States of America, within the sixty days following the date of the last ratification." (Translation from the Official Gazette of Guatemala, Vol. II, No. 24, Aug. 17, 1931.)

[9] "The convention with respect to traveling salesmen between the United States and Paraguay, signed October 20, 1919, was ratified by both parties in sufficient time to enable the exchange of ratifications to take place within the period prescribed in the convention itself. The Paraguayan instrument of ratification, however, did not reach Washington for exchange until after the expiration of that period. Secretary Hughes effected the exchange of ratifications with the Paraguayan plenipotentiary on the condition and with the understanding that the convention should not be binding until the United States Senate should sanction this delayed exchange of ratifications. The Senate, by resolution of April 24, 1922, gave its advice and consent to the exchange of ratifications." (Statement in Hackworth, Dig., V, § 472.)

[10] See, in this connection, Case concerning Certain German Interests in Polish Upper Silesia (The Merits), Publications, Permanent Court of International Justice, Series A, No. 7, 39–40.

[11] See D. Anzilotti, *Cours de Droit International,* French translation of third Italian edition, by G. Gidel, Paris, 1929, I, 372–373.

[12] According to Art. 9 of the Harvard Draft Convention on The Law of Treaties: "Under

When a State has taken all needed steps to make binding upon itself a treaty such as one marking the termination of a war, and has so placed it within the power of the other party or parties to consummate the arrangement by appropriate formal action, the former may not lawfully, during the interval before the exchange or deposit of ratifications, take any stand or commit any act that is injurious to what it has yielded, or that is designed to impair the value of what may have been conceded. It is not suggested that the deposit of ratifications may not be withdrawn before it has been utilized by another signatory. The consenting, however, to that utilization by such other signatory (as through the timely deposit of its own ratification), serves to clothe the latter with the right to challenge the propriety of any act that was at variance with the terms of any undertakings embodied in the instrument. When the contracting party that was guilty of such an act is a defeated belligerent which found itself obliged to agree to do specified things, antecedent to the consummation of the final treaty of peace, its remissness may betoken contempt for distinct and definite obligations of which the opposing contracting parties might fairly have demanded respect when and as they accrued. It seems to be desirable that arrangements pertaining to matters calling for action that may antedate the exchange of ratifications of a treaty of peace should, as far as possible, be incorporated in instruments that are extrinsic to it and which in themselves suffice to reveal complete accord.

It has been authoritatively announced that "In the case of multilateral treaties ratifications are usually not exchanged; rather, they are deposited with a government or an organization such as the League of Nations or the Pan American Union" that the functions of a depositary of a treaty and its ratifications are, (*a*) to take custody of the original document; (*b*) to furnish certified copies thereof to all parties; (*c*) to receive the instruments of ratification, including reservations; (*d*) to advise all the other parties regarding the deposit of each ratification together with any reservations made; (*e*) to receive the replies of the other parties, whether accepting or rejecting the reservations; and (*f*) to inform all the other parties to the treaty regarding each reply.[18]

e

§ 520A. **Adherence.** It must be obvious that the parties to a treaty, especially if it be a multi-partite arrangement, may deem it advisable to permit non-signatories to become parties to the agreement, and may lay down the terms upon which they may do so. The procedure contemplating such action by the latter

---

some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult." (*Am. J., Supplement,* XXIX, October, 1935, 658.) See Comment by Reporter, *id.,* 778.

[18] Statement in Hackworth, Dig., V, § 473.

The International Agreement for the Regulation of Whaling, signed at London, June 8, 1937 (U. S. Treaty Vol. IV, 5573), was done in a single copy, which was to remain deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, by whom certified copies were to be transmitted to all the other contracting Governments. The Government of the United States deposited its ratifications on Sept. 3, 1937.

must, of course, be followed. The conduct whereby a non-signatory State makes itself or becomes a party to a treaty already concluded by others is commonly described as adherence.[1]

The Department of State has declared that while it recognizes that the deposit of a formal instrument executed by the head of a State is "not always expressly stipulated for in multilateral conventions as evidence of adherence to such conventions," it believes that the deposit of such an instrument is "representative of the better diplomatic procedure and is more consistent with the further provision of such conventions that ratifications shall be deposited." [2]

f

§ 521. **Proclamation.** Following the exchange of ratifications, a treaty is commonly proclaimed by the highest authorities of the signatory States in order that the compact may be made known and observed within their respective territories.[1] In the case of the United States, proclamation is made by the President.[2] "Proclamation, however, is a national and not an international act." [3] When a treaty to which the United States is a party has become perfected through an exchange of ratifications and is according to its terms made operative upon the happening of that event, it behooves the President to proclaim the agreement without delay so that in assuring deference through domestic agencies for its provisions, there may be no room for complaint by a foreign contracting party that privileges conferred through the arrangement are withheld from its reach.[4] The United States does not essay through its domestic laws to obstruct

§ 520A. [1] Illustrative of the need of the consent of the contracting parties, see judgment of the Permanent Court of International Justice in the Case Concerning German Interests in Polish Upper Silesia, in 1926, Publications, Permanent Court of International Justice, Series A, No. 7, pp. 28–29; also separate opinion of Judge Negulesco, in the Case Concerning the Free Zones, *id.*, Series A, No. 22, p. 37. Both cases are referred to in Hackworth, Dig., V, § 474.

[2] Mr. Castle, Acting Secy. of State, to the Danish Minister at Washington, Aug. 26, 1930, Hackworth, Dig., V, § 474. See also Mr. Carr, Acting Secy. of State, to the Polish Ambassador at Washington, March 10, 1930, Hackworth, Dig., V, §474.

§ 521. [1] See, for example, proclamation of President Wilson of June 24, 1916, of convention between the United States and Nicaragua, Aug. 5, 1914, 39 Stat. 1664.

[2] "The proclamation of a ratified treaty can be made only by the President of the United States, and cannot be issued by the legation by whom the treaty is negotiated." (Moore, Dig., V, 210, *citing* Mr. Blaine, Secy. of State, to Mr. Angell, Oct. 10, 1881, MS. Inst. China, III, 266.)

[3] See Miller's Treaties, I (Short Print), 19.

[4] "While under the present practice of the Department of State only a very brief period elapses between the exchange of ratifications of a treaty and its proclamation (sometimes, indeed, proclamation takes place on the very day of the exchange), there have been instances in the past when months have elapsed between the two dates. In a very few early cases the proclamation preceded the exchange." (*Id.*, 20.)

The convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, concluded January 23, 1924 (U. S. Treaty Vol. IV, 4225), was to come into force on the date of the exchange of ratifications. (Art. V.) Ratifications were exchanged on May 22, 1924. On that date certain British vessels laden with intoxicating liquors were lying outside of the territorial waters of the United States awaiting the opportunity to exercise the privilege accorded by the convention to enter those waters. Inquiry was made by telephone in behalf of those vessels on that day whether the President had proclaimed or was about to proclaim the convention. Within two hours after the exchange of ratifications, President Coolidge proclaimed the convention, and information as to the fact was immediately placed within reach of persons controlling the movements of the British vessels.

by executive action the proper performance of treaties concluded in its behalf. Even the act of proclaiming a treaty seemingly lacks statutory basis.[5] Inasmuch as the President is to be deemed to be far from disposed to permit delay on his part in proclaiming a treaty to give cause of umbrage to another contracting party, as by subjecting the United States to a charge of bad faith in fulfilling a contractual obligation, it is unnecessary to discuss the domestic question whether or to what extent local agencies, judicial or otherwise, may withhold recognition of a treaty as a part of the applicable law of the land prior to the proclamation of the agreement.[6]

Executive agreements concluded on behalf of the United States are not ordinarily proclaimed.[7] The Congress may, however, condition the exercise of authority which it yields to the President to conclude particular classes of agreements upon his finding of specified facts and his proclamation thereof.[8] Again, executive agreements, such as those known as reciprocal trade agreements, may by their terms provide for proclamation.[9]

g

§ 521A. **Aspects of Personal or Governmental Undertakings.** The texts of international agreements to which the United States has become a party have at times embodied, or have had appended to them, recitals of particular undertakings on the part of American agencies of negotiation, such as the President, the plenipotentiary signing the instrument, or the Government of the United States. Such undertakings have, for example, announced the agreement of a plenipotentiary to use his good offices to secure ratification by the appropriate authorities of his country at the earliest possible date.[1] They have set forth the engagement of the President to recommend to the States of the Union the

[5] See Henry Reiff in his excellent study entitled "The Proclaiming of Treaties in the United States," *Am. J.*, XXX, 63, 69–70, and documents there cited.

[6] It is said that "a treaty which does not require legislation to make it operative will be executed by the courts from the time of its proclamation." (Moore, Dig., V, 246, *citing* Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 750; Foster *v.* Nielson, 2 Pet. 253, 314; United States *v.* Arredondo, 6 Pet. 691, 725.) See, also, United States *v.* Grand Rapids & I. R. Co., 165 Fed. 297, 301.

See discussion by Henry Reiff in article cited, *Am. J.*, XXX, 63.

See also documents in Hackworth, Dig., V, § 475.

Concerning the publication of treaties of the United States, see Hackworth, Dig., V, § 476, and documents there cited.

[7] Thus, the protocol of agreement embodying the terms of a basis for the establishment of peace between the United States and Spain, signed Aug. 12, 1898, was not proclaimed. Malloy's Treaties, II, 1688.

[8] See, for example, Act of March 4, 1909, 35 Stat. 1075, 1077, as amended in 1919, and 1941, 17 U.S.C.A. § 8, in relation to the matter of copyright.

See also Act of June 12, 1934, To Amend the Tariff Act of 1930, 48 Stat. 943.

[9] According to Art. XVI of the Reciprocal Trade Agreement between the United States and Honduras of Dec. 18, 1935: "The present Agreement shall come into force on the thirtieth day following proclamation thereof by the President of the United States of America, and the President of the Republic of Honduras, or should the proclamations be issued on different days, on the thirtieth day following the date of the later in time of such proclamations." (U. S. Executive Agreement Series, No. 86.)

§ 521A. [1] See undertaking of Mr. Pittman, Delegate of the United States, July 26, 1933, at the London Silver Conference, appended to the International Silver Agreement of July 22, 1933, U. S. Executive Agreement Series, No. 63.

enactment of laws necessary for the achievement of a desired end.[2] They have committed the Government of the United States to recommend to the appropriate authorities the exercise of mercy by way of the commutation of the sentence of death to that of imprisonment for life in certain cases.[3]

Interested contracting parties expect such undertakings to be fulfilled, even though they may beget no legal obligation upon the State whose agents have made such commitments to respect the same.[4] Normally there is no disposition to evade them. As a result, there appears to be a growing practice tending to facilitate the utilization of particular bases of accord by a process whereby a prospective contracting party is encouraged to accept the text of a proferred arrangement by assurances from the agencies of another that they will lend their good offices either to effect the consummation of the agreement, or the enactment of legislation that may be essential to its successful operation.

[2] See Art. VII, Consular Convention with France of Feb. 23, 1853, Malloy's Treaties, I, 531.

[3] See Notes concerning the Death Penalty, exchanged at the time of Signature of the Extradition Treaty between the United States and Austria, of Jan. 31, 1930, U. S. Treaty Vol. IV, 3946.

[4] Obviously, a different situation is apparent where the contracting powers themselves agree to propose to their appropriate law-making bodies measures necessary for insuring the execution of a particular convention. See Art. VIII, Convention for the Protection of Migratory Birds of Aug. 16, 1916, U. S. Treaty Vol. III, 2648.

# TITLE D

## OPERATION AND ENFORCEMENT OF TREATIES

### 1

§ 522. **Date of Taking Effect.** Any arrangement, whether expressed or implied, that a treaty is to take effect for any purposes prior to the completion of the contractual relationship between the signatory parties, is obviously subject to the condition that that relationship be perfected.[1] As Secretary Hull declared in 1939:

> This Government considers that, in the case of any treaty or convention to which it is a signatory, it has not accepted any obligations or acquired any rights until it has duly ratified such instrument in accordance with its constitutional procedure and until the requirements of the treaty or convention with reference to exchange or deposit of ratification also have been fulfilled by it. Moreover, this Government could accord rights under treaties and conventions only to countries which likewise have met the requirements of the particular instruments with respect to ratification or adherence. This position, it is believed, is in accordance with the customary and reasonable rule in regard to the interpretation of treaties.[2]

An agreement which does not purport to require ratification, and which is consummated upon signature, is free from such a provisional aspect.[3]

The parties to an international arrangement may fix at will the time when their compact is to become operative. In the case of a treaty, the terms of the instrument frequently make announcement of the design.[4] These may reflect

§ 522. [1] Mr. Evarts, Secy. of State, to Mr. Fairchild, Minister to Spain, No. 581, Aug. 11, 1880, For. Rel. 1880, 922.

[2] Communication to the British Ambassador at Washington, Oct. 6, 1939, Hackworth, Dig., V, at the beginning of § 491. See also Mr. Hughes, Secy. of State, to the Netherland Minister at Washington, Aug. 21, 1924, For. Rel. 1924, Vol. I, 207.

[3] See agreement of June 19, 1934, between the United States and other powers concerning Statistics of Causes of Death, U. S. Executive Agreement Series, No. 80.

[4] See, for example, Art. VIII of the extradition convention with Belgium of March 19, 1874, announcing that the agreement should "take effect twenty days after the day of the date of the exchange of ratifications." Malloy's Treaties, I, 90.

Art. 440 of the treaty of peace with Germany of June 28, 1919, made the following provision:

"The deposit of ratifications shall be made at Paris as soon as possible.

"Powers of which the seat of the Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible.

"A first *procès-verbal* of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of the Principal Allied and Associated Powers on the other hand.

"From the date of this first *procès-verbal* the treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time

a variety of purposes that defy classification.[5] Despite the repeated failure of contracting States to make clear their thought through the terms of their choice in relation to the matter, their experience has established the importance of careful drafting of relevant instruments. There may be reason to anticipate less need than heretofore to endeavor to ascertain what the law of nations may prescribe in situations where the form of a text affords no definite guidance and no extrinsic evidence is probative of a particular design. In such a case it is not illogical or unreasonable to conclude that normally an international agreement of any type should take effect on the date when it becomes binding upon the parties thereto.[6] The Department of State has declared that "the weight of authority on the question is that when a treaty expressly provides that it is to be effective on ratification, it has no validity or binding force prior to the date of ratification and that ratification is not retroactive."[7]

In America it has oftentimes been laid down as a rule of the law of nations that in the absence of special agreement a treaty upon the exchange of ratifications operates retroactively, as from the date of signature.[8] This is said to be

---

provided for in the present Treaty this date will be the date of the coming into force of the Treaty.

"In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification.

"The French Government will transmit to all the signatory Powers a certified copy of the *procès-verbaux* of the deposit of ratification."

It may be noted that the corresponding articles of the treaty of Saint Germain-en-Laye, of Sept. 10, 1919 (Art. 381), and of the treaty of Trianon, of June 4, 1920 (Art. 364), are identical with Art. 440 of the treaty of Versailles.

[5] "In the case of multipartite treaties, for which a deposit of ratifications rather than exchange is now usually required, it is a common practice to provide that they shall come into force upon the deposit of the ratifications of all the parties, or of the ratifications of a certain number of them (sometimes as few as two or three), or upon the date of the *procès-verbal* recording the fact of deposit of a certain number of ratifications, or upon a fixed date following the closure of the *procès-verbal*." (Comment by the Reporter, Professor Garner, on Art. 19 of Harvard Draft Convention on The Law of Treaties, *Am. J., Supplement,* XXIX, October, 1935, 790.)

[6] According to Art. 8 of the Convention on Treaties signed at the Sixth International Conference of American States, Feb. 20, 1928: "Treaties shall become effective from the date of exchange or deposit of ratification, unless some other date has been agreed upon through an express provision." (Report of the Delegates of the United States of America to the Sixth International Conference of American States, Appendix 10, 198.)

"The English and Continental decisions indicate that judicial opinion in Europe leans strongly in favor of the rule that a treaty which requires ratification under international law, in the absence of contrary provision, takes effect as from the date of the exchange of ratifications, and not as from the date of signature. This, too, appears to be the considered opinion of the more recent writers in Great Britain and in Continental Europe." (J. Mervyn Jones, "The Retroactive Effect of the Ratification of Treaties," *Am. J.,* XXIX, 51, 64.)

See Art. 10 of Harvard Draft Convention on The Law of Treaties, *Am. J., Supplement,* XXIX, October, 1935, 658.

See award in case of the Iloilo Claims, Nielsen's Report, American and British Claims Arbitration, under agreement of Aug. 18, 1910, 403.

Concerning the effective date of operation of the commercial convention between the United States and Spain, of Dec. 11, 1902, see United States *v.* American Sugar Refining Co., 202 U. S. 563; also documents in Hackworth, Dig., V, § 491.

[7] Memorandum for the Chinese Legation at Washington, March 1, 1926, For. Rel. 1926, Vol. I, 1021.

[8] Statement in Moore, Dig., V, 244, *citing* Davis *v.* Police Jury of Concordia, 9 How. 280; Hylton's Lessee *v.* Brown, 1 Wash. C. C. 343; J. C. B. Davis, Notes, U. S. Treaty Vol. (1776–1887) 1228; Mr. Buchanan, Secy. of State, to Mr. Clay, Minister to Peru, Sept. 18, 1847, MS. Inst. Peru, XV, 56. See United States *v.* Reynes, 9 How. 127, 148; Mr. Hay, Secy. of

true, however, only so far as the agreement concerns the relations between State and State.[9] With respect to the rights of private individuals, the date of operation, unless otherwise specified, is regarded as simultaneous with that of the exchange of ratifications.[10] A treaty is said, moreover, not to operate retroactively so as to affect vested rights acquired before the compact was concluded or signed by the signatory parties.[11]

The Harvard Draft Convention on The Law of Treaties[12] definitely rejects the rule of retroactivity which, according to the eminent Reporter "has no support today among writers on international law outside the United States," is unsupported by the decisions of national courts in any country except the United States, and finds scant favor in those of international tribunals.[13]

Obviously, a tribunal may properly decline to permit a litigant to enjoy the benefits of a treaty if it appears from the record that at the time when its claim arose, the State whose obligations were sought to be availed of had not taken the final steps that were contemplated in order to perfect the contractual relationship.[14]

Whether a State may claim the benefit of the provisions of a treaty to which

---

State, to Gen. Reyes, Jan. 5, 1904, For. Rel. 1903, 294, 299. See also Jesse W. Beam *v.* United States, 43 Ct. Cl. 61.

See also Mr. Root, Secy. of State, to the Colombian Minister to the United States, Feb. 10, 1906, S. Doc. 542, 60th Cong., 2d sess., p. 10, Hackworth, Dig., V, § 491.

[9] In Davis *v.* Police Jury of Concordia, 9 How. 280, it was declared at 289: "It is true, that, in a treaty for the cession of territory, its national character continues for all commercial purposes; but full sovereignty, for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true, that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands." See also United States *v.* Reynes, 9 How. 127; The Fama, 5 Ch. Rob. 106; Montault *v.* United States, 12 How. 47.

In the opinion of Attorney General Knox, the navigable waters of Porto Rico were waters of the United States within the meaning and intent of Section 10 of the River and Harbor Act of March 3, 1899. The date of the treaty of cession of that island to the United States by Spain was Dec. 10, 1898; ratifications were not exchanged until April 11, 1899, 23 Ops. Attys. Gen., 551.

[10] Dooley *v.* United States, 182 U. S. 222, 230; Haver *v.* Yaker, 9 Wall. 32; United States *v.* Arredondo, 6 Pet. 691; Lessee of Hylton *v.* Brown, 1 Wash. C. C. 343; Bush *v.* United States, 29 Ct. Cl. 144; *Ex parte* Ortiz, 100 Fed. 955; J. W. Beam *v.* United States and Sioux Indians, 43 Ct. Cl. 61, 66; Wm. S. Macleod *v.* United States, 45 Ct. Cl. 339, 358; United States *v.* Grand Rapids & I. R. Co., 165 Fed. 297, 301; San Lorenzo Title & Improvement Co. *v.* City Mortg. Co., 48 S. W. (2) 310, 314.

"The principle that a treaty is not to be held to operate retroactively in respect to vested rights does not apply to conventions of extradition. It is a general principle that such conventions apply to offenses committed prior to their conclusion, unless there is an express limitation." (Moore, Extradition, I, 99.)

[11] Taney, C. J., in Prevost *v.* Greneaux, 19 How. 1.

[12] Art. 11, *Am. J., Supplement,* XXIX, October, 1935, 658.

[13] *Id.,* 811, where it is added: "The rule also runs counter to considerations of convenience, logic and reason. Manifestly, if treaties which are subject to ratification, and which by their own terms come into force when ratified or when the instruments of ratification are exchanged, are deemed to operate retroactively from such date back to the date of signature, anomalous situations may result and the obligations of the parties during the intervening period may be very uncertain."

[14] See Case of Radio Corporation of America *v.* Republic of Turkey, Tribunal to pass upon American claims against Turkey (under Act of Congress of March 22, 1935, 49 Stat. 67), Nielsen's Opinions and Report, 711.

*Cf.* Judgment of the Permanent Court of International Justice in the Case of The Mavrommatis Palestine Concessions, Aug. 30, 1924, Publications, Permanent Court of International Justice, Series A, No. 2, 33–34; also dissenting opinion by Judge Moore, 54, 57.

it is not a party, and whether also, it may properly claim the provisional application of some provisions of a treaty prior to its consummation as such, present problems that are distinct from that concerning the question as to the date when a treaty itself becomes operative.

As has been noted elsewhere,[15] the text of an international agreement may embody distinct and severable undertakings, such as one contemplating the consummation of the arrangement as a treaty, and another providing for the operation of some or most of the provisions registered in the instrument prior to its final acceptance as a treaty. The latter undertaking may by common design purport to impose obligations or create rights which may not be dependent upon the ultimate fate of the agreement within the text of which they are incorporated. If they are not so dependent, they obviously exemplify an agreement to achieve particular ends regardless of what the text of the enveloping instrument may itself ordain as to its own consummation.[16]

## 2

## SOME ASPECTS OF PERFORMANCE

### a

§ 523. **In General.** It may be assumed that the law of nations imposes upon the parties to a treaty the duty to perform faithfully the undertakings which they have agreed to discharge. This assumption is justified by the practice of States, and finds recognition in the utterances of international tribunals,[1] as well as in those of American statesmen. Declared Secretary Hull, as Chairman of the American delegation to the Inter-American Conference for the Maintenance of Peace at Buenos Aires, on December 5, 1936: "Observance of understandings, agreements and treaties between nations constitutes the foundation of international order." [2] The phrase *pacta sunt servanda* is employed to refer to and accentuate the burdens resting upon contracting parties.[3] Nevertheless,

[15] See Exchange of Ratifications, *supra*, § 522.

[16] See Art. XIX of the Treaty for the Limitation of Armament, concluded at Washington, Feb. 6, 1922, in which it was agreed that "the status quo at the time of the signing of the present treaty, with regard to fortifications and naval bases, shall be maintained," etc., U. S. Treaty Vol. III, 3105.

§ 523. [1] See award of the Tribunal in the North Atlantic Coast Fisheries Arbitration, J. B. Scott, Hague Court Reports, 146, 167; G. G. Wilson, Hague Arbitration Cases, 145, 166.

[2] *New York Times*, Dec. 6, 1936. See also statement by Secy. Hull, July 16, 1937, Dept. of State Press Releases, July 16, 1937, 41.

See, also, Mr. Livingston, Secy. of State, to Mr. Serurier, June 3, 1833, MSS. Notes. For. Leg., Wharton, Dig., II, 67.

Declared President F. D. Roosevelt, in an address at Chicago, Oct. 5, 1937: "It is a matter of vital interest and concern to the people of the United States that the sanctity of international treaties and the maintenance of international morality be restored." (Dept. of State Press Releases, Oct. 9, 1937, 275, 278.)

[3] Declares Professor Hudson in relation to the position of the Permanent Court of International Justice: "The Court has acted upon the principle of *pacta sunt servanda*, though without frequent reference to it, and it has repeatedly declared that international engagements are binding on the parties thereto. Throughout its jurisprudence, the assumption runs that States will in good faith observe and carry out the obligations which they have undertaken. Hence, little hospitality has been shown to reasons advanced by parties for the nonfulfillment of their obligations." (The Permanent Court of International Justice, 1934, § 528.)

States which are compelled by others to accept arrangements that are deemed to be harshly sacrificial of their interests, such as those calling for unwilling transfers of territory, are not likely to regard either the phrase or the principle behind it as a deterrent of repudiation or denunciation when favorable opportunity presents itself for recourse to such action.[4] Before examining the grounds on which a contracting State may reasonably rely by way of excuse for non-performance, attention is called briefly to the modes by which the contractual obligation is under normal circumstances sought to be fulfilled.

The process by which the parties to a valid compact effect performance and assure respect for it by public agencies or private individuals under their control, is primarily a matter of domestic concern.[5] It is theoretically unimportant, from an international point of view, that the constitution of a contracting State attaches a definite legal value to a treaty as a means of insuring its observance. The United States, Italy, the Netherlands, and Japan are equally bound to perform their contractual obligations, notwithstanding the differing fundamental laws which each may invoke and utilize in the effort to effect performance. The extent and nature of the duties conventionally imposed upon each are not limited by the requirements of those laws, so long as the particular treaty is acknowledged to be valid.

It may be observed parenthetically that the individual national can not, by attempting to waive privileges created by treaty for his benefit, deprive his own country of the right to demand, on appropriate occasion, that those privileges continue to be accorded by the State which has agreed to yield them.[6]

## b

## Legislation Necessary to Performance

### (1)

§ 524. **Appropriations of Money.** The terms of a treaty may be such as to require legislation by a contracting State to enable it to fulfill its obligation. Treaties calling for the payment of funds in connection with the acquisition of territory are typical.[1]

---

Declared the Council of the League of Nations in the course of a resolution adopted on April 17, 1935: "The scrupulous respect of all treaty obligations is a fundamental principle of international life and an essential condition of the maintenance of peace." (League of Nations, *Official Journal*, May, 1935, 551.)

See Art. 20 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Special Supplement*, October, 1935, 661, and comment by Professor Garner, Reporter, *id.*, 977.

See, also, Baron Michel de Taube, "*L'Inviolabilité des Traités*," *Recueil des Cours*, 1930, II, 295; John B. Whitton, "The Sanctity of Treaties," *International Conciliation*, No. 313, 1935.

[4] See Agreements between States, Preliminary, *supra*, § 489; also, Manifestation of Assent, Compulsion, *supra*, § 493.

[5] The terms of a treaty may, however, specify the mode of performance as well as the extent of the obligation to be undertaken. In such case both matters cease to be of solely domestic concern.

[6] See Mr. MacMurray, Chief of the Division of Far Eastern Affairs, to the foreign secretary of the American Board of Commissioners for Foreign Missions, For. Rel. 1924, Vol. I, 602.

§ 524. [1] See, for example, convention with Russia of March 30, 1867, for the cession of Alaska to the United States, Malloy's Treaties, II, 1521.

If it be acknowledged that a treaty is not invalid by reason of the circumstance that performance necessitates the exercise of the legislative function which, under the constitutional law of a contracting State, is confided to the legislative department of the government, it would seem to follow that the duty to effect performance is none the less obligatory.[2] In a word, it is not unreasonable to assert that when, for example, the United States concludes a treaty contemplating payment by it for the cession to itself of territory, the nation incurs a legal obligation to make payment, and incidentally agrees that the Congress will not fail to make the requisite appropriation. This means that the treaty serves to render it inequitable for either branch of the Congress to exercise its constitutional power not to take such action. It is significant that the Congress has never failed to appropriate funds in accordance with the terms of a perfected convention.[3]

Another application of the same requirement is seen where in consequence of an agreement to adjust by arbitration a particular controversy with a foreign State, it becomes necessary to pay to that State a sum awarded to it by the arbitral tribunal. The United States has, on occasion, found itself subjected to such an obligation which the action of the Congress has enabled it duly to fulfill.[4]

[2] "If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these; so they are not to be affected or concluded by them, to their own injury." (Dana's Wheaton, Dana's Note No. 250, *citing* Kent, I, 165–166, Heffter, § 84, Vattel *Droit des Gens*, liv. iv. Ch. 2, § 14, Halleck, 854.)

[3] "The House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution, because it pledges the public faith; and no legal power to refuse its execution because it is a law — until at least it ceases to be a law by a regular act of revocation of a competent authority." (Alexander Hamilton, Works, edited by H. C. Lodge, New York, 1886, VII, 118.) See, also, Writings of Jefferson, Paul Leicester Ford's edition, New York, 1892, I, 191; discussion of debates on the Jay Treaty in Crandall, Treaties, 2 ed., § 76, also *id.*, §§ 74–81. In his conclusions in § 81, that writer declares: "Stipulations involving the payment of money have regularly been made without qualification or reservation as to any action thereon by Congress, and have been ratified by the President upon the advice and consent of the Senate only. When so ratified they have been considered by this Government as also by the other contracting parties as valid and definitely concluded, and Congress has never failed to vote the necessary appropriation."

According to Art. V of the convention with Denmark of Aug. 4, 1916, for the cession of the Danish West Indies, the United States agreed to pay within ninety days from the date of the exchange of ratifications to a representative of the Danish Government the sum of $25,000,000. U. S. Treaty Vol. III, 2558. Ratifications were exchanged Jan. 17, 1917, and the convention was proclaimed Jan. 25, 1917. By an Act of March 3, 1917, § 7, 39 Stat. 1133, the requisite appropriation was made.

Concerning the controversy between the United States and France in regard to the delay in the payment of the French indemnity under the Claims Convention of July 4, 1831, see Moore, Arbitrations, V, 4463–4468; Mr. Wheaton, American Minister, to Mr. Butler, Atty. Gen., Jan. 20, 1835, Moore, Dig., V, 231.

See also documents in Hackworth, Dig., V, § 490.

[4] See Art. IV of agreement with Norway for the submission to arbitration of certain claims of Norwegian subjects, concluded at Washington, June 30, 1921, U. S. Treaty Vol. III, 2751. See Joint Resolution approved Feb. 20, 1923, to satisfy the award rendered against the United States on Oct. 13, 1922 by the arbitral tribunal established under this agreement. 42 Stat. 1280.

(2)

§ 525. **Certain Other Legislative Requirements.** Treaties of the United States have oftentimes required legislative action other than the appropriation of funds. In such cases the Congress has not failed to respond accordingly. The statutory law of the United States with respect to extradition may be regarded as due in part to the provisions of existing conventions.[1] Acts of July 3, 1918, February 18, 1929, March 16, 1934, and June 15, 1935, served to render efficacious the convention concluded with Great Britain, August 16, 1916, for the protection of migratory birds.[2] Again, acts of May 22, 1926, and April 18, 1928, made provision to carry into effect the convention with Great Britain in respect of Canada to regulate the level of the Lake of the Woods, concluded February 24, 1925.[3] Other legislation has appropriately operated to meet the demands of contractual undertakings.[4]

It has been observed, however, that it is highly inexpedient for those possessed of the treaty-making power of the United States to bind the nation to an engagement calling for legislative action which it is likely or probable that Congress may refuse.[5] Even though the arrangement be not invalid, its scope and purpose may be such as not to impress the Congress with a sense of obligation to lend coöperation. Were it believed that the treaty-making power had been abused, although not exceeded, legislative action might fail.[6]

Such a difficulty may be avoided by conditioning performance upon the acquiescence of Congress, thus preventing the free exercise of its constitutional right from exposing the nation to a charge of bad faith in case that body withholds its approval.[7]

§ 525. [1] 18 U.S.C.A. §§ 651–668.

It may be observed, as Crandall has noted, Treaties, 2 ed., p. 233, *citing* Castro *v.* De Uriarte, 16 Fed. 93, that the design of the statutory law was to give effect "not only to past treaties but also those thereafter concluded."

[2] 40 Stat. 755, 45 Stat. 1222, 48 Stat. 451, and 49 Stat. 378, respectively, 16 U.S.C.A. §§ 715–718h.

[3] 44 Stat. 617, and 45 Stat. 431, respectively.

[4] See, for example, 22 U.S.C.A. §§ 256–258, with respect to the jurisdictional powers of foreign consular officers in cases of disputes between seamen of vessels belonging to the States represented by such officers.

See, also, in this connection, Crandall, Treaties, 2 ed., § 102.

[5] Other Problems of Constitutionality, Agreements Calling for Legislative or Other Action, *supra*, § 503.

[6] "The extent to which Congress would regard itself as bound, as a matter of good faith, to enact legislation for the purpose of carrying out treaties has been the subject of debate, from time to time, since the days of Washington. Despite these debates, and notwithstanding its power to frustrate the carrying out of treaties, Congress in a host of instances has passed the necessary legislation to give them effect; and the disposition has frequently been manifested to avoid any basis for the charge of bad faith through a disregard of treaty stipulations. . . . But it is apparent to a student of our history that Congress has not recognized an authority of treaty-making power to place upon Congress the moral duty to carry out any sort of stipulation, and there have been notable remonstrances in the House of Representatives against commitments even with respect to legislation as to commercial regulations." (Charles E. Hughes, Address on the Proposed Covenant for a League of Nations, before the Union League Club of New York City, March 26, 1919, 25–26.)

[7] On March 15, 1920, the Senate, as in Committee of the Whole and in open executive session, by a vote of 56 to 26, agreed to an amendment proposed by Mr. Lodge in the nature of a substitute, as modified, to a reservation (No. 2) to be attached to the pending treaty of peace with Germany of June 28, 1919, and in the following form: "The United States

It may be observed that the conventions of the United States contemplating the modification of existing revenue laws have been deemed to be subject to the condition, which it has long been the practice to incorporate in the agreement, that the change should be dependent upon the consent of the Congress.[8] As a careful writer has said: "It appears that whatever may be the *ipso facto* effect of treaty stipulations, entered into on the authority of the President and Senate, on prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, legislation by Congress to give effect to such stipulations; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation has expressly been made dependent upon such action by Congress; and that in the recent Cuban treaty such a clause was inserted on the initiative of the Senate." [9]

The requisite Congressional approval may, of course, precede the conclusion of the particular agreement. It has been observed elsewhere that it was in pursuance of the Act of June 12, 1934 (to amend the Tariff Act of 1930), that the President found authority to enter into certain trade agreements with foreign countries serving to effect modifications of existing duties and other import restrictions.[10]

## c

## Judicial Action

### (1)

**§ 526. Province of the Courts in the United States.** The fundamental law of a State may greatly facilitate respect for the treaties to which it is a party, by appropriate declarations defining the legal quality of international agreements,

---

assumes no obligation to preserve the territorial integrity or political independence of any other country by the employment of its military or naval forces, its resources, or any form of economic discrimination, or to interfere in any way in controversies between nations, including all controversies relating to territorial integrity or political independence, whether members of the League or not, under the provisions of Article 10, or to employ the military or naval forces of the United States, under any Article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall, in the exercise of full liberty of action, by act or joint resolution so provide." (*Cong. Rec.*, March 15, 1920, Vol. LIX, 4333.) See, also, resolution of ratification which failed to receive the requisite majority of votes of the Senate, March 19, 1920, *Cong. Rec.*, March 19, 1920, Vol. LIX, 4599.

It may be observed that the Senate conditioned its approval of the treaties of peace with Germany, of August 25, 1921, with Austria, of August 24, 1921, and with Hungary, of August 29, 1921, upon an understanding to be made a part of the resolution of ratification, "that the United States shall not be represented or participate in any body, agency or commission, nor shall any person represent the United States as a member of any body, agency or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation." (U. S. Treaty Vol. III, 2599, 2496, and 2696, respectively.)

[8] Thus, according to Art. XI of the commercial convention with Cuba, of Dec. 11, 1902, Malloy's Treaties, I, 353, 356–357, the agreement was not to take effect until it should have been approved by the Congress. See, in this connection, United States *v.* American Sugar Refining Co., 202 U. S. 563.

[9] Crandall, Treaties, 2 ed., § 89; *id.*, §§ 82–88.

[10] See Executive Agreements in Pursuance of Acts of Congress, *supra*, § 506.

binding the judiciary to give heed to them, and conferring jurisdiction in controversies pertaining to them.

The provisions of the Constitution that all treaties "made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," [1] and that "the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding," have been of vital aid both in securing judicial respect for such compacts, and in removing doubts which might otherwise prevail as to the invalidity of opposing State laws.[2] That "a treaty, constitutionally concluded and ratified, abrogates all State laws inconsistent therewith" is necessarily accepted doctrine.[3] Again the declaration in the Constitution extending the judicial power of the United States to all cases, in law and equity, arising under the "treaties made, or which shall be made" under the authority of the United States, has been of value in fixing the basis of jurisdiction.[4]

By virtue of the foregoing provisions private alien litigants have constantly invoked the aid of the courts for the purpose of securing recognition of privileges claimed under treaties of the United States, and with full assurance that the supremacy of such agreements over any inconsistent State statutes or previously enacted acts of Congress would be recognized.[5] The courts of the United States regard themselves as entitled to take judicial notice of treaties to which their country is a party.[6] The terms of the Constitution appear to have justified in numerous cases the demands of the Department of State expressed in diplomatic correspondence, that aggrieved aliens complaining of local infringement of treaty rights should exhaust their judicial remedies.[7]

§ 526. [1] Art. VI, paragraph 2. See also documents in Hackworth, Dig., V, § 487.

[2] Ware *v.* Hylton, 3 Dall. 199; Chirac *v.* Chirac, 2 Wheat. 259; Swayne, J., in Hauenstein *v.* Lynham, 100 U. S. 483, 488–490.

[3] J. C. B. Davis, Notes, U. S. Treaty Vol. (1776–1887) 1227, Moore, Dig., V, 371.

[4] Art. III, Section 2, paragraph 1.

According to the Judicial Code of the United States, the district courts are given original jurisdiction of all suits of a civil nature, at common law or in equity, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars," and arises under a treaty, 36 Stat. 1091, 28 U.S.C.A. § 41 (1); also of all suits brought by an alien for a tort only, in violation of the law of nations or of a treaty of the United States. Par. 17 of same act, 28 U.S.C.A. § 41 (17).

See, also, § 237 of the Judicial Code, 28 U.S.C.A. § 344, with reference to appeals to the Supreme Court of the United States from final judgments or decrees in suits in highest courts of a State in which a decision in the suit could be had, where there is drawn in question the validity of a treaty of the United States, and the decision is against its validity, or where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to treaties of the United States, and the decision is in favor of its validity; and in reference to the competence of the Supreme Court by certiorari to require that there be certified to it for review and determination with the same power and authority as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where there is drawn in question the validity of a treaty of the United States, or the validity of a statute of any State on the ground of its being repugnant to treaties of the United States, "or where any title, right, privilege, or immunity is specially set up or claimed by either party . . . under any treaty."

[5] See Cheung Sum Shee *v.* Nagle, 268 U. S. 336, where the Immigration Act of 1924 was not construed to be at variance with the treaty with China of Nov. 17, 1880.

[6] See, for example, Munich Reinsurance Co. *v.* First Reinsurance Co. of Hartford, 6 F. (2d) 742, 747–748.

[7] See, for example, Mr. Bayard, Secy. of State, to Baron Fava, Italian Minister, Dec. 18,

"The Department of State has taken the position that 'Under the system of government of the United States, a final decision of questions involving the interpretation of laws and treaties, from the standpoint of municipal law, rests with the courts.' "[8] Confident that the Supreme Court will interpret correctly the provisions of any treaty which it has occasion to construe, the Department refrains from diplomatic discussion of a question of construction pending before that court,[9] and regards itself without power to act upon any construction at variance with one which has been adopted by that tribunal.[10] Notwithstanding this attitude, another contracting State, complaining of the alleged infraction of a treaty by American authority, is believed to be justified in declining to admit that the soundness of its contention or the scope of its rights under the agreement may be determined and disposed of as against itself by an American tribunal in an adjudication to which such State does not consent to be a party. Thus in response to a suggestion from Secretary Hay that the controversy between the United States and China as to the correct construction of the immigration treaty of March 17, 1894, be ascertained by recourse to the United States courts, Mr. Wu, the Chinese Minister, replied, January 25, 1899:

> While I have the highest estimate of the ability and impartiality of the Supreme Court of the United States, and for that reason would have confidence it would place the same construction upon the treaty which is maintained by my Government, at the same time the questions submitted by me to you in my note of November 7 last were of a diplomatic character, involving the construction of conventions entered into between two equal and sovereign Governments, and I could not, by any action on my part, recognize the competency of a domestic tribunal of one of the parties to take such action as would irrevocably bind the other party to the convention.[11]

---

1888, MS. Notes to Italy, VIII, 315, Moore, Dig., V, 238; Mr. Hay, Secy. of State, to Signor Carignani, Italian Chargé d'Affaires, Aug. 24, 1901, For. Rel. 1901, 308, Moore, Dig., VI, 672.

When an alien residing in the United States invokes the aid of the courts in order to secure recognition or enforcement of a privilege alleged to have been accorded him by a treaty with his country, his action possesses, in one sense, merely a domestic character. He simply attempts to obtain respect for the law of the land wherein the provisions of the treaty, like those of an act of Congress, are supreme. He calls upon a local court to enforce a local law which is necessarily that of the place where the tribunal administers justice. It is not until the contracting State of which he is a national interposes, and challenges through the diplomatic channel the local (and possibly judicial) construction applied to the treaty involved, that the question attains international significance.

[8] Statement in Hackworth, Dig., V, § 500, *citing* Aide Mémoire handed the German Ambassador by the Under Secretary of State, May 3, 1933.

[9] The Department is understood to take the same stand when such a question is pending in the lower Federal courts. See Mr. Lansing, Secy. of State, to the German Ambassador April 7, 1916, For. Rel. 1916, Supplement, 735, 736; Same to Same, March 2, 1916, *id.*, 729, 731.

[10] Mr. Seward, Secy. of State, to Mr. Bancroft, Minister to Prussia, Aug. 18, 1868, MS. Inst., Prussia, XV, 2, *citing* Frederickson *v.* Louisiana, 23 How. 445, Moore, Dig., V, 237; Mr. Blaine, Secy. of State, to Mr. Comly, American Minister, June 30, 1881, For. Rel. 1881, 624, 625, Moore, Dig., V, 238.

See, also, Mr. Wilson, Assist. Secy. of State, to the Swedish Minister at Washington, Nov. 30, 1912, Hackworth, Dig., V, § 486: Aide-Mémoire from the Dept. of State to the Japanese Embassy at Washington, July 16, 1913, For. Rel. 1913, 645–650; Mr. Castle, Assist. Secy. of State, to the Italian Ambassador at Washington, April 6, 1928, Hackworth, Dig., V, § 486.

[11] For. Rel. 1899, 195.

The United States appears at times to have advanced a like argument respecting adjudications before foreign domestic tribunals.[12] Thus, the Department of State declared in 1928: "A State complaining of the infraction of a treaty is believed to be justified in declining to admit that its rights under the agreement can be ultimately determined by a foreign local court without the consent of each party to the agreement." [13]

Reasons of policy doubtless oftentimes impel contracting States to refrain from permitting the construction of a treaty, especially in so far as the question concerns the scope of the rights of their respective nationals, from developing into or producing international controversy. Thus other States, in matters pertaining to treaties with the United States, seem at times disposed to pursue such a course in view of the fact that its tribunals are not only accessible to individual litigants, but also because those who appeal to its court of last resort will in all probability obtain thereby the full benefits to be derived from the correct construction of the agreement involved.

(2)

§ 527. **Political Questions.** In lending their aid to secure performance of treaties, the courts of the United States feel bound to respect the attitude of the political department of the Government with regard to political questions.[1]

[12] Mr. Blaine, Secy. of State, in a communication to Mr. Comly, American Minister to Hawaii, said, June 30, 1881: "I am not aware whether or not a treaty, according to the Hawaiian constitution is, as with us, a supreme law of the land, upon the construction of which — the proper case occurring — every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated and carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government, of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling." (For. Rel. 1881, 624, 625, Moore, Dig., V, 238.)

See, also, Mr. Blaine, Secy. of State, to Mr. Shannon, Minister to Central America, April 6, 1892, For. Rel. 1892, 34–36, Moore, Dig., VI, 683; Case of C. A. Van Bokkelen *vs.* Haiti, Moore, Arbitrations, II, 1807–1853.

"A construction of a treaty, also, by the courts of one of the contracting sovereigns can only have municipal operation; nor can such construction be set up, even by the sovereign by whose courts it is pronounced, as an authority when conducting negotiations with the other sovereign as to the meaning of the treaty. That meaning is a matter of international settlement. If the parties cannot agree in reference to it, it must be referred to arbitration or, as the last resort, to war. Nor can the judiciary control the actions of the executive in either the construction or the application of a treaty." (Wharton, Dig., II, 673.)

See, in this connection, Advisory Opinion of the Permanent Court of International Justice regarding the autonomy of Eastern Carelia, Publications, Permanent Court of International Justice, Series B, No. 5, at p. 27.

[13] Mr. Castle, Assist. Secy. of State, to the Ambassador to France, April 21, 1928, Hackworth, Dig., V, § 486. See, also, Case of The David J. Adams, American-British Pecuniary Claims Arbitration, convention of Aug. 18, 1910, Nielsen's Report, 524.

§ 527. [1] "It is said, however, that the King of Spain, by the constitution under which he was then acting and administering the government, had not the power to annul it [the grant] by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the Cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.

"But these are political questions and not judicial. They belong exclusively to the political department of the government.

Thus whether a treaty is still in force is regarded as one to be determined by that department; and it is declared that "whether power remains in a foreign State to carry out its treaty stipulations is in its nature political and not judicial." [2] It has been intimated, however, in behalf of the Supreme Court of the United States, that in a case involving private rights, that tribunal might be obliged, if those rights were dependent upon the construction of a treaty, and the case turned upon a question public in its nature, which had not been determined by the political department in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment.[3] The bearing of the views of the political department of the Government of the United States long subsequent to the negotiation of a treaty to which it is a party upon the interpretation thereof by the Supreme Court is dealt with elsewhere.[4]

(3)

§ 528. **Absence of Necessary Legislation.** In the case of a treaty requiring a legislative enactment in order to make its provisions effective, the courts of the United States do not regard the agreement as one to be enforced by them until the requisite legislative action is taken.[1] This principle is also observed with respect to parts of treaties proclaimed and acknowledged to be in force, and calling for legislation without which the courts find it impossible to lend their judicial aid.[2]

In 1933, the Supreme Court of the United States announced that the treaty between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, of January 23, 1924, was in a strict sense "self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions." [3] Again, in 1940, the same tribunal concluded that "no special

---

". . . It would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered." (Taney, C. J., in Doe *v.* Braden, 16 How. 635, 657.)

[2] Terlinden *v.* Ames, 184 U. S. 270, 288. Also, Anchor Line *v.* Aldridge, 280 Fed. 870, 876.

The decision of the political department as to the extent of territory acquired under the terms of a treaty appears to be regarded as one not to be reviewed by the courts. See Marshall, C. J., in Foster *v.* Neilson, 2 Pet. 253, 307 and 309. Also *In re* Cooper, 143 U. S. 472, 502–503; Garcia *v.* Lee, 12 Pet. 511; United States *v.* Lynde, 11 Wall. 632, 643; United States *v.* Reynes, 9 How. 127; Daigle *v.* United States, 237 Fed. 159.

[3] Chief Justice Fuller, in *In re* Cooper, 143 U. S. 472, 503. Cordova *v.* Grant, 248 U. S. 413, where it was held that the case did not involve the validity or construction of a treaty.

[4] See The Interpretation of Treaties, The Attitude of the Supreme Court of the United States, Miscellaneous Considerations, *infra*, § 533E.

§ 528. [1] Foster *v.* Neilson, 2 Pet. 253, 314; United States *v.* Percheman, 7 Pet. 51.

See, also, statement in Moore, Dig., V, 223, concerning the view of Mr. Justice Story as to the impossibility of the execution by judicial process of Art. X of the treaty between the United States and Prussia of 1828, without the aid of an Act of Congress.

[2] See Consuls, Notification of the Deaths of Fellow-Countrymen, *supra*, § 478.

See the situation in *Ex parte* Dove, 49 F. (2) 816.

[3] Cook *v.* United States, 288 U. S. 102, 119, *citing* Ford *v.* United States, 273 U. S. 593, also the view of the Secretary of State, expressed in a letter of March 3, 1924, to the Chairman of the House Committee on Foreign Affairs. *Cf.* Edwin D. Dickinson, "Are the Liquor Treaties Self-Executing?" *Am. J.*, XX, 444.

legislation in the United States was necessary" in order to make effective the General Inter-American Convention for Trade-Mark and Commercial Protection concluded on February 20, 1929.[4]

In 1928, Mr. Hackworth, the Solicitor for the Department of State, expressed the view that the most-favored-nation provisions of the commercial treaty between the United States and Germany, of December 8, 1923, required no congressional legislation to render them effective so as to overcome provisions of prior tariff acts.[5]

Upon the consummation of a valid treaty, the enquiry whether special legislation is necessary in order to give effect to the agreement, as through the aid of the courts, presents primarily a domestic question of which the solution depends upon the character of the objectives sought to be achieved. Unless the obligations to perform have been conditioned upon the subsequent voluntary enactment of appropriate laws (which in the particular case may have been the obvious design of the parties), the international undertakings registered in the treaty are in no wise affected by the method by which a party thereto elects to perform. Whether a domestic court whose aid is invoked for the purpose of enforcing a treaty should conclude that in the circumstances it must await the enactment of a law purporting to render judicially operative what has been agreed upon, is a matter that calls for a judicial conclusion touching both the design and fundamental laws of its own sovereign. A like problem may confront the political department of the Government; and when it does, the proper solution depends upon the correct appraisal of such considerations.[6]

(4)

§ 529. **Acts of Congress at Variance with Treaties.** Inasmuch as the laws of the United States made in pursuance of the Constitution are, like treaties made under the authority of the United States, declared by that instrument to be the supreme law of the land,[1] it has frequently been said that the courts are bound to sustain an Act of Congress which is at variance with the terms of an existing treaty. The enactment is regarded as superseding the prior agreement.[2] Conversely, it is also true that a treaty will be deemed to supersede a

[4] Bacardi Corp. *v.* Domenech, 311 U. S. 150, 161.

[5] Communication to Mr. Mitchell, the Solicitor General, July 19, 1928, Hackworth, Dig., V, § 488.

[6] See opinion of Mr. McReynolds, Atty. Gen., of Aug. 14, 1913, concerning the authority of the President under the existing statutory law, or under the provisions of Art. V of the treaty between the United States and Great Britain of Jan. 11, 1909, concerning the boundary waters between the United States and Canada (U. S. Treaty Vol. III, 2609), to exercise certain privileges without the aid of further legislation, 30 Ops. Attys. Gen. 217, Hackworth, Dig., V, § 488.

§ 529. [1] Art. VI, paragraph 2.

[2] The Cherokee Tobacco, 11 Wall. 616; The Head Money Cases, 112 U. S. 580; Whitney *v.* Robertson, 124 U. S. 190; Chae Chan Ping *v.* United States, 130 U. S. 581; Fong Yue Ting *v.* United States, 149 U. S. 698; United States *v.* Lee Yen Tai, 185 U. S. 213, 220–222; Hijo *v.* United States, 194 U. S. 315; Taylor *v.* Morton, 2 Curtis, 454; Ropes *v.* Clinch, 8 Blatchf. 304; The Clinton Bridge, 1 Woolworth, 150; *In re* Ah Lung, 18 Fed. 28; The Ship James and William, 37 Ct. Cl. 303. See, also, Minerva Automobiles *v.* the United States, 96 F. (2d) 836.

Declared Chief Justice White in Rainey *v.* United States, 232 U. S. 310, 316, quoting Noyes, J., in United States *v.* Billings, 190 Fed. 359, 371: "Treaties are contracts between

prior act of Congress if at variance therewith.[3] As Chief Justice Taft found occasion to observe in his opinion and award as Sole Arbitrator in the case between Great Britain and Costa Rica under a treaty of which the ratifications were exchanged March 7, 1923, "the Constitution of the United States makes the Constitution, laws passed in pursuance thereof, and treaties of the United States the supreme law of the land. Under that provision, a treaty may repeal a statute, and a statute may repeal a treaty."[4] The conventions concluded by the United States for the prevention of smuggling of intoxicating liquors, of which the first was that with Great Britain, of January 23, 1924, are illustrative.[5] That convention being subsequent to the National Prohibition Act[6] and to the Tariff Act of 1922,[7] superseded both in so far as it was inconsistent with the terms of either.[8]

It should be observed that the Supreme Court is wisely reluctant to construe an Act of Congress as in violation of an existing treaty in the absence of convincing proof that such was the design of that body. There appears to be no disposition to impute to it a readiness to disregard the terms of the international agreements of the United States.[9] In 1925, that tribunal, in determining whether the Immigration Act of 1924 was in contravention of the treaty between the United States and China of November 17, 1880,[10] declared, through Mr. Justice McReynolds: "That Act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry."[11] The Supreme Court has also announced that an Act of Congress "should never be held to be displaced by

nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty." See, also, Wadsworth *v.* Boysen, 148 Fed. 771; United Shoe Machinery Co. *v.* Duplessis Shoe Machinery Co., 155 Fed. 842.

See also statement in Hackworth, Dig., V, at beginning of § 489.

[3] Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 291, Moore, Dig., V, 370; Davis *v.* Concordia, 9 How. 280; The Clinton Bridge, 1 Woolworth, 150; Whitney *v.* Robertson, 124 U. S. 190, 194; opinion of Mr. Knox, Atty. Gen., Oct. 10, 1901, 23 Ops. Attys. Gen., 545; Putnam, J., in United Shoe Machinery Co. *v.* Duplessis Shoe Machinery Co., 155 Fed. 842, 845.

[4] *Am. J.*, XVIII, 147, 159–160. See also Opinion of Mr. Gregory, Atty. Gen., April 2, 1915, 30 Ops. Attys. Gen. 351, Hackworth, Dig., V, § 489.

[5] U. S. Treaty Vol. IV, 4225. See Treaties for the Prevention of Smuggling of Intoxicating Liquors, *supra*, § 235B.

[6] 41 Stat. 305, and 42 Stat. 222.

[7] § 581, 42 Stat. 858, 979.

[8] See Cook *v.* United States, 288 U. S. 102.

[9] *Ex parte* Webb, 225 U. S. 663, 683; Chew Heong *v.* United States, 112 U. S. 536, 539; Lem Moon Sing *v.* United States, 158 U. S. 538; United States *v.* Mrs. Gue Lim, 176 U. S. 459.

[10] Malloy's Treaties, I, 239.

[11] Cheung Sum Shee *v.* Nagle, 268 U. S. 336, 345–346.

"A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. Chew Heong *v.* United States, 112 U. S. 536; United States *v.* Payne, 264 U. S. 446, 448." (Brandeis, J., in the opinion of the Court in Cook *v.* United States, 288 U. S. 102, 120, in connection with the holding that the convention for the Prevention of Smuggling of Intoxicating Liquors, concluded with Great Britain January 23, 1924, was not abrogated by provisions of the Tariff Act of 1930.)

a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced." [12] The design of the contracting parties is, however, a matter of fact; and the evidence thereof may conclusively establish a common endeavor to effect or permit by agreement conduct which an existing Act of Congress forbade.[13]

It must be clear that while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty,[14] its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement. The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States.[15] As Secretary Hughes declared in 1922: "It is, of course, true that a Nation may by its Constitution and laws override treaties, but by such domestic acts, however sanctioned nationally, it cannot escape its international duties and obligations. The fact that a Nation exerts its power through its organs of government to commit a breach of a treaty engagement in no way permits it to avoid the international consequences of such a breach." [16]

---

"An intention to violate a treaty or to direct an act which would be a breach of national good faith is not to be imputed to Congress. While Congress has the power to violate treaties, it is obviously not to be assumed that Congress intends to exercise such a power unless its intention is unequivocally expressed." (Mr. Hughes, Secy. of State, to President Harding, Oct. 8, 1921, Hackworth, Dig., V, § 489.)

[12] United States *v.* Lee Yen Tai, 185 U. S. 213, 222, where, however, there was found to be no inconsistency between certain legislation of the United States and a subsequent treaty.

[13] Such was the case in relation to the conventions for the prevention of smuggling of intoxicating liquors.

[14] See Minerva Automobiles *v.* United States, 96 F. (2d) 836.

"It is true that the Supreme Court has held that an Act of Congress may repeal a treaty; but such repeal would only be effective so far as our domestic law is concerned. The other nation would still have a right to consider us bound by our contract, and if the contract was broken on our part, it might lead to a declaration of war." (Hon. Shelby M. Cullom, in *North Am. Rev.*, CLXXX, No. 2, 335, 345.)

"However much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation or the judgment of a domestic tribunal can release a government from its solemn treaty obligations." (Mr. Wu, Chinese Minister, to Mr. Hay, Secy. of State, Jan. 25, 1899, For. Rel. 1899, 195.)

[15] See Marquis of Salisbury to Mr. Welsh, Nov. 7, 1878, For. Rel. 1878, 323; Mr. Chang Yen Hoon, Chinese Minister, to Mr. Blaine, Secy. of State, July 8, 1889, For. Rel. 1889, 132, 133; Mr. Caleb Cushing, Minister to Spain, to Mr. Fish, Secy. of State, Jan. 13, 1877, For. Rel. 1877, 492. See, also, the French Minister to the American plenipotentiaries, Aug. 26 and Aug. 11, 1800, concerning the Act of Congress approved July 7, 1798, abrogating the treaties between the United States and France, Am. State Pap., For. Rel., II, 330, 331.

Declared Mr. Bryce, British Ambassador at Washington, Feb. 27, 1913, in a communication to Mr. Knox, Secy. of State, in relation to the Act of Congress of Aug. 24, 1912, and the effect thereof upon the Hay-Pauncefote treaty: "His Majesty's Government . . . conceive that international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a concrete instance has been taken, which in the present instance would, according to your argument, seem to mean, until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted." (For. Rel. 1913, 547, 548.)

[16] Communication to the Chargé d'Affaires in Mexico, April 15, 1922, For. Rel. 1922, Vol. II, 646, 650. Also Secy. Hughes, to the Secy. of the Treasury, Feb. 19, 1923, Hackworth, Dig., V, § 489.

Abundant material supports the proposition that a State may not excuse non-performance of its contractual obligations by mere reliance upon its own legislation at variance therewith.[17] It should be observed, however, that if in the circumstances of the particular case a contracting State is to be deemed to enjoy the privilege of unilateral denunciation, the exercise thereof may be participated in by the legislative branch of the government. In such a situation the mode by which such State reasonably undertakes to free itself from the contractual yoke is not of great international concern.[18]

d

§ 529A. **Aspects of the Relationship of Third States to Treaties.** A State is not obliged to adhere to a treaty concluded by other States and to which for any reason it prefers not to be a party.[1] Nor is a State bound by the terms of a treaty which it has not accepted.[2] Again, the rights of a State can not be impaired by the provisions of a treaty to which it is not a party.[3] An abundance of evidence sustains these conclusions.[4] Doubtless a rule-proclaiming agreement such as the Declaration of Paris, of April 16, 1856, may in consequence of the sheer worth of its proposals, inspire non-signatory States to respect them. In such case the treaty is merely the cause of, or reason for, the gradual modification of the customary law to which must be ascribed the ultimate legal obligation that is acknowledged to rest upon a non-signatory State to heed an injunction which the agreement may have been the first to ordain.[5]

A treaty may be the vehicle by which a particular State purports to yield a

[17] See data contained in comment on Art. 23 of Harvard Draft Convention on The Law of Treaties (as well as the text of that article), *Am. J., Supplement,* XXIX, October, 1935, 1029–1039, where the Reporter cites the judgment of the Permanent Court of International Justice in the Case concerning Certain German Interests in Upper Silesia, Publications, Permanent Court of International Justice, Series A, No. 7, 81; advisory opinion of the Permanent Court of International Justice on the Question concerning the Acquisition of Polish Nationality, *id.,* Series B, No. 7, 16; advisory opinion of the Permanent Court of International Justice in the Case relative to the Greco-Bulgarian Communities, *id.,* Series B, No. 17, 32, 35; order of the Permanent Court of International Justice in the Case of the Free Zones of Upper Savoy and the District of Gex, *id.,* Series A, No. 24, 11–12; award of the arbitrator in the Case of Metzger and Co., United States and Haiti, protocols of Oct. 18, 1899, and June 30, 1900, For. Rel. 1901, 264, 275; award of the Senate of Hamburg in the Case of *Yuille, Shortridge et Cie,* Lapradelle and Politis, *Recueil des Arbitrages Internationaux,* II, 1923, 105–106.

[18] See Abrogation by One Party, *infra,* § 546.

§ 529A. [1] See the Equality and Similarity of Independent States, *supra,* § 11.

[2] See Judgment of the Permanent Court of International Justice, Sept. 10, 1929, in the Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Publications, Permanent Court of International Justice, Series A, No. 23.

See, also, Mr. Hughes, Secy. of State, to the American Ambassador at London, Feb. 16, 1924, For. Rel. 1924, Vol. II, 193–194.

[3] See Treaties, Restrictions of International Law, *supra,* § 490.

See Fifth Advisory Opinion of the Permanent Court of International Justice in the Case Concerning the Status of Eastern Carelia, July 23, 1923, Publications, Permanent Court of International Justice, Series B, No. 5.

[4] Declared the Permanent Court of International Justice in the course of its order of Aug. 19, 1929, in the Case of the Free Zones: "In any event, Article 435 of the Treaty of Versailles is not binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it." (Publications, Permanent Court of International Justice, Series A, No. 22, p. 17; also, judgment of June 7, 1932, *id.,* Series A/B No. 46, p. 141.)

[5] See, Modifications of the Law, *supra,* § 2B; also Evidence, *supra,* § 3.

privilege for the benefit of a non-signatory, as well as signatory States. As the Permanent Court of International Justice found occasion to declare in a dictum in 1932, in the Free Zones Case: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such." [6] The third State may, moreover, be enabled to accept the benefit by recourse to some simple procedure without becoming a party to the agreement.[7] In a word, acceptance of the benefit may not call for participation in the contractual arrangement which was creative of the benefit and out of which it grew. Thus the non-signatory grantee of the privilege may with reason oppose the efforts of parties to the treaty to thwart its endeavor to enjoy the privilege unless it becomes a party to that agreement. The Government of the United States has taken such a stand.[8]

It may be difficult in a particular case to ascertain whether it was in fact the design of contracting States to create a benefit that should accrue to a third State, and which it might through an appropriate process claim irrevocably to be its own. It is perhaps reluctance to impute such a design to those parties rather than a denial of their ability to achieve such an objective that may cause the judicial mind at times to look askance at a conception of the law that would make it easy for a third State to gain such a privilege.[9]

[6] Publications, Permanent Court of International Justice, Series A/B, No. 46, pp. 147–148. See, also, Judgment of May 25, 1926, in Case concerning German Interests in Upper Silesia, *id.*, Series A, No. 7, p. 29.

[7] See The Relationship of the United States to the Mandatory System, *supra*, § 26A.

[8] See American Participation in German Reparation Payments, *supra*, § 299A.

[9] See Opinion of Judge Dreyfus in the Free Zones Case, 1929, Publications, Permanent Court of International Justice, Series A, No. 22, pp. 43–45; dissenting opinion of Judges Altamira and Hurst in the Free Zones Case, June 7, 1932, *id.*, Series A/B, No. 46, p. 185.

"In connection with the Hay-Pauncefote treaty between the United States and Great Britain, signed November 18, 1901, providing that the Panama Canal 'shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise,' Secretary Hughes wrote that 'other nations . . . not being parties to the treaty have no rights under it.'" (Hackworth, Dig., V, § 493, *citing* communication to President Harding, Oct. 13, 1921.)

# TITLE E

## THE INTERPRETATION OF TREATIES

### 1

§ 530. **The Nature of the Problem.** The interpretation of treaties is a part of the procedure of carrying out or realizing the act of contracting. The method of interpretation consists in finding out the connection made by the parties to an agreement, between the terms of their contract and the objects to which it is to be applied.[1] This involves two steps. One is to ascertain what has been called the "standard of interpretation"; that is, the sense in which various terms are employed. The other is to learn what are the sources of interpretation; that is, to find out where it is possible to turn for evidence of that sense.

It is important to observe that various standards of interpretation are available. The contracting States are free to adopt any one they choose. Thus they may employ words in a technical sense, or in one known only to themselves, or in one that is purely colloquial.[2] In this regard they are fettered by no restriction. In seeking, therefore, to ascertain what has in fact been the standard of their choice, there must necessarily be greatest reluctance to resort to a presump-

§ 530. [1] J. H. Wigmore, Law of Evidence, 3 ed., IX, § 2458, and following, where the principles applicable to the interpretation of documents are fully enunciated. To Professor Wigmore's illuminating exposition, the author acknowledges his debt.

See Art. 19 of Harvard Draft Convention on The Law of Treaties, and comment thereon by James W. Garner, Reporter, *Am. J.*, XXIX, *Supplement*, October, 1935, 661, 937–977.

See Hackworth, Dig., V, §§ 493–499, and documents there cited. See also, H. M. Adler, "The Interpretation of Treaties," *Law Mag. & Rev.*, XXVI, 62 and 164; Yi-Ting Chang, The Interpretation of Treaties, New York, 1933; Paul Duez, "*L'Interprétation des Traités Internationaux*," *Rev. Gén.*, XXXII, 429; Ludwik Ehrlich, "*L'Interprétation des Traités*," *Recueil des Cours*, 1928, IV, 5–145; A. P. Fachiri, "Interpretation of Treaties," *Am. J.*, XXIII, 745; Charles Fairman, "The Interpretation of Treaties," Grotius Society, XX, 123; T. W. Graske, "Some Aspects of Treaty Interpretation in the United States — 1930–1935," *Tulane Law Review*, X, 246; Manley O. Hudson, The Permanent Court of International Justice, New York, 1934, Chap. 28; M. Jokl, *De L'interprétation des Traités Normatifs d'après la doctrine et la jurisprudence internationales*, Paris, 1936; H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties," *Harv. Law Rev.*, XLVIII, 549; Arnold D. McNair, "*L'Application et L'Interprétation des Traités, d'après la Jurisprudence Britannique*," *Recueil des Cours*, 1933, I, 251–305; R. W. Miller, "Preparatory Work in the Interpretation of Treaties," *Iowa Law Rev.*, XVII, 206 and 366; P. Pic, "*De L'Interprétation des Traités Internationaux*," *Rev. Gén.*, XVII, 5; Ralston, revised ed., Chap. II; John H. Spencer, *L'Interprétation des Traités par les Travaux Préparatoires*, Paris, 1934; Robert R. Wilson, "Some Aspects of Treaty Interpretation," *Am. J.*, XXXIII, 541; Quincy Wright, "The Interpretation of Multilateral Treaties," *Am. J.*, XXIII, 94; Tsune-Chi Yü, The Interpretation of Treaties, New York, 1927.

[2] The common law does not permit such latitude in the interpretation of legal acts. The rule prohibiting reliance on a sense "disturbing a clear meaning" is illustrative. Wigmore, Evidence, 3 ed., IX, §§ 2461 and 2462. It seems important to observe that the restrictions of that law are, by reason of their origin and purpose, not to be taken as decisive of the rights of States in their conclusion of international agreements.

De Lemos Case, Ralston's Report, Venezuelan Arbitrations of 1903, 302, 309.

tion in favor of one rather than another, until at least the search for evidence has proved to be in vain.[3] Nor should any technical rule of construction be permitted to interfere with proof that the terms of a treaty were used in a special sense.

The freedom of the contracting parties ought to suffice as a warning that the linguistic clearness of a text is not necessarily indicative of clearness of design on their part. The function of the words of a treaty is to mirror that design, and as symbols thereof to guide the interpreter to a correct understanding of the instrument that registers accord. Their value for such purpose, or, to express it more simply, the clearness of their guidance, must depend upon and even await explanations that may come from many places. Through them is revealed the connection between the terms employed and the ends sought to be accomplished; the revelation of that association gives to the words their real significance and makes their guidance comprehensible.[4] The interpreter must, therefore, find out what that connection is. Nothing that is explanatory can contradict what is explained. No light that is shed as to the ends sought to be accomplished is hostile to the common design which the words of a treaty are employed to register, even though it be at variance with particular meanings or significations that

[3] It should be noted that not infrequently the courts conclude that particular terms are to be deemed to have been given a signification in harmony with their plain meaning because, in the light of all the circumstances of the case, it would be wholly unreasonable to infer an opposing design. Such a conclusion may be thus a necessary deduction from the evidence presented. See, for example, Award in North Atlantic Coast Fisheries Arbitration, interpreting the words "in common with British subjects," under Question I, *Proceedings,* North Atlantic Coast Fisheries Arbitration, I, 78–79.

[4] "But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention. In the first alternative it may rightly be said that the text is clear and that it is impossible, on the pretext of interpretation, to endow it with an import other than that which is consistent with the natural meaning of the words. In the other alternative, since the words have no value save as an expression of the intention of the Parties, it will be found either that the words have been used in a wider sense than normally attaches to them (broad interpretation) or that they have been used in a narrower sense than normally attaches to them (narrow interpretation)." (Dissenting opinion of Judge Anzilotti in the case of the advisory opinion of the Permanent Court of International Justice concerning the Interpretation of the Convention of 1919 Concerning Employment of Women during the Night, Publications, Permanent Court of International Justice, Series A/B, No. 50, 383.)

See, also, Judge Anzilotti's views, *id.,* 388.

Declared Judge Anzilotti, in the course of a communication to the author, May 10, 1933: "To my mind, a distinction between verbal and logical construction of a text is hardly possible, because the words have no value except in so far as they express an idea. Mere verbal clarity is therefore no clarity, in the meaning of the legal construction, when the idea expressed by the words is not beyond doubt. Moreover, every legal text must not be considered alone, but in connection with the other provisions of the act (law, treaty, etc.) of which it is a part. The text is clear only if it is quite consistent with the object and the intent of the act. Only if this be the case, there is no occasion to resort to extrinsic evidence and to preparatory work."

Declared the same judge in the course of his dissenting opinion in the case of The Diversion of Water from the River Meuse: "But it is always dangerous to be guided by the literal sense of the words before one is clear as to the object and intent of the Treaty; for it is only in this Treaty, and with reference to this Treaty, that these words — which have no value except in so far as they express the intention of the Parties — assume their true significance." (Publications, Permanent Court of International Justice, Series A/B, No. 70, p. 46.)

usage has served to attach to them. Accordingly, one must reject as an unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty by reference to their so-called "natural meaning" or any other linguistic standard, and then to attempt to reconcile therewith the thought or conduct of the contracting parties. Such a method involves the implication that those parties must be deemed to have employed words in a sense that usage may have decreed, even though contrary to their common design. It transforms the function of the interpreter from a fact-probing endeavor to ascertain the actual sense in which the parties used the words of their choice, to an effort to find what usage appears to decree as to the significance of those words, and thereupon to reconcile the conduct of the parties therewith. In so far as the interpreter essays to make that effort he is diverted from the task of ascertaining the truth concerning the design of the parties as exemplified by the text of their agreement, and endangers the success of such an attainment.[5]

It rarely happens that convincing evidence of the sense in which particular terms were in fact employed is beyond the reach of the parties, at least when the problem of interpretation confronting them grows out of a treaty not antedating the nineteenth century. Even when evidence extrinsic to the document is wholly lacking, caution must be exercised in applying any rule in the nature of a presumption. It is only the single reasonable inference which must be deduced from the conduct of both of the contracting parties (in the case of a bi-partite agreement) which may be safely relied upon. Grounds for such an inference may exist. They may be found in the text itself, and the language of the preamble may shed light.[6]

It is not inconsistent with the principles stated to require that a contracting

[5] This paragraph is taken from an editorial by the author on "Judge Anzilotti on the Interpretation of Treaties," *Am. J.*, XXVII, 502, 503–504.

Declared Mr. Lansing, Counselor for the Dept. of State, in a memorandum submitted to President Wilson, Oct. 16, 1913: "The essential thing is to interpret it in accordance with the mutual intention of the contracting parties, and this intention, outside of the language of the instrument itself, may be shown by any discussion between the parties as to the meaning of its provisions." (Hackworth, Dig., V, § 494.)

[6] See the opinion of Mr. Pinkney, commissioner, July 1, 1797, case of the *Betsey*, Furlong, master, commission under Article VII, treaty between the United States and Great Britain, November 19, 1794, as to whether the commission, according to the treaty establishing it, was bound by the decision of the Lords Commissioners of Appeal affirming a sentence of condemnation by the Vice-Admiralty of Bermuda. Moore, Arbitrations, III, 2291, 3180. In the course of his opinion Mr. Pinkney said: "Are we, then, to uphold an interpretation of this instrument which is not only unauthorized by its language, but is unsuitable to the subject of it, and at variance with the undoubted rights of one party and the duties of the other? What Great Britain could not properly demand, we are to *suppose* she did demand, what the United States ought to have insisted upon, we are to *suppose* they abandoned, and is this to be done not only without evidence, but in direct contradiction to the declarations of the parties?" (*Id.*, 3203–3204.)

See opinion of Sir Edward Thornton, umpire in the case of Don Rafael Aguirre *v.* The United States, No. 131, convention between the United States and Mexico of July 4, 1868, as to the scope of the release given the United States by Mexico in Article II of the Gadsden Treaty of December 30, 1853. Moore, Arbitrations, III, 2444; Mr. Ralston, umpire in the Sambiaggio Case, Italian-Venezuelan Claims Commission, under protocol of February 13, 1903, Ralston's Report, 666, 688; opinion of Pinkney, commissioner, case of the *Betsey*, Furlong, master, commission under Article VII, treaty between the United States and Great Britain of November 19, 1794, concerning the power of the arbitrators under the treaty to determine their own jurisdiction. Moore, Arbitrations, III, 2291. Also opinion of the same commissioner in the case of the *Sally*, Hayes, master, *id.*, III, 2306.

State be not permitted to enjoy recognition of a standard of interpretation known only to itself. It is the signification which both or all the parties have, or are to be regarded as having, attached to the words of their agreement which is alone the subject of investigation.[7]

2

§ 531. **Sources of Interpretation.** The ascertaining of the sense in which terms have been employed in a treaty involves a search for sources of interpretation. These may be found in what is extrinsic to the agreement. The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said: "The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilised world." [1]

It must, however, be borne in mind that the final purpose of seeking the intention of the contracting States is to ascertain the sense in which terms are employed. It is the contract which is the subject of interpretation, rather than the volition of the parties. It may be that while certain expressions are used in a particular sense, a contracting State has in fact given its consent with the design of accomplishing a purpose hostile thereto. Proof of such an intention is not decisive of the rights of the parties under the agreement. As has been tersely said: "Interpretation as a juristic process is concerned with the *sense* of the word used, and not with the *will* to use that particular word." [2]

The demands which a State may make upon another at the time of entering into their contract, the facts known to the plenipotentiaries, the correspondence or interchange of views leading up to and forming a part of the final negotiations, may all be important. Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal charged with the duty of interpretation.[3]

[7] See Order of the Permanent Court of International Justice of Aug. 20, 1929, in its Sixteenth Judgment in the Case Concerning the Jurisdiction of the International Commission of the River Oder, Publications, Permanent Court of International Justice, Series A, No. 23, 41, 42.

§ 531. [1] Westlake, 2 ed., I, 293.

"Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words — that is, their associations with things." (Wigmore, Evidence, 3 ed., IX, § 2470.)

[2] Wigmore, Evidence, 3 ed., IX, § 2459. Also Scott's Cases Int. Law, 426, note by the Editor.

[3] Cameron Septic Tank Co. *v.* Knoxville, 227 U. S. 39. See Mr. Justice Day in Sullivan *v.* Kidd, 254 U. S. 433.

"Treaties cannot be usefully interpreted with the microscope and the dissecting knife, as if they were criminal indictments. Treaties are steps in the life and the development of great nations. Public policies enter into them; public policies certified by public documents and authentic expressions of public officers. Long contests between the representatives of nations enter into the choice and arrangement of the words of a treaty. If you would be sure of what a treaty means, if there be any doubt, if there are two interpretations suggested, learn out of what conflicting public policies the words of the treaty had their birth; what argu-

Inasmuch as it is not the function of the interpreter to revise a treaty, as by putting himself in the place of the parties in order to produce a fresh accord, the need of ascertaining the sense in which they used the terms employed, or more broadly, of getting at their design at the time of contracting, is an unceasing burden. It is only through such an achievement that the interpreter is able to determine whether an alleged undertaking was assumed or imposed by the agreement. The same test is invariably applicable regardless of the length of the interval between the date of the consummation of a treaty and that of an interpretative adjudication. In every case the interpreter must satisfy himself whether the contracting parties are to be deemed to have bound themselves to confer or withhold the particular privilege that is claimed by virtue of the arrangement. If the evidence from whatsoever source demands the conclusion that such a claim did not in fact engage their attention in the course of negotiating the agreement, the interpreter may still be satisfied from the evidence that if it had done so, the claim would or would not have been regarded by the parties as within the purview of the agreement. It is such a conclusion that is decisive; for it is attributable to the conduct and thought of the parties when they essayed to contract. Moreover, the interpreter, after having reached it, is unembarrassed by the consequences, even though they establish that the parties left undealt with the particular matter which one of them later sought to connect with the requirements of the treaty.[4]

It remains to observe the extent to which the interpreters of treaties are disposed to respect the foregoing principles, and to take special note of the effort of judicial tribunals, whether international or domestic, to rid themselves of the influence of any formula purporting to regard the form of an instrument which registers accord as decisive of the character of the obligations of the parties thereunder, in the face of extrinsic evidence establishing an opposing design. Before examining the views of the Supreme Court of the United States and of the Permanent Court of International Justice it is worth while to scrutinize some conclusions that have been reached in a few miscellaneous cases.[5]

---

ments were made for one side or the other, what concessions were yielded in the making of a treaty. Always, with rare exceptions, the birth and development of every important clause may be traced by the authentic records of the negotiators and of the countries which are reconciling their differences." (Senator Elihu Root in speech in reply in the Senate on Panama Canal Tolls, May 21, 1914, Addresses on International Subjects by Elihu Root, collected and edited by Robert Bacon and James Brown Scott, Cambridge, Mass., 1916, 252, printed also in Hackworth, Dig., V, § 497.)

[4] The parties to a treaty may, of course, agree to entrust to an appropriate body the power to establish for them the basis of a fresh agreement to effect the solution of a problem which such body finds to be outside of the purview of an existing arrangement. Obviously, the exercise of that power is unrelated to the interpretation of that arrangement except in so far as it proves to be a consequence of a finding that the existing agreement is inapplicable.

[5] According to Art. 19 (a) of the Harvard Draft Convention on The Law of Treaties: "A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve." (*Am. J.*, XXIX, *Supplement*, October, 1935, 661.)

## 3

## CERTAIN CASES

### a

§ 532. **The Aroa Mines Case.** An instructive case was decided by the umpire of the British-Venezuelan Commission, under the protocol of February 13, 1903, providing for the arbitration of British claims before a mixed commission. Article III of that instrument declared that

> The Venezuelan Government admit their liability in cases where the claim is for injury to, or wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: (*a*) Whether the injury took place and whether the seizure was wrongful, and (*b*) if so, what amount of compensation is due.[1]

In behalf of Great Britain it was contended that Venezuela had thus assumed liability for injury to or wrongful seizure of property by forces of unsuccessful insurgents. Venezuela, however, asserted that liability was admitted only for such claims as were "just" according to international law, and that there was no assumption of liability for acts of revolutionary troops without proof of

§ 532. [1] Ralston's Report, Venezuelan Arbitrations of 1903, 292.

According to the convention of Jan. 24, 1903, between the United States and Great Britain for the settlement of the Alaskan boundary dispute before a joint tribunal, it was agreed that the court should consider certain Articles of the Russian-British treaty of Feb. 28/16, 1825, and of the Russian-American treaty of March 30/18, 1867, and that "the tribunal shall also take into consideration any action of the several governments or of their respective representatives preliminary or subsequent to the conclusion of said treaties so far as the same tends to show the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under and by virtue of the provisions of said treaties." (For. Rel. 1903, 488, 491.) It was further agreed that seven specified questions as to the interpretation of the Russian-British treaty should be answered and decided by the tribunal. In the course of his instructive opinion on the fifth question Lord Alverstone, the President of the tribunal, said: "It is in my opinion correctly pointed out, on behalf of the United States, that the word 'coast' is an ambiguous term, and may be used in two, possibly more than two, senses. I think, therefore, we are not only entitled, but bound to ascertain as far as we can from the facts which were before the negotiators the sense in which they used the word 'coast' in the treaty. Before considering this latter view of the case, it is desirable to ascertain as far as possible from the treaty itself what it means, and what can be gathered from the language of the treaty alone. . . . This consideration, however, is not sufficient to solve the question; it still leaves open the interpretation of the word 'coast' to which the mountains were to be parallel." (*Proceedings of the Alaskan Boundary Tribunal,* I, Part I, 36, 37, 39.) See the opinions of the American members of the tribunal, Messrs. Root, Lodge and Turner, *id.*, I, Part I, 43, 48–49; opinion of Sir L. Jetté, *id.*, I, Part I, 65–79; Rules of Construction and Interpretation presented in argument of the United States, *id.*, V, Part I, 6–11; evidence to be considered in the American case, *id.*, V, Part I, 11. It was said in the United States counter-case that "the United States asserts that the intention of the parties to the treaty is vital to its true interpretation; that such intention between nations is the very essence of the agreement; and that any material variance from the intention must give place to an interpretation in accordance with it." (*Id.*, IV, Part I, 40.) In the counter-case of Great Britain it was said that "the function of the tribunal is to interpret the Articles of the convention by ascertaining the intention and meaning thereof, and not to recast it. Any considerations showing that the words of the treaty must have been intended to bear a particular meaning, being a meaning which they are in themselves capable of bearing, may, of course, be legitimately presented." (*Id.*, IV, Part III, 6.) See, also, argument of Great Britain, *id.*, V, Part II, 37; oral argument of Mr. Taylor, *id.*, VII, 578–579; Mr. Robinson, *id.*, VII, 501–502, 506–507, 514–516; Mr. Watson, *id.*, VI, 363–364; Mr. Dickinson, *id.*, VII, 731–732.

fault on the part of the titular government. In support of the British interpretation it was urged that the circumstances attending the signing of the protocol, particularly the fact that Venezuela entered into the arbitration agreement as a condition precedent to the lifting of the blockade of its ports by Great Britain and its allies, proved conclusively that the words of the compact should be given their broadest colloquial sense, and that therefore the admitted liability should cover acts of revolutionary as well as of governmental forces.

In his search for sources of interpretation the umpire made a careful review of the circumstances leading up to the agreement. The diplomatic correspondence between the two Governments was rigidly examined. His conclusion was that "President Castro understood that he was admitting the liability of his Government only for such claims as were 'just,' that Mr. Bowen (representing Venezuela) understood he was submitting to arbitration only the matters contained in the ultimatum of each of the allied powers;" that in none of the correspondence or conferences of the allies with Venezuela was there "a sentence, a phrase, or a word directly or indirectly making claim to indemnity for losses suffered through acts of insurgents or directly or indirectly making allusion thereto;" that while the British Government thought the terms of the agreement broad enough to include such claims, it could not invoke a construction which Venezuela neither knew of, nor had reason to know of, and to which it had, therefore, never assented. Hence the umpire held that "Venezuela did not specifically agree in the protocols to be subject to indemnities for the acts of insurgents." [2]

[2] Ralston's Report, Venezuelan Arbitrations of 1903, 344, 350, 383. See, also, the Crossman Case, *id.*, 298, and the De Lemos Case, *id.*, 302, both also decided by the umpire of the British-Venezuelan Commission.

Similar expressions in the Italian-Venezuelan protocol of the same date were given a like interpretation by Mr. Ralston, umpire of the Italian-Venezuelan Commission, in a well-considered and instructive opinion in the Sambiaggio Case, *id.*, 666, 679. But see the interpretation of the German-Venezuelan protocol by the umpire, General Duffield, in the Kummerow Case, *id.*, 526, 549; that of the Spanish-Venezuelan protocol by the umpire, Mr. Gutierrez-Otero, in the Padrón Case, *id.*, 923, and in the Mena Case, *id.*, 931.

Note also the following cases involving the interpretation of international agreements:

Case of Joseph Chourreau before the French and American Claims Commission, under the convention between the United States and France of January 15, 1880, and the decision of Mr. Frelinghuysen, Secy. of State, as to the interpretation of the terms "territory" and "territorial jurisdiction" employed in the convention. Moore, Arbitrations, II, 1145, 1146, *citing* H. Ex. Doc. 235, 48th Cong., 2 Sess., 16; also Boutwell's Report, 134.

Opinion of the umpire, Sir Frederick W. A. Bruce, in the Capitation Tax Case, as to the power of the commission under the convention between the United States and Colombia of February 10, 1864, to determine whether a certain tax imposed by Panama was in violation of Articles II, III, and XXXV of the treaty between the United States and New Granada of Dec. 12, 1846, Moore, Arbitrations, II, 1412.

Opinion of Mr. Alexander S. Johnson, American commissioner of the joint commission under the British-American treaty of July 1, 1863, in the case of the Puget's Sound Agricultural Company, concerning the interpretation of Article IV, treaty of June 15, 1846, between the United States and Great Britain. Moore, Arbitrations, I, 266.

Sentence and award of Mr. C. A. Logan, arbitrator in the matter of the Chilean-Peruvian Alliance of December 5, 1865, under the Chilean-Peruvian protocol of March 2, 1874. Moore, Arbitrations, II, 2086.

Opinion of Mr. John Little, commissioner in the case of William H. Aspinwall, executor of G. G. Howland and others *v.* Venezuela, No. 18, United States and Venezuelan Claims Commission, under convention of Dec. 5, 1885, as to whether bonds of Venezuela were included among the claims to be submitted to arbitration before the commission, Moore, Arbitrations, IV, 3616; also opinion of Mr. John V. L. Findlay, commissioner, *id.*, 3642.

b

§ 533. **The North Atlantic Coast Fisheries Arbitration.** In the North Atlantic Coast Fisheries Arbitration the tribunal, as has been observed, was confronted with the task (under Question V) of interpreting the treaty of October 20, 1818, and of determining the mode of measurement of the "three marine miles of any of the coasts, bays, creeks, or harbours" mentioned in Article I, and within which the United States had renounced forever liberties previously enjoyed.[1] It is significant that the Tribunal declined to accede to the contention of the United States that the so-called three-mile rule should afford a test of the measurement of what had been renounced, because, as it declared, "it has not been shown by the documents and correspondence in evidence here that the application of the three-mile rule to bays was present to the minds of the negotiators in 1818, and they could not reasonably have been expected either to presume it or to provide against its presumption." [2] In view of this conclusion the Tribunal found itself unable to be influenced by other considerations, such as the subsequent conduct of the parties during the decades that followed the treaty.[3]

---

Decision of Mr. John Little, commissioner of the United States and Venezuelan Claims Commission, under convention between the United States and Venezuela of Dec. 5, 1885, as to the character of the proceedings under the treaty. Moore, Arbitrations, II, 1677.

In the course of an elaborate opinion in the Manica arbitration between Great Britain and Portugal, under the *Acte de Compromis* of Jan. 7, 1895, the arbitrator, Signor Paul Honoré Vigliani, said: "In our case the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who have arranged it and the most favorable to the aim of the contract, obliges us to give to the word 'plateau' the broadest possible signification — that is to say, to require only the minimum normal altitude — so as to be able to affirm its existence as far as the Save, as the high contracting parties had supposed, and so as thus to render possible the application of the text of Article II of the treaty." (Moore, Arbitrations, V, Appendix, 4985, 5011.)

In the case of Marryatt *v.* Wilson, 1 Bosan. & Puller, 435, 436, Chief Justice Eyre said: "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states." Mr. Morse, the arbitrator in the Van Bokkelen Case, said that "Marryatt *v.* Wilson is strong authority for the proposition that the municipal tribunals of the country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction." (Moore, Arbitrations, II, 1840.)

Opinion of the arbitrator, Mr. Alexander Porter Morse, in the case of Charles Adrian Van Bokkelen, under the protocol between the United States and Haiti of May 24, 1888, concerning the interpretation of the treaty between those States, Nov. 3, 1864. Moore, Arbitrations, II, 1813.

Case of Lewis S. Hargous before the United States and Mexican Claims Commission, under convention of April 11, 1839, concerning the scope of the powers of the commission, and the nature of claims for which liability was assumed. Moore, Arbitrations, II, 1267.

Note the language of His Imperial Majesty, the Emperor of Russia, interpreting Art. I of the Treaty of Ghent, Dec. 24, 1814, as arbitrator under Article V of the convention between the United States and Great Britain, October 20, 1818; also the reasons given for the method of interpretation employed. Moore, Arbitrations, I, 359, 360.

See, also, Goetze *v.* United States, 103 Fed. 72; Schultze *v.* Schultze, 144 Ill. 290; Adams *v.* Akerlund, 168 Ill. 632; Tucker *v.* Alexandroff, 183 U. S. 424.

§ 533. [1] See Bays, The North Atlantic Coast Fisheries Arbitration, *supra*, § 147.

[2] Award, North Atlantic Coast Fisheries Arbitration, *Proceedings* (Senate Doc. No. 870, 61 Cong., 3 Sess.), I, 94–95.

The Tribunal also declared it to be "a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose." (*Id.*, 96.)

[3] Award, *id.*, 94.

c

§ 533A. **In the Matter of the *David J. Adams*.** The views expressed in the decision in the case of the *David J. Adams* adjudicated before the American and British Claims Arbitration Tribunal, under convention of August 18, 1910, are worthy of attention.[1] There was involved the interpretation of Article 1, of the Treaty of London of October 20, 1818, to the effect that

> The United States hereby renounce forever, any liberty, heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever.[2]

According to the British view, the arrangement signified that American fishermen had no access to such bays and harbours for purchasing bait. The Government of the United States contended, on the other hand, that the right of access as such, was not prohibited to American fishermen by the treaty, except so far as it was inconsistent with the prohibition of taking, drying or curing fish within the three mile limit, accepted by the United States in the treaty; and that the four cases (shelter, repairs, wood and water) of admittance, were cases where admittance was secured by the treaty, and could not be refused or prohibited by local legislation.[3]

The Tribunal expressed the opinion that a stipulation which declared that fishermen "shall be admitted" for certain enumerated purposes and "for no other purpose whatever," seemed to be "perfectly clear" and to mean that for the specified purposes the fishermen should be admitted and that for any other purposes they had no right to be admitted; and it was said to be "difficult to contend that by such plain words the right to entrance for purchasing bait is not denied." The Tribunal added that "no sufficient evidence of contrary intention of the High Contracting Parties is produced to contradict such a clear wording."

Attention was called to the American argument that if the language of the treaty were to be interpreted literally, "rather than according to its spirit and plain intent," a vessel engaged in fishing would be prohibited from entering a Canadian port for any purpose whatever, except to obtain wood or water, to

§ 533A. [1] Nielsen's Report, 524, 526. The Tribunal was composed of M. Henri Fromageot, President, Sir Charles Fitzpatrick, and Honorable Chandler P. Anderson.

[2] Malloy's Treaties, I, 631.

[3] "In other words," said the Tribunal, "according to the American view, the United States Government had renounced by the Treaty their former liberty to fish in Canadian territorial waters. That renunciation has as a counterpart the obligation of the Canadian Government to admit American fishermen for shelter, repairs, wood, and water and for no other purpose. That is to say, that Canada has no obligation to admit the said fishermen for any other purpose than these four . . . that Canada may very well prohibit the entrance for any other purposes; but, so long as entrance for the purpose of purchasing bait is not prohibited by Canadian legislation, it must be considered as the legal exercise of the right of access belonging to any American ship." (Nielsen's Report, 531.)

repair damages or to seek shelter; and also to the contention that "the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended."

The Tribunal declared, however, that "such an intention of the negotiators to contradict the literal meaning of the Treaty does not appear in the evidence presented in this case," and, therefore, declined to yield to the American contention.[4] This disposition on the part of the Tribunal to lay stress on the absence of evidence contradictory of the literal meaning of the terms employed rather than to intimate that evidence indicative of a common design at variance with that meaning would be excluded or ignored, is the significant aspect of the decision. It manifested respect for what the record revealed rather than for a rule of construction.[5]

[4] The Tribunal added: "It appears from the report dated October 20, 1818, from Gallatin and Rush, the two American Plenipotentiaries (British Answer, pp. 27, 28), that they had in view to procure for the American fishermen fishing on the fishing grounds outside the three mile limit off Nova Scotia coasts, the privilege (that is to say, the exceptional right) of entering the ports for shelter." (Nielsen's Report, 532.)

[5] See endeavor made by Dr. Östen Undén as arbitrator in dispute between Bulgaria and Greece concerning Article 181 of the treaty of Neuilly to obtain "preparatory documents" concerning that article "which might throw light on the point in controversy." *Am. J.*, XXVIII, 760, 770.

*Cf.* Ascherberg Hopwood and Crew Ltd. *v.* Quaritch, Anglo-German Mixed Arbitral Tribunal, M. Borel, President, July, 1925, 5 T.A.M. 332, where the tribunal, in view of what it conceived to be the clearness of a text, was unwilling to be guided by preparatory work which revealed a common design of the contracting parties sharply at variance with what the form of the text appeared to require. See, also, Little *v.* Watson, 32 Maine 214, 221, where the tribunal through Shepley, C. J., declared: "The literal is the correct construction of such an instrument, when the language is clear, precise, not inconsistent with other provisions, and not leading to absurd conclusions. Vattel, lib. II, c. 17. And in such case no extraneous means for an interpretation of the treaty should be sought." Other tribunals attaching great significance to the form of a text have adverted to a sense of obligation to respect it. Declared Parker, Umpire, of the Mixed Claims Commission, United States and Germany, under agreement of August 10, 1922, in his opinion in the Lusitania Cases: "The Treaty is our charter. We can not look beyond its express provisions or its clear implications in assessing damages in any particular claim. We hold that its clear and unambiguous language does not authorize the imposition of penalties. Hence the fundamental maxim 'It is not allowable to interpret that which has no need of interpretation' applies." (Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions, 1925, 1, 31.)

"In the answer of the United States there is an elaborate and ingenious argument, based upon the history of the negotiations leading to Article IX, on the basis of which we are asked to hold that the article was only a 'nominal' provision, not intended to have any definite application. We can not agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do." (Award in Cayuga Indians Case, American and British Claims Arbitration, special agreement of August 18, 1910, Nielsen's Report, 307, 322.)

President Coolidge in his award as Arbitrator, March 4, 1925, in the controversy between Chile and Peru pertaining to Tacna-Arica, made significant use of preparatory work in interpreting the Treaty of Peace of October 20, 1883, between those countries, in relation to the problem whether any part of the Peruvian Province of Tarata was included in the territory covered by the provisions of Article 3. *Am. J.*, XIX, 393, 427–429. See also Universal Adjustment Corporation *v.* Midland Bank, 281 Mass. 303, 324.

See Island of Timor Case between The Netherlands and Portugal, under convention of April 3, 1913, J. B. Scott, Hague Court Reports, 354, 369–375.

For various judicial discussions concerning appropriate uses of preparatory work see, for example, Parker, Commissioner, Tripartite Claims Commission (United States, Austria and Hungary), convention of Nov. 26, 1924, Administrative Decision No. I, Final Report of

## 4

## THE ATTITUDE OF THE SUPREME COURT OF THE UNITED STATES

### a

§ 533B. **Concerning a Liberal Construction.** In his opinion in behalf of the Court in the case of *Shanks v. Dupont*,[1] delivered in 1830, and interpretative of Article IX of the Jay Treaty with Great Britain of 1794, Mr. Justice Story declared: "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?" Accordingly it was said that all British born subjects whose allegiance Great Britain had never renounced, ought, "upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the treaty of 1794," by which titles of British subjects holding lands in the United States were safeguarded against disabilities of alienage.[2] In the case of *Hauenstein v. Lynham*,

---

Commissioner and Decisions and Opinions, 1929, 1, 12–13; *Schmid v. Chemische Werke Furstenwalde*, Franco-German Mixed Arbitral Tribunal, 1921, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 248; Reparation Commission *v.* German Government, Special Arbitral Tribunal, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 194; S.C.C.C. *v.* B.V. (Patents Case), Germany, Reichsgericht in Civil Matters, 1923, *id.*, Case No. 195; Antippa *v.* Germany, Germano-Greek Mixed Arbitral Tribunal, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 285; Kulin, Emeric *v.* Roumanian State, Roumanian-Hungarian Mixed Arbitral Tribunal, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 59; Georges Pinson Case, § 50, France and Mexico, Mixed Claims Commission, 1928, *id.*, Case No. 292; Roumanian Minister of War *v.* Turkish Government, Roumanian-Turkish Mixed Arbitral Tribunal, 1928, *id.*, Case No. 297 (with editorial bibliographical note at p. 434); Eastern Bank Ltd. *v.* Turkish Government, Anglo-Turkish Mixed Arbitral Tribunal, 1927, *id.*, Case No. 298; Polyxene Plessa *v.* Turkish Government, Greco-Turkish Mixed Arbitral Tribunal, 1928, *id.*, Case No. 299; G. Kauroklis *v.* Turkey, Turko-Greek Arbitral Tribunal, 1928, *id.*, Case No. 300; Photiadis *v.* Turkish Government, Turco-Greek Mixed Arbitral Tribunal, 1928, Lauterpacht, Annual Dig., 1929–1930, Case No. 236; *Wilhelm et Cie. v.* Czechoslovak State, Hungaro-Czechoslovak Mixed Arbitral Tribunal, 1929, *id.*, Case No. 237; *Geschäftshaus-CmbH. v. Schweizerische Rückversicherungs-Gesellschaft*, Germany, Reichsgericht, 1930, *id.*, Case No. 239.

§ 533B. [1] 3 Pet. 242, 249. *Cf.* dissenting opinion by Mr. Justice Johnson, *id.*, 250.

[2] Declared Mr. Justice Story in this connection: "The object of the British government must have been to protect all her subjects holding lands in America from the disability of alienage, in respect to descents and sales. The class of American loyalists could at least, in her eyes, have been in as much favour as any other; there is nothing in our public policy which is more unfavourable to them than to other British subjects. After the peace of 1783 we had no right or interest in future confiscation; and the effect of alienage was the same in respect to us, whether the British subject was a native of Great Britain or of the colonies. This part of the stipulation then being for the benefit of British subjects who became aliens by the events of the war; there is no reason why all persons should not be embraced in it, who sustained the character of British subjects, although we might also have treated them as American citizens. The argument supposes that because we should treat them as citizens, therefore Great Britain had no right to insist upon their being British subjects within the protection of the treaty. Now, if they were in truth and in fact, upon principles of public and municipal law, British subjects, she has an equal right to require us to recognize them as such. It cannot be doubted that Mrs. Shanks might have inherited any lands in England, as a British subject, and her heirs might have taken such lands by descent from her." (*Id.*, 249–250.)

decided in 1879, Mr. Justice Swayne, in the course of his opinion in behalf of the Court, adverted, in slightly differing terms, to the view expressed in the case of *Shanks v. Dupont,* and declared it to be "the settled rule in this Court." [3]

In the case of *Geofroy v. Riggs,* decided in 1890, it was held that a French citizen could take by descent from an American citizen land in the District of Columbia, as being in one "of the States of the Union" within the meaning of that term as employed in Article VII of the Consular Convention with France of February 23, 1853.[4] The Court, through Mr. Justice Field, not only adverted to the rule as laid down in *Hauenstein v. Lynham,* but also gave a fresh and broader enunciation of it in the following words:

> It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.[5]

It should be noted that the Court construed the treaty as it did, because, as it said in a later case, it was "necessary to give consistency to the provisions of the convention, and not defeat the consideration given by France for her concession of certain rights to citizens of the United States." [6] Here was disclosed a sufficient reason for the decision.

In the course of decisions since rendered the Court has continued to advert to the same theory. In the case of *Tucker v. Alexandroff,* a Russian sailor deserting in American territory from a Russian Naval force sent to the United States to man a vessel of war there under construction was deemed to be a deserter from a ship and subject as such to reclamation, within the meaning of the existing treaty with Russia of 1832, although the sailor had not in fact been aboard the vessel which, at the time of his desertion, remained uncompleted although launched.[7] Declaring that "treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred," the Court in 1924 held that the business of pawnbroking was within the meaning of "trade" which by virtue of the treaty with Japan of 1911, might be participated in by a Japanese national who had been admitted to American territory; [8] and in 1928 it held that the terms "trade and commerce"

[3] 100 U. S. 483, 487.
It was hardly necessary to invoke the "rule" in this decision which was interpretative of the treaty between the United States and Switzerland, of November 25, 1850, as the narrow construction sought to be applied would have defeated an obvious design of the contracting parties respecting which the Court entertained no doubt.

[4] 133 U. S. 258.

[5] *Id.,* 271.

[6] *In re* Ross, 140 U. S. 453, 475.

[7] Tucker *v.* Alexandroff, 183 U. S. 424, 437. *Cf.* dissenting opinion of Mr. Justice Gray, with whom concurred Mr. Chief Justice Fuller, and Justices Harlan and White, *id.,* 449, 466.

[8] Asakura *v.* Seattle, 265 U. S. 332, 342–343. The opinion of the Court, rendered by Mr. Justice Butler, cited Hauenstein *v.* Lynham, 100 U. S. 483, 487; Geofroy *v.* Riggs, 133

of the same treaty when used in conjunction with each other and with the grant of authority to lease land for "commercial purposes," were "sufficient to include the operation of a hospital as a business undertaking." [9] In this instance the Court, through Mr. Justice Stone, declared that it was "required by accepted principles" to give the terms of the treaty "a liberal rather than a narrower interpretation," thus indicating that the matter was not one of judicial discretion. Again, in 1940, the Court announced through the Chief Justice that "according to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it," adding that "even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." [10]

One encounters difficulty, however, in finding a case where the statement favorable to a liberal construction is other than a dictum supplemental to reasons which in themselves have afforded sufficient grounds for the conclusions actually reached concerning the sense in which the contracting parties employed the terms of their choice.[11] Moreover, there has been no intimation that such a construction should prevail when it has appeared from the evidence, internal or external, that the design of those parties was otherwise.[12]

Thus the Court declined in 1912, to heed the contention favorable to a liberal construction of Article IX of the treaty with the Argentine Republic of July 27, 1853, conferring upon a consular officer "the right to intervene in the possession, administration and judicial liquidation" of the estate of an intestate countryman, being unwilling to hold that the article conferred the right to administer to the exclusion of persons entitled to administer by the local laws of the State in which the foreign decedent died and left property.[13] Again, in 1923,[14] the

---

U. S. 258, 271; and Tucker *v.* Alexandroff, 183 U. S. 424, 437. See, also, State of California *v.* Tagami, 195 Cal. 522.

[9] Jordan *v.* Tashiro, 278 U. S. 123, 128–129. In a dictum in the opinion of the Court in the case of Factor *v.* Laubenheimer, 290 U. S. 276, 293–294, it was declared by the same Justice: "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."

See J. J. Lenoir, "Treaties and the Supreme Court," *University of Chicago Law Review,* I, 602.

[10] Bacardi Corporation of America *v.* Domenech, 311 U. S. 150, 163.

[11] This is believed to have been the case with respect to all of the earlier decisions of the Court. See, also, Nielsen *v.* Johnson, 279 U. S. 47; Todok *v.* Union State Bank, 281 U. S. 449, 454; Santovincenzo *v.* Egan, 284 U. S. 30.

[12] In Valentine *v.* U. S. *ex rel.* Neidecker, 299 U. S. 5, at p. 10, the Court concluded that the explicit denial of any obligation to surrender citizens of the asylum State in the extradition treaty of 1909 between the United States and France, left no room for the application of the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties."

[13] Rocca *v.* Thompson, 223 U. S. 317. Declared the Court through Mr. Justice Day: "But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered

circumstances attending the making of the treaty with Japan of February 21, 1911, were, as the Court itself declared in 1928, "deemed to exclude from the operation of its broad language any grant of the privilege of acquiring and using lands within the United States for agricultural purposes." [15]

The recurring emphasis laid by the Court upon the liberal construction of treaties must be regarded as due to the imputation to the contracting parties of a design to carry out their undertakings in perfect good faith, and to the conviction that the requirements of such good faith beget the obligation to yield whatever is reasonably incidental to the exercise of a particular concession, or whatever such concession necessarily entails for its proper exercise. Such a conclusion does not necessarily call for liberality, as by acts of generosity, on the part of the grantor. The reference in terms of liberality to the character of commitments which a contracting State assumes is believed, therefore, to be of doubtful value as a means of ascertaining the exact design of the interested parties concerning the scope of what is granted.

b

§ 533C. **Avoidance of Restrictive Rules of Evidence.** In its long experience as an interpreter of treaties the Supreme Court has maintained a record singularly free from the manifestation of a sense of obligation to exclude, or ignore the probative value of, evidence at variance with what the form of a text would appear to entail. Although never unmindful of the fact that inasmuch as the contracting States have endeavored to express their common design in a formal instrument, it is essentially a document which is the subject of interpretation,[1] the Court has been equally respectful of the freedom of such States to attach to the words of an agreement any signification that might be desired by them. Hence it has not been prone to invoke or to heed rules of construction subversive of the consequences of such freedom.[2] In a word, the conclusions of the Court as to the designs of contracting States have been expressed in terms revealing deference for what the evidence established rather than for any other consideration.[3] Thus it has not found occasion to declare, still less to hold, that by employing phrases commonly deemed, in the light of usage or grammatical

---

into, with a view to effecting the objects and purposes of the States thereby contracting. *In re* Ross, Petitioner, 140 U. S. 453, 475." (*Id.*, 331–332.)

See Consuls, Administration of Estates, *supra*, § 480.

[14] Terrace *v.* Thompson, 263 U. S. 197, 223.

[15] Jordan *v.* Tashiro, 278 U. S. 123, 128.

§ 533C. [1] Declared Mr. Justice Harlan, in the course of the opinion of the Court in the case of United States *v.* Texas, 162 U. S. 1, 36–37: "Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. 1 Kent Com. 174."

[2] Thus Mr. Justice Field declared in the course of the opinion of the Court in the case of Geofroy *v.* Riggs, 133 U. S. 258, 271: "As they [treaties] are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial sense impressed upon them by local law, unless such restricted sense is clearly intended."

*Cf.* Views of Mr. Justice Chase and Mr. Justice Paterson in 1796, in Ware *v.* Hylton, 3 Dall. 199, 239, and 253, respectively.

[3] See Cook *v.* United States, 288 U. S. 102.

considerations, to be plain or to have a clear signification, the contracting parties are not free to show that by common understanding they departed from custom, and used the words of their choice in an abnormal or special sense agreeable to their purposes. Accordingly, it has not acknowledged that the final test of clearness of design is necessarily to be found in the character or form of a text.

c

§ 533D. **Preparatory Work.** The Supreme Court is not disposed to forbid recourse to, or to decline itself to rely upon, diplomatic exchanges or correspondence indicating the views of negotiators of a treaty, of which the interpretation is uncertain. The fact of uncertainty is seemingly regarded as made apparent by the divergency of views of opposing litigants, notwithstanding the form of the text.[1] The Court has not sought to postpone consideration of such evidence until, after exhausting other modes or processes of interpretation, it still remains itself in doubt. Thus it has not been wary of utilizing such data in order to supplement or support conclusions to be drawn from the face of an instrument, or as a means of establishing others at variance with a meaning seemingly deducible from its terms. The significant thing is the readiness with which the Court turns to such forms of preparatory work as reasonable and applicable sources of interpretation. It relied upon them, for example, in construing Article II of the treaty with Russia of March 30, 1867, providing for the cession of Alaska; [2] Article III of the treaty with Spain of February 22, 1819, establishing the boundary west of the Mississippi, beginning at the mouth of the Sabine River; [3] Article I of the treaty with Japan of April 5, 1911; [4] Article VII of the treaty with Denmark of April 26, 1826; [5] and Article I of the extradition convention with Great Britain of July 12, 1889.[6] In the case of *Cook* v. *United States,* decided January 23, 1933, the Court made fullest use of data leading up to the conclusion of the convention with Great Britain for the Prevention of Smuggling of Intoxicating Liquors, of January 23, 1924, as an effectual means of ascertaining the design of the contracting parties.[7] Again, in 1933, the Court invited counsel to search for preparatory work indicative of the design of the parties in relation to Article X of the treaty with Great Britain of August 9, 1842.[8] The Court found occa-

§ 533D. [1] *Cf.* Paterson, J., in Ware *v.* Hylton, 3 Dall. 199, 253, who invoked Vattel's maxim: "It is not permitted to interpret what has no need of interpretation. Vattel, B. 2, ch. 17, s. 263."

[2] Kinkead *v.* United States, 150 U. S. 483, 486.

[3] United States *v.* Texas, 162 U. S. 1, 23–28, 36–38; Oklahoma *v.* Texas, 260 U. S. 606, 632.

[4] Terrace *v.* Thompson, 263 U. S. 197, 223.

[5] Nielsen *v.* Johnson, 279 U. S. 47, 52–57. See, in this connection, "Exemption of Aliens from Taxation," by Wm. R. Vance, *Am. J.,* XXIII, 395.

See Theodore W. Graske, "Some Aspects of Treaty Interpretation in the United States — 1930–1935," *Tulane Law Review,* X, 246, 256.

[6] Factor *v.* Laubenheimer, 290 U. S. 276.

See also Cameron Septic Tank Company *v.* City of Knoxville, Iowa, 227 U. S. 39, 50.

[7] 288 U. S. 102, 116–118.

In the case of Valentine *v.* United States, 299 U. S. 5, at 13, the Court declared that "historical background and administrative practice furnish no warrant for reading into the treaty with France a grant which the parties failed to insert. History and practice not only do not support, but they rather negative, the claim of an implied discretionary power."

[8] Factor *v.* Laubenheimer, 290 U. S. 276, at 295, where Mr. Justice Stone declared: "But

sion to observe, however, in 1934, through Mr. Justice Brandeis, that the "rule" in relation to the use of preparatory work "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body."[9]

d

§ 533E. **Miscellaneous Considerations.** When the evidence from whatsoever source reveals the general design of the contracting parties, the Supreme Court is reluctant to accept a construction inconsistent with, or subversive of it. Inasmuch as it was obvious from the face of the instrument that the consular convention with France, of February 23, 1853, was to be reciprocal in operation in respect to the privileges accorded nationals of the one party to take lands within the territory of the other by descent from nationals of that other, the Court found it impossible to approve of an interpretation which would defeat that design and deny full reciprocity.[1] A demand for a construction inconsistent with the manifest object or purpose of a treaty "to secure equality in exchange of privileges and reciprocity in rights granted" will be regarded with scant favor.[2] Nor is the Court disposed to impute to the contracting parties a design that "the words of a treaty should be literally followed, if by so doing the real object they had in mind would be defeated."[3] It was declared by Chief Justice Taft in behalf of the Court that "considering the friendly purposes of both countries" (the United States and Great Britain) in concluding in 1924 a treaty to prevent the smuggling of intoxicating liquors into American territory, "we do not think that any construction should be given which would defeat it."[4] For

---

the exhaustive search, by counsel, through available diplomatic records and correspondence, in response to the invitation of the Court in its order for reargument of this cause, has disclosed nothing in diplomatic history which would afford a basis for any different conclusion."

[9] Arizona *v.* California, 292 U. S. 341, 359–360.

§ 533E. [1] Geofroy *v.* Riggs, 133 U. S. 258, 271; also *In re* Ross, 140 U. S. 453, 475.

[2] Sullivan *v.* Kidd, 254 U. S. 433, 440; Todok *v.* Union State Bank, 281 U. S. 449, 454–55.

[3] United States *v.* Texas, 162 U. S. 1, 37. In this case the Court concluded from the diplomatic correspondence leading up to the treaty with Spain of February 22, 1819, that the negotiators had had access to a particular map (that of Melish, improved to 1818, and published at Philadelphia) which was referred to in the treaty in relation to the boundary, and which was, therefore, regarded by the Court as if it had been expressly made a part of the treaty. The Court did not, however, feel justified "upon any fair interpretation of the treaty," in assuming that the parties regarded the map as absolutely correct in all respects, and not to be departed from in any particular or under any circumstances. To do so would, it was said, serve to defeat the real object of the parties. Thus it was concluded, in the light of the antecedent diplomatic correspondence, that the negotiators assumed that for the purposes of settling their controversy as to the boundary the map was in the main correct. "But," declared the Court through Mr. Justice Harlan, "they did not and could not know that it was accurate in all respects. Hence they were willing to take it as the basis of a final settlement, the fixing of the line with more precision, and the designating of the limits of the two nations with more exactness, to be the work of commissioners and surveyors who were to meet at a named time, and the result of whose work should become a part of the treaty. While the line agreed upon was, speaking generally, to be as laid down on Melish's map, it was to be fixed with more precision, and designated with more exactness, by representatives of the two nations." (*Id.*, 36–38.)

[4] Ford *v.* United States, 273 U. S. 593, 618.

a token of design the Supreme Court may seek light from, and be guided by, the preamble of the instrument under consideration.[5]

Where certain provisions of a treaty between the United States and Spain of February 22, 1819, were expressed in the Spanish and English languages, and each purported to be an original, and where also the words of the two texts lent themselves to differing constructions, the Supreme Court did not hesitate to conclude that the Spanish version, by reason of the character of the acts of the Spanish sovereign to which they referred and the treatment textually accorded them, should be deemed to reflect the common design and to manifest the sense in which the words in both versions had been employed.[6] Such a conclusion shows that despite the desire of the contracting parties to have the two versions of an instrument mirror with exactness a singleness of purpose, and in a form that reveals no divergence of thought, their bi-lingual achievement may fail to do so, and that in the event of such failure the two versions are not, in a linguistic sense, of equal value.

As an interpreter of treaties the Supreme Court does not appear to regard itself as necessarily bound by the conclusions of the political department of its own government.[7] The views thereof in construing and applying the provisions of agreements to which the United States is a party are, however, regarded as entitled to much weight in confirming conclusions which the tribunal is able to deduce from other circumstances,[8] and as an aid to it in the resolving of doubts.[9] The Court has, accordingly, laid stress upon those views in the course

[5] See Todok *v.* Union State Bank, 281 U. S. 449; Cook *v.* United States, 288 U. S. 102.

See likewise Mr. Nielsen, American Commissioner, Opinion in Naomi Russell Case, Special Claims Commission, United States and Mexico, Conventions of Sept. 10, 1923, and Aug. 17, 1929. Opinions of Commissioners, 44, 75–76, Hackworth, Dig., V, § 494.

[6] United States *v.* Arredondo, 6 Pet. 691, 710, 737–744. Declared the Court through Mr. Justice Baldwin: "The king of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words and expressed his intention, and though the American version showed the intention of this government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted, and what reserved; the rules of law are too clear to be mistaken and too imperative to be disregarded by this Court. We must be governed by the clearly expressed and manifest intention of the grantor, and not the grantee in private a fortiori in public grants." (*Id.*, 741.)

Also United States *v.* Percheman, 7 Pet. 51.

Concerning discrepancies between the English and Spanish texts of the extradition treaty of March 26, 1913, between the United States and Paraguay, see correspondence in For. Rel. 1921, II, 627–632. See also Mr. Hughes, Secy. of State, to Mr. de Graeff, Netherland Minister at Washington, March 2, 1925, concerning differences between the English and Dutch texts of an arbitration convention that had been signed in behalf of the United States and The Netherlands, but which had not been consummated by an exchange of ratifications, Hackworth, Dig., V, § 499.

According to Art. 19 (a) of the Harvard Draft Convention on The Law of Treaties: "When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve." (*Am. J.*, XXIX, *Supplement*, October, 1935, 661.)

[7] See Charlton *v.* Kelly, 229 U. S. 447, 468; Factor *v.* Laubenheimer, 290 U. S. 276, 295. See Province of the Courts of the United States, *supra*, § 526.

[8] See *In re* Ross, 140 U. S. 453, 467–468 and 472–475; United States *v.* Texas, 162 U. S. 1, 41–42 and 62–63; Charlton *v.* Kelly, 229 U. S. 447, 468; Sullivan *v.* Kidd, 254 U. S. 433, 442.

[9] See Factor *v.* Laubenheimer, 290 U. S. 276, 295–298. See, also, Florida Avocado Growers' Exchange *v.* United States, 71 F. (2) 309, 314.

of interpreting treaties with Spain of 1819, with Japan of 1858, with Italy of 1868, and with Great Britain of 1842 and 1899.[10]

It may well be doubted whether the views of particular departments of a government, such as the legislative or executive, long subsequent to the negotiation and conclusion of a treaty are necessarily probative of the sense in which terms were employed when the arrangement was consummated.[11] In a case decided in 1933, the Supreme Court expressed deference for the "practical construction" placed by the Congress in 1901, and also somewhat later by Canadian authority, upon Article II, of the Webster-Ashburton treaty of 1842, providing that all of the water communications along the Pigeon River (constituting a portion of the boundary between the United States and Canada) should be "free and open" to the use of citizens and subjects of both countries, that construction being to the effect that either country might authorize corporate entities to levy tolls for the use of improvements on its own side of the stream.[12] The tribunal evinced great reluctance to disregard such a construction and to embark upon the task of independent interpretation in order to ascertain what was the design of the contracting States when they perfected their agreement, or whether the "practical construction" alluded to coincided with that design.[13] The decision rested, however, upon the ground that the improvements and uses within the river being permitted by the contracting parties, were governed and recognized by the terms of the subsequent convention in relation to boundary waters concluded January 11, 1909.[14]

It should be obvious that when a tribunal for any reason feels obliged to defer to the construction which the contracting parties have themselves placed upon their agreement, it ceases to be an interpreter thereof and acknowledges its incompetence to act as one.[15]

[10] The domestic tribunals of a State may in fact acknowledge a lack of competence to interpret the provisions of a particular treaty, or to do more than accept the construction placed upon them by the political department of the government. See *In re Société Française Radio-Électrique et Compagnie Générale* de T.S.F., France, *Conseil d'État,* 1930, Lauterpacht, Annual Dig., 1929–1930, Case No. 233; French State *v.* Prat, France, Court of Cassation, 1920, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 240; *In re* X, France, Council of State, 1920, *id.,* Case No. 241; Ministère Public *v.* King, France, Court of Cassation, 1912, Hudson's Cases, 2 ed., 893; *La Compagnie des Services Contractuels des Messageries Maritimes v. Tito Landi,* France, Council of State, 1936, Lauterpacht, Annual Dig., 1935–1937, Case No. 216. *Cf.,* however, Status of Russian Trade Delegation Case, Germany, *Reichsarbeitsgericht,* 1930, Lauterpacht, Annual Dig., 1929–1930, Case No. 202.

[11] The Court in the case of *In re* Ross, 140 U. S. 453, at 468, quoted the following passage from a communication of the United States minister in Japan to the Secretary of State: " 'Here was the construction above stated by me asserted by the same Senate which ratified the treaty, and by the same President who approved both the treaty and the act of Congress.' "

See So-called Rules of Construction, *infra,* § 535.

[12] Pigeon River Co. *v.* Cox Co., Ltd., 291 U. S. 138, 160–161.

[13] "In deciding the instant case," it declared, "we think that there are controlling considerations which make it unnecessary to pass broadly upon the significance of the words 'free and open' in provisions in treaties relating to the use of navigable streams." (*Id.,* 157.)

[14] U. S. Treaty Vol. III, 2607.

See Act of June 12, 1934, 48 Stat. 943, to provide for the final construction, on behalf of the United States, of postal treaties or conventions to which the United States is a party, in which it is declared that the decisions of the Postmaster General construing or interpreting the provisions of any postal treaties or conventions which have been or may be negotiated and concluded shall, if approved by the President, "be final and conclusive upon all officers of the United States."

[15] See Award of June 15, 1911, in the Case of the Chamizal Arbitration, United States and Mexico, For. Rel., 1911, 573.

5

# THE INTERPRETATION OF TREATIES BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE [1]

a

§ 533F. **Deference for the Form of a Text.** In the several cases calling for the interpretation of a treaty numerous considerations have in differing degree been responsible for the conclusions of the Court. Evidence internal and external to the particular instrument has been weighed; the conduct of the parties, the ends which they have sought to accomplish, historical and other backgrounds, and the practices of States in making kindred arrangements, have played their part.

In the first case confronting it, that of the *S.S. Wimbledon*,[2] decided on August 17, 1923, calling for an interpretation of Article 380 of the Treaty of Versailles, of June 28, 1919,[3] the Court approached the problem according to a method which has not been without influence upon its subsequent work. Instead of seeking primarily to ascertain the sense in which the words of the text were employed as a question of fact to be solved through the aid of all of the relevant evidence from whatsoever source, a majority of the tribunal looked to the form of the text as its chief guide, declaring that the terms of the article were "categorical" and "give rise to no doubt." [4] Acknowledging that Germany had, through the treaty, been obliged to submit to an important limitation upon the exercise of its rights as a sovereign in respect to the canal, and that such fact was "a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation," the Court declared, however, that it felt "obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted." [5] There were other considerations to which the Court referred which doubtless had their influence upon it and which perhaps sufficed to justify the result that was reached.[6] The case failed at least to present a

§ 533F. [1] The sections concerning this matter embrace in part a study by the author on "The Interpretation of Treaties by the Permanent Court of International Justice" published in the *Am. J.*, January 1930 (XXIV, 1), and also pertain to the subsequent development of the interpretative work of the Tribunal.

[2] Publications, Permanent Court of International Justice, Series A, No. 1.

[3] That article provided that "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce of all nations at peace with Germany on terms of entire equality." The Court was confronted with the problem of determining whether those provisions should be construed to impose an obligation upon Germany, the territorial sovereign, serving to forbid it to deny access to the Canal in 1921 to a British merchant vessel under French charter carrying a cargo of war material destined for Poland at a time when the treaty of peace between that State and Russia had not been ratified. The Court concluded that the article should be so construed.

[4] Publications, Permanent Court of International Justice, Series A, No. 1, 22.

[5] *Id.*, 24–25.

[6] Some should be noted. Stress was laid on the fact that as indicated by the arrangements for the Suez and Panama Canals, the use by belligerent vessels of the Kiel Canal did not run counter to any obligation of prevention by Germany. (*Id.*, 25–28.) It was noted that at the time of the *Wimbledon* affair, Germany had not claimed a right to close the Canal to vessels of war of belligerent States at peace with Germany.

definite conflict between "plain terms" so-called and evidence at variance with what their plainness seemed to demand.[7] The matter of the soundness of the judgment which was vigorously challenged by Judges Anzilotti and Huber,[8] as well as Schücking,[9] was, however, of less importance than the method by which the Tribunal undertook to perform the task of interpretation. That method involved the assumption either that the linguistic clearness of a text was identical with clearness of design on the part of the contracting States, or that those States were to be deemed to have attached to the words of their choice a significance which the form thereof linguistically demanded. Acceptance of either assumption was calculated to pervert the exercise of the function of the interpreter.[10]

The Court approached in like fashion the problem of interpreting Article 4 of the Minorities Treaty concluded by the Principal Allied Powers and Poland, June 28, 1919.[11] In explaining its conclusions, the Tribunal said:

> The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it.[12]

Again, in passing on the nature and scope of the right of Poland to establish a postal service within the port of Danzig in consequence of agreements between the Free City of Danzig and Poland, of November 9, 1920, and October 24, 1921, the Court declared:

> The rules as to a strict or liberal interpretation of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted

[7] The Court was far from intimating that such a conflict existed, and made no reference to some evidence in the nature of preparatory work discussed in the pleadings, offered by Germany in support of a differing view. See German Counterclaim, Publications, Permanent Court of International Justice, Series C, No. 3, Additional Volume, 40, 44. In a word, Germany failed to convince the Tribunal, through any evidence, that it was the design of the parties to permit that State to deal with the *Wimbledon* as it did.

[8] Publications, Permanent Court of International Justice, Series A, No. 1, 35.

[9] *Id.*, 43.

[10] Declared Judges Anzilotti and Huber in their dissenting opinion: "Though ["*si*" in the French version] it is true that when the wording of a treaty is clear, its literal meaning must be accepted as it stands, without limitation or extension, it is equally true that the words have no value except in so far as they express an idea; but it must not be presumed that the intention was to express an idea that leads to contradictory or impossible consequences or which, in the circumstances, must be regarded as going beyond the intention of the parties. The purely grammatical interpretation of every contract, and more especially of international treaties, must stop at this point." (*Id.*, 36.) Assuming as a major premise the theory that the provisions of the treaty in relation to the Kiel Canal were to be deemed to be applicable to, and to contemplate the existence of a state of peace, these judges were unable to construe them literally in the absence of evidence of such a design. It is unfortunate that the issue between the majority and the minority related chiefly to deductions to be drawn from the form of the text and the character of the concession yielded by Germany, rather than to conclusions of fact attributable to all of the evidence of design that was adduced.

[11] Seventh Advisory Opinion, Sept. 15, 1923, Publications, Permanent Court of International Justice, Series B, No. 7. The question concerned the conditions of habitual residence within specified territory which had to be met by parents of persons of certain nationalities who were born there, in order to enable the latter to attain Polish nationality.

[12] *Id.*, 20.

> in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.[13]

In both of these cases, however, the Court announced other and distinct reasons in support of the conclusions that were reached; [14] in neither case were those conclusions at variance with evidence deemed to establish an opposing design on the part of the contracting States.

In more recent years, with growing appreciation of the embarrassing implications necessarily involved in the acknowledgment or assertion that linguistic clearness is to be regarded as a decisive token of design or as the basis of a rule of interpretation in cases where extrinsic evidence reveals the fact that the contracting parties made use of particular words or phrases in order to give expression to a design contrary to what their form might indicate, the Court has become increasingly reluctant either to find clearness of guidance in the form of a text, or to subordinate the matter of actual design to that of the character of the symbols employed in the effort to register agreement. Instances where the Court has found occasion to discuss the uses of preparatory work illustrate the gradual change in the expression of its thought and perhaps also in its thinking.[15]

The Court has reiterated the declaration that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself," [16] implying thereby, to quote its language, that "preparatory work should not be used for the purpose of changing the plain meaning of a text." [17] Yet the Court took pains, after making the latter statement, to add that the records of the preparation of the text under consideration (of the Definitive Statute of the Danube) did not, in its opinion, "furnish anything calculated to

[13] Eleventh Advisory Opinion, May 16, 1925, Publications, Permanent Court of International Justice, Series B, No. 11, 39.

See also concurring opinion of Judge Anzilotti, in the Case concerning the Austro-German Customs Régime, Sept. 5, 1931, *id.*, Series A/B, No. 41, p. 60.

[14] In the former case it was declared that the Polish assertion (which the Court opposed) was in contradiction of the terms of the provision which it claimed to interpret, was not supported by the precedents supplied by international practice, imposed a condition not to be found in any treaty of annexation previously concluded, and that the inquiry which it prescribed would be arbitrary, especially in view of the first paragraph of Article 4 of the treaty. In the latter case the Court took pains to observe that its construction of the provisions in question was "not only reasonable" but also "supported by reference to the various articles taken by themselves and in their relation one to another." (Publications, Permanent Court of International Justice, Series B, No. 11, 39–40.)

[15] See, in this connection, H. Lauterpacht, The Development of International Law by the Permanent Court of International Justice, London, 1934, 35–41; same writer, "Some Observations on Preparatory Work in the Interpretation of Treaties," *Harv. Law Rev.*, XLVIII, 549; Manley O. Hudson, The Permanent Court of International Justice, New York, 1934, §§ 532–545.

[16] Ninth Judgment in the Case of the *S.S. Lotus*, Publications, Permanent Court of International Justice, Series A, No. 10, 16; Fourteenth Advisory Opinion Concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braïla, *id.*, Series B, No. 14, 28; Fourteenth Judgment in Case Concerning the Payment of Various Serbian Loans Issued in France, *id.*, Series A, Nos. 20/21, 30; Opinion in Case of the Interpretation of the Statute of the Memel Territory, *id.*, Series A/B, No. 47, 249; Opinion Interpretative of the Convention of 1919 Concerning the Work of Women at Night, *id.*, Series A/B, No. 50, 378.

[17] Fourteenth Advisory Opinion concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braïla, Dec. 8, 1927, Publications, Permanent Court of International Justice, Series B, No. 14, 31.

overrule the construction indicated by the actual terms of Article 6."[18] In one instance, in 1925, the Court was of opinion that since the particular article subjected to interpretation was "in itself sufficiently clear," the question did not arise whether consideration of the work done in preparation of the treaty in which it was embraced would also lead to the conclusions which the Court had drawn from the text. Nevertheless, the Court thought it well to test its own conclusions in the light of the negotiations leading up to the consummation of the treaty, and found therein nothing that was probative of a different design by the contracting parties. The Court went further, and declared that, assuming that a study of the preparatory work would have led to an opposing conclusion, that result would have been incompatible with the terms of the article in question, and productive of an interpretation which, as previously indicated, would from both a grammatical and logical point of view be demanded by the form of the text, thereby intimating that the form should be deemed to be decisive.[19]

It should be observed that the Court has regularly admitted and duly considered such preparatory work as was offered, except when it could not be fairly regarded as probative of a common design,[20] or when it was not properly authenticated, or not offered in compliance with conditions which the Court had laid down.[21] It has in no case found in that work evidence of a design which

[18] *Id.*

[19] Twelfth Advisory Opinion in relation to the Frontier between Turkey and Iraq, and involving an interpretation of the Treaty of Lausanne of June 24, 1923, Publications, Permanent Court of International Justice, Series B, No. 12, 22–24.

Declared Mr. J. N. Hyde in the course of a memorandum concerning this case, in 1935: "It was undesirable and illogical, having examined preparatory work then to attempt by words to outlaw such examination, which formed at least a confirmatory argument for the decision. Patently the dictum as to a possible conflict between linguistic clearness and preparatory work is out of place. It is a statement of controversial doctrine, violated in the context in which it is found."

[20] In the Case concerning the Territorial Jurisdiction of the International Commission of the River Oder, the Polish Government "cited and relied on *inter alia* certain passages taken, directly or indirectly, from the minutes of the Commission on Ports, Waterways and Railways of the Conference held in Paris in 1919 which drew up the Versailles Treaty." The six opposing governments (being those of Great Britain, the Czechoslovak Republic, Denmark, France, Germany, and Sweden) made objection to the admissibility of these references. On August 20, 1929, prior to the rendering of its judgment, the Court sustained the objection and excluded the minutes as evidence from the proceedings. Definite reasons were given for this decision — namely, that three of the parties concerned "did not take part in the work of the conference which prepared the Treaty of Versailles," that the record of that work could not be used to determine, in so far as they were concerned, "the import of the treaty"; and that "in any particular case, no account can be taken of evidence which is not admissible in respect of certain parties to that case." It was added that "the only preparatory work in question was that performed by the Commission of Ports, Waterways and Railways of the Peace Conference." Publications, Permanent Court of International Justice, Judgment No. 16, Series A, No. 23, 8, and Annex 3, 41–42.

In the course of its Thirteenth Judgment in the Case concerning the Factory at Chorzów (Claim for Indemnity, Merits), the Court declared that it "cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement." (Publications, Permanent Court of International Justice, Series A, No. 17, 51.)

[21] The Court declared in the course of the Fourteenth Advisory Opinion concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braïla (Publications, Permanent Court of International Justice, Series B, No. 14, 32), that "the record of the work preparatory to the adoption of these articles [those of the Treaty of Versailles which had been invoked in behalf of Roumania] being confidential and not having been

in its mind contradicted what the form of the language of the text under scrutiny appeared in its mind to establish. The circumstance that the Court has not yet been confronted with a case where in the estimation of a majority of the judges,[22] extrinsic evidence in the shape of preparatory work served to contradict conclusions which they drew from the character of the terms employed, accentuates the fact that the words of the tribunal in reference to the limitation in the event of a conflict must be regarded as dicta.

In the course of its Advisory Opinion concerning the Treatment of Polish Nationals in the Free City of Danzig, the Court observed that "this text not being absolutely clear, it may be useful, in order to ascertain its precise meaning, to recall here somewhat in detail the various drafts which existed prior to the adoption of the text now in force." [23] In its Opinion in 1932, in the case concerning the Work of Women at Night, despite a declaration that the terms of the article in question were "in themselves clear and free from ambiguity," [24] and notwithstanding the disclaimer of an intention "to derogate in any way from the rule which it has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself," the Court stated that it had been so struck with the confident opinions expressed at Geneva by several delegates with expert knowledge of the subject — to the effect that the convention applied only to working women (*ouvrières*), that it had been led to examine the preparatory work in order to see whether or not it confirmed the opinions expressed.[25] That examination led the Court to declare that the preparatory work confirmed the conclusion reached on a study

---

placed before the Court by, or with the consent of, the competent authority, the Court is not called upon to consider to what extent it might have been possible for it to take this preparatory work into account." This statement must, however, be regarded as a dictum which was hardly responsive to the factual situation in relation to this testimony. It so happened that the record of this work was not placed before the Court in the Roumanian Counter-Memorial or in the Roumanian oral argument properly certified in accordance with the Rules of the Court, and that in other ways it was not in compliance with conditions which the Court had laid down, and that for these reasons the Tribunal was not called upon to take this work into account. The issue did not, therefore, arise whether the confidential character of the evidence rendered it inadmissible. In this connection, the author acknowledges his indebtedness to Roger Sumner, Esquire, whose careful scrutiny of the record confronting the Court as disclosed in the pleadings, and narrated in a Memorandum at Columbia University, 1936, has inspired the conclusion stated.

Declared Jhr. van Eysinga, in his separate opinion in the Oscar Chinn Case, in 1934: "The undersigned cannot refrain in this connection from expressing his regret that the Court should frequently be called upon to give decisions in regard to collective conventions concluded after the Great War, without having at its disposal the records of the meetings at which these conventions were elaborated, these records being kept secret. The resulting lack of information has once more made itself felt in the present case." (Publications, Permanent Court of International Justice, Series A/B. No. 63, 136.)

[22] Probably, however, the dissenting Judges in the Case concerning the Work of Women at Night, were of opinion that there was such a contradiction between the conclusions derivable from the natural sense of the words employed in the instrument to be interpreted and those revealed by the preparatory work. (See Publications, Permanent Court of International Justice, Series A/B, No. 50, 383–389.)

[23] Publications, Permanent Court of International Justice, Series A/B, No. 44, 33.

[24] Publications, Permanent Court of International Justice, Series A/B, No. 50, 373.

[25] *Id.*, 378. Opinions will differ whether this statement on the part of the Court was a confession of doubt as to the sufficiency of the method which it was professing to follow, or a token of zeal to construe correctly the text that demanded interpretation.

See dissenting opinion by Judge Anzilotti (quoted *supra*, § 530), *id.*, 383 and 389.

of the text concerned, and that there was no good reason for interpreting Article 3 thereof otherwise than in accordance with the natural meaning of the words.[26] In view of the form of the text, the Court further declared it to be "necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words." [27] Accordingly, the Court considered the formal instruments which furnished the historical antecedents or background of the article which it was sought to interpret (as distinct from the preparatory work), and appeared to be willing to heed what they proved. In the instant case, however, the evidence derived from such sources was not deemed to be productive of the requisite "valid ground." [28]

In 1934, in its Opinion in the Lighthouses Case between France and Greece, the Tribunal was confronted with the task of interpreting the words "contract . . . duly entered into" contained in a certain agreement.[29] Not regarding the words "duly entered into" as a technical phrase always to be deemed to possess the same meaning, it was said that "where the context does not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice, has to consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties." [30]

In its Advisory Opinion of April 6, 1935, concerning Minority Schools in Albania,[31] in which the Court was obliged to interpret the Albanian Declaration before the Council of the League of Nations on October 2, 1921,[32] purporting to guarantee to minorities of Albanian nationals the same treatment "in law and in fact" as other Albanians and to give them "an equal right" to maintain

[26] *Id.*, 380.

[27] *Id.*, 373.

[28] *Id.*, 378, where it was said: "The grounds considered above upon which it has been suggested that the natural meaning of the text of the Convention can be displaced, do not appear to the Court to be well founded." Here thus, was a seeming limitation of the stern doctrine that would exclude evidence contradictory to the "plain meaning" of a text, and significantly pointed to a form or type of extrinsic evidence which when probative of a common design that was not in harmony with that meaning, might, nevertheless, be accepted as a basis of interpretation. This point was developed by Mr. C. H. McLaughlin, in a seminar at Columbia University, 1935–1936, and is worthy of consideration.

[29] Publications, Permanent Court of International Justice, Series A/B, No. 62. The language calling for interpretation was contained in Art. I of Protocol XII, attached to the Treaty of Lausanne of July 24, 1923, embodying the peace settlement between Turkey and the Principal Allied Powers.

[30] Publications, Permanent Court of International Justice, Series A/B, No. 62, 13.

In this case the Court was confronted with the task of interpreting a "Special Agreement" contemplating an adjudication before itself concerning the interpretation of a particular protocol under conditions when the Court found that "there was no agreement" between the parties "as to what the words meant in the Special Agreement." (*Id.*, 17.) This lack of accord did not, however, signify also lack of actual agreement to adjudicate before the Court the question whether a particular contract of concession granted by the Ottoman Government to a French firm in 1913, "was duly entered into and accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently."

[31] Publications, Permanent Court of International Justice, Series A/B, No. 64.

[32] The precise question before the Court was whether, regard being had to that Declaration, as a whole, the Albanian Government was justified in its plea that, as the abolition of the private schools in Albania constituted a general measure applicable to the majority as well as to the minority, it was in conformity with the letter and the spirit of the stipulations laid down in Art. 5, first paragraph, of that Declaration. (See *id.*, 5.)

private schools, the Tribunal appeared to conclude that the "intention was to grant to the minority an unconditional right to maintain and create their own charitable institutions and schools," [33] and that any lesser grant would result in "inequality in fact." [34] Apart from the matter of the soundness of this conclusion, it is to be noted that the Court undertook to interpret a paragraph which in the estimation of a minority of the judges was "clear and simple" by reference to extrinsic data, and to find therein evidence of a design that ran "counter to the natural sense of the words." [35] The opinion of the Court marked no primary deference for or reference to linguistic clearness, and no intimation that from the form of the text there was to be deduced an authoritative and uncontradictable standard of interpretation. Moreover, the use of preparatory work was unaccompanied by any statement that the text calling for interpretation was not clear.[36] The case thus revealed a seeming departure from methods of approach which the Court had applied in earlier cases, a fact that was noted by the dissenting judges.[37] In the course of its unanimous judgment of November 6th, 1937, in the Borchgrave Case (Preliminary Objections), the Court adverted to "the diplomatic correspondence antedating the Special Agreement," which was the object of interpretation as indicative of the intention of the parties thereto, and that without discussion of the linguistic clarity of the text.[38]

From the record of its experience as an interpreter of treaties, it is to be anticipated that the Permanent Court of International Justice, if it be resuscitated after the present war, will become increasingly indisposed to expect to find sole or decisive guidance as to the design of the parties in the form of texts which purport to register agreement, and that evidence of such design, wherever to be found, and regardless of lack of harmony with such form, will become increasingly acknowledged to be decisive of the sense in which particular terms and phrases were in fact employed; and finally, that the ascertainment of that sense — or to put it more broadly, the design of the parties in reference to that sense — will be regarded in reality as the goal of the interpreter.[39]

[33] The language quoted is taken from the minority opinion, *id.*, 25.

[34] *Id.*, 19.

[35] *Id.*, 24 and 32.

[36] The Court announced that the construction which it placed on paragraph 1 of Art. 5 was "confirmed by the history of this provision." (*Id.*, 21.)

[37] Thus, it was said in the dissenting opinion by Sir Cecil Hurst, Count Rostworowski and M. Negulesco: "As the opinion of the Court is based on the general purpose which the minorities treaties are presumed to have had in view and not on the text of Article 5, paragraph 1, of the Albanian Declaration, it involves to some extent a departure from the principles hitherto adopted by this Court in the interpretation of international instruments, that in presence of a clause which is reasonably clear the Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added to it or substituted for it, and this even if the results following from it may in some particular hypothesis seem unsatisfactory." (*Id.*, 25–26.)

It should be observed that these dissentients also relied upon preparatory work in support of their conclusions. (*Id.*, 32.)

[38] Publications, Permanent Court of International Justice, Series A/B, No. 72, 158, 163–168.

[39] The final result may not express itself in utterances that proclaim or acknowledge departure from earlier dicta that emphasized deference for the form of a text, but may be rather exemplified by conclusions that fail, in the particular case, to find linguistic clarity in the terms of the instrument subjected to interpretation, and which, therefore, are deemed to give no room for the application of a restrictive rule.

b

§ 533G. **Versions in Differing Languages.** The Court has expressed the view that

> Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.[1]

The foregoing statement was, however, a dictum uttered in the course of the Second Judgment concerning the Mavrommatis Palestine Concessions in connection with the construction of the words "public ownership or control" (*propriété ou contrôle public*) contained in Article II of the mandate for Palestine conferred on His Britannic Majesty, July 24, 1922. A majority of the Court, deeming the English version "to have a more restricted meaning" than the French, regarded the former as authoritative in determining the nature of the acts of the Palestine Administration to which the mandate applied.[2] Nevertheless, it was also of opinion that the English expression was still broad enough to embrace certain acts of the administration in granting a concession to a particular concessionaire. "This wider meaning," in the opinion of the Court, appeared to be the only one which did not nullify the expression "*contrôle public*" in the French version. It should be observed, however, that this so-called "wider meaning" was capable of utilization merely because it was one regarded by the tribunal as reasonably assignable to the words of the English language.[3] Thus, the Court was not called upon to apply the rule which it had enunciated in the face of extrinsic evidence establishing to the satisfaction of the Tribunal a design on the part of the contracting parties to use the words employed in the mandate in a sense other than that regarded by it to be fairly assignable to them in the English language. The Court did not have occasion to declare that the narrower scope of a burden indicated by the language of one version should be deemed to be decisive of a common design notwithstanding proof that the parties did in fact employ the two texts to refer to a broad undertaking not fairly described by the phraseology of one of the languages utilized as a setting for the agreement.[4] It may not be out of place here to observe that the Court

§ 533G. [1] Judgment No. 2 in the Case of the Mavrommatis Palestine Concessions, Publications, Permanent Court of International Justice, Series A, No. 2, 19.

[2] *Id.*, 20.

[3] *Cf.* dissenting opinion of Judge Moore, *id.*, 69–70.

[4] In the Second Advisory Opinion concerning the Competence of the International Labour Organisation, the Court was not obliged to apply a rule such as that later enunciated in the Mavrommatis Case, as quoted in the text. The Tribunal concluded that the function of the words "*industrie*" and "*industriel*" was not essentially unlike that of the words "industry" and "industrial" employed in the English version of the treaty. The Court expressed the view that the French words, though commonly used in a relatively narrower sense than was the case with respect to the corresponding words in the English language, might, nevertheless, be employed, as in the English, to include that form of production known as agriculture. It was declared that "the context is the final test, and in the present instance the Court must consider the position in which these words are found and the sense in which they are em-

has declared that where a convention "was drawn up" in a single language — French, "regard must be had to the meaning of the disputed term in that language." [5]

c

§ 533H. **Some Miscellaneous Considerations.** When from an examination of all of the evidence that has been offered in relation to a treaty, the Court has concluded that there was a broad design to facilitate the achievement of a particular end, it is loathe to yield to a construction subversive of such a purpose and tending to thwart it. In one sense this is merely a manifestation of respect for the judicial duty to heed what the preponderance of evidence establishes. In another, however, this attitude shows that in appraising the value of testimony in support of opposing views, the Court is likely to attach great weight to textual and other manifestations of a common design to accomplish a general yet well-defined purpose, and is proportionally reluctant to acknowledge the force of testimony (and still less of arguments) that may be obstructive of it.[1]

While the Court has expressed the view that where a text was "doubtful, the solution should be adopted which imposes the least restriction on the freedom of States," [2] it has not found occasion to apply such a rule. In the instances where

---

ployed in Part XIII of the Treaty of Versailles." (Publications, Permanent Court of International Justice, Series B, No. 2, 35.)

[5] Tenth Advisory Opinion concerning the Exchange of Greek and Turkish Populations, Publications, Permanent Court of International Justice, Series B, No. 10, 18.

Among cases before other tribunals calling for the interpretation of treaties in more than one language, see Reparation Commission *v.* German Government, Special Arbitral Tribunal, 1924, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 194; Standard Oil Company Tankers Case, Arbitration between the Reparation Commission and the United States, 1926, McNair and Lauterpacht, Annual Dig., 1925–1926, Case No. 281; Wietzenhoffer *v.* Germany, Roumano-German Mixed Arbitral Tribunal, 1926, *id.*, Case No. 282; *Société Audiffren-Singrun* v. *Liquidation Morlang, Binger et Société Atlas,* Civil Tribunal of Strasbourg, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 294; Archdukes of the Habsburg-Lorraine House *v.* Polish State Treasury, Poland, Supreme Court, 1930, Lauterpacht, Annual Dig., 1929–1930, Case No. 235 (with editorial note, p. 370).

See also Hackworth, Dig., V, § 499, and documents there cited.

§ 533H. [1] See Eighth Judgment, Case between Germany and Poland concerning the Factory at Chorzów (claim for indemnity and jurisdiction), Publications, Permanent Court of International Justice, Series A, No. 9; Thirteenth Advisory Opinion concerning the Competence of the International Labor Organization, *id.*, Series B, No. 13; Sixteenth Advisory Opinion concerning the Power of the Mixed Commission for the Exchange of Greek and Turkish Populations under the Greco-Turkish Agreement of Dec. 1, 1926 (Final Protocol, Art. IV), *id.*, Series B, No. 16; Sixth Advisory Opinion, on Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, *id.*, Series B, No. 6.

In the case concerning the Diversion of Water from the Meuse, in 1937, Judge Hudson, in the course of his individual opinion adverted to the "freedom of the Court to consider principles of equity as part of the international law which it must apply." (Publications, Permanent Court of International Justice, Series A/B, No. 70, p. 77.) He added: "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party." (*Id.*, 77.) He felt, moreover, that there might be room for the application of this principle in the interpretation of treaties. He may have felt also that when two parties were contracting as equals and assumed an identical or reciprocal obligation, there might be imputed to both a common design that forbade either, when guilty of continued non-performance of such obligation towards the other, to utilize for its own benefit a like non-performance of that obligation by the other.

[2] See Judgment No. 16 in Case relating to the Territorial Jurisdiction of the International

it has been invoked, the Court has appeared to find at least a textual manifestation of a clearness of design that left no room for what might be looked upon as a narrow construction of the concession yielded by the contracting grantor.[3] Regarding the terms of a declaration by which the French Government in 1931 accepted the compulsory jurisdiction of the Court as "perfectly clear," the Court in its judgment of June 14, 1938, concerning Phospates in Morocco (Preliminary Objections), declared that "in these circumstances, there is no occasion to resort to a restrictive interpretation that, in case of doubt, might be advisable in regard to a clause which must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it." [4]

As has been suggested above,[5] the Court makes faithful effort to ascertain and take full cognizance of the historical and other backgrounds revealing the position in which the parties found themselves when they undertook to agree, as a helpful means of ascertaining their exact design when they did so. This effort has been manifested on numerous occasions, and notably in the Fourteenth Advisory Opinion Concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braïla,[6] and in the Sixteenth Judgment in the Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder.[7] The endeavor to ascertain the design of the parties is, at

---

Commission of the River Oder, Publications, Permanent Court of International Justice, Series A, No. 23, 26, where the Court added: "This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States." (*Id.*, 26.)

[3] See Case of the *S.S. Wimbledon,* Judgment No. 1, Publications, Permanent Court of International Justice, Series A, No. 1, 24–25; Second Advisory Opinion concerning the Competence of the International Labor Organization, *id.*, Series B, No. 2, 23; Twelfth Advisory Opinion concerning Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), *id.*, Series B, No. 12, 25, where the Court declared: "This argument [by the Turkish Government] appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the present case, however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear."

Declared the Court in a dictum in the Fourth Advisory Opinion in the Case as to the Nationality Decrees Issued in Tunis and Morocco: "It must not, however, be forgotten that the provision contained in paragraph 8 [of Art. 15 of the Covenant of the League of Nations], in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international law, solely within the domestic jurisdiction of one Party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation." (Publication, Permanent Court of International Justice, Series B, No. 4, 25.)

[4] Publications, Permanent Court of International Justice, Series A/B, No. 74, 23–24.

[5] See *supra,* § 533F.

[6] Publications, Permanent Court of International Justice, Series B, No. 14, 38–46.

[7] Publications, Permanent Court of International Justice, Series A, No. 23, 26–29. See, also, Advisory Opinion concerning the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, *id.*, Series A/B, No. 44, 27–28; Judgment in the Case of the Free Zones of Upper Savoy and the District of Gex, *id.*, Series A/B, No. 46, 148.

In the course of its Advisory Opinion Concerning the Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, the Court made reference to "the history of this Convention as shown by the preparatory work." (*Id.*, Series A/B, No. 50,

times, moreover, exemplified in the individual or dissenting opinions of members of the Court.[8] In fact, every feature of the conditions in which the instrument to be interpreted was concluded is scrutinized by the Court in order to get at the thought of the contracting parties.[9] This judicial diligence is a token of the unceasing effort made to heed that thought as a determining factor in the construction of terms that have been employed. It is, moreover, a salutary check upon any disposition to attach undue significance to the form of a text. If sharp differences of opinion frequently manifest themselves in the views that are finally expressed, it is at times attributable to differing appraisals of the evidence that has been adduced and to differing conclusions as to the design of the contracting parties, rather than to divergence of opinion as to applicable methods of interpretation.[10]

The Permanent Court of International Justice appears to be quite aware of the fact that the action of the parties long subsequent to the negotiation of a treaty is not necessarily probative of the sense in which the terms were used at the time when the agreement was made; [11] and that if such action is to be respected it is attributable to reasons that do not grow out of the requirements of interpretation. The Court may find convenient confirmation of its conclusions in the action of the parties,[12] and it may even regard itself in a particular case

---

378.) Again, in its Judgment in the Lighthouses Case Between France and Greece, the Court adverted to "the history of the Special Agreement" that was the object of interpretation as a convenient mode of referring to the preparatory work involved. (*Id.*, Series A/B, No. 62, 16.)

[8] See, for example, dissenting opinion of Judge Hudson in The Electricity Company of Sofia and Bulgaria Case (Preliminary Objection), where careful effort was made to get at the intentions of the parties to the treaty between Belgium and Bulgaria of June 23, 1931, partly through the "pre-natal history" of that agreement. Publications, Permanent Court of International Justice, Series A/B, No. 77, 125–128. See also separate opinion of the same judge in the Pajzs, Csáky, Esterházy Case, *id.*, Series A/B, No. 68, 76.

[9] "Quite clearly, the Court would not be justified in dealing with an international instrument as if it had been concluded *in vacuo*. It must take account of the general setting in which the parties acted if it would understand their purposes, and its construction of an instrument may very properly be influenced by factors of a political or social significance." (Manley O. Hudson, The Permanent Court of International Justice, New York, 1934, 567.)

[10] See, for example, The Pajzs, Csáky, Esterházy Case, Publications, Permanent Court of International Justice, Series A/B, No. 68.

[11] In the course of the Thirteenth Advisory Opinion of the Permanent Court of International Justice concerning the Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer, the Court declared that a certain "measure was thus treated as falling within the sphere of labour legislation; and this may be regarded as a contemporaneous practical interpretation made by the High Contracting Parties of the scope of the competence which they had conferred upon the International Labour Organisation." (Publications, Permanent Court of International Justice, Series B, No. 13, 19.) See, also, Second Advisory Opinion Concerning the Competence of the International Labour Organisation, *id.*, Series B, No. 2, 39–41.

In the course of the Twelfth Advisory Opinion of the same Tribunal interpretative of Article 3, Paragraph 2 of the Treaty of Lausanne (Frontier between Turkey and Iraq) it was said: "The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the Parties at the time of the conclusion of that Treaty." (*Id.*, Series B, No. 12, 24.) The inference from this statement would appear to be that facts long subsequent to the conclusion of a treaty might not be calculated to throw light on the intention of the parties when they consummated their agreement.

[12] See Fifteenth Advisory Opinion concerning Jurisdiction of the Courts of Danzig, Publications, Permanent Court of International Justice, Series B, No. 15, 20.

as obliged to defer thereto. Such deference, save when the action of the parties is contemporaneous with the consummation of their agreement, marks an avoidance of the task of interpretation.[13]

6

§ 534. **Declarations of Negotiators.** Declarations on the part of the negotiators of a treaty at the time of its conclusion, or by plenipotentiaries exchanging ratifications, indicating the understanding of the parties as to the sense in which particular terms were employed are useful as sources of interpretation and should not be disregarded. Nor are the declarations of negotiators even long subsequent to the perfecting of an agreement without value.[1] The reason why, according to the common law, declarations of intention could not be given in aid of the interpretation of documents, save under certain exceptional circumstances, was that they were considered as dangerous for a jury, who, not being expert in such matters, might attach to them too great weight.[2] This objection is not applicable to adjudications concerning the interpretation of agreements between States. Declarations of their negotiators, in so far as they indicate the sense in which terms were employed, are valuable, not merely because they are enlightening, but also because they may be safely entrusted to the consideration of judges or arbitrators, or to ministers of State.[3] The Department of State has

[13] See, also, The Attitude of the Supreme Court of the United States, Miscellaneous Considerations, *supra*, § 533E; So-called Rules of Construction, *infra*, § 535.

§ 534. [1] A commission under Article V of the Jay Treaty of Nov. 19, 1794, between the United States and Great Britain, was established to decide what river was the River St. Croix mentioned by the treaty of 1782–1783, as forming a part of the boundary between the United States and New Brunswick. There was at that time no river known as the St. Croix. The depositions of John Adams and John Jay, surviving negotiators of the treaty of 1782–1783, as well as a letter of Benjamin Franklin, also a negotiator of that treaty, were received in evidence as declarations concerning the original negotiations and the agreement itself. Moore, Adjudications, I, 63–67; *id.*, II, 362–363.

[2] *Compare* reasoning in Crandall, Treaties, 2 ed., § 166.

[3] Prior to the exchange of ratifications of the Clayton-Bulwer treaty of 1850, Sir Henry Bulwer, the British Minister, made a declaration at the Department of State that his Government did not understand the engagements of that convention to apply to the British settlement at Honduras, or to its dependencies. Mr. Clayton, Secretary of State, in reply acknowledged that he understood that British Honduras was not embraced in the treaty, at the same time declining to deny or affirm British title to the territory in question. The Secretary adverted to the fact that he had been informed by the Chairman of the Senate Committee on Foreign Relations, Mr. W. R. King, "that the Senate perfectly understood that the treaty did not include British Honduras." H. Ex. Doc. 1, 34th Cong., 1 Sess., 119, Moore, Dig., III, 136–137. Lord Clarendon, in the course of a note to Mr. Buchanan, May 2, 1854, said: "It was never in the contemplation of Her Majesty's Government, nor in that of the Government of the United States, that the treaty of 1850 should interfere in any way with Her Majesty's settlement at Belize or its dependencies." Brit. and For. St. Pap., XLVI, 267; Moore, Dig., III, 138. The statements of Sir Henry Bulwer and Messrs. Clayton and King were clearly evidence of the fact asserted. For that purpose, and for that alone, they were entitled to consideration. It must be obvious that these gentlemen did not possess the power to amend a treaty between the United States and Great Britain. Owing, however, to their official positions they necessarily had precise knowledge of the fact in question. The evidential quality of their declarations in regard to it could not be ignored.

See, also, Mr. Marcy, Secy. of State, to Mr. Borland, Dec. 30, 1853, Correspondence in Relation to the Proposed Interoceanic Canal (Washington, 1885), 247, Moore, Dig., III, 137; Lord Granville to Mr. West, Minister at Washington, Dec. 30, 1882, For. Rel. 1883, 484; Memorandum of Mr. Olney, Secy. of State, 1896, on the Clayton-Bulwer Treaty, Moore, Dig., III, 203, 207; The Diamond Rings, 183 U. S. 176.

appreciated the significance of such statements.[4] Courts of arbitration have accepted them.[5]

When the declarations of negotiators constitute a part of the negotiations leading up to the signature and subsequent acts pertaining to the perfecting of a treaty they are to be regarded as a part of the preparatory work, and are to be dealt with accordingly.[6]

7

§ 535. **So-called Rules of Construction.** As no principle of law deters contracting States from employing the terms of their agreement in any sense they choose, or prevents those charged with the task of interpretation from giving heed to all evidence that is probative of the choice actually made, it may be doubted whether the enunciation of so-called rules of construction serves a useful purpose.[1] Some supposed rules have produced much confusion of thought by diverting attention from the essential function of the interpreter through the intimation that the actual design of the contracting parties should be subordinated to the form which a text was permitted to assume.[2] As has been sug-

[4] The treaty between the United States and Switzerland of November 25, 1850, provided for most-favored-nation treatment "in the importation, exportation, and transit" of their respective products. In 1898, the Swiss Government claimed that by virtue of Articles VIII, IX, X, and XII, it was entitled to demand for Swiss importations into the United States such concessions as were accorded French importations under a reciprocity agreement between the United States and France of May 28, 1898. Mr. Pioda, Swiss Minister, to Mr. Day, Secy. of State, June 29, 1898, For. Rel. 1899, 740. Mr. Day, Secy. of State, pointed out "that a reciprocity treaty is a bargain and not a favor, and that it therefore does not come within the scope of the most-favored-nation clause." (*Id.*, 740.) It was urged, however, by the Swiss Minister that according to the understanding of the signatory parties in 1850, expressly shown by the American plenipotentiary, Mr. Mann, who negotiated the treaty, no limitation was to be attached to the most-favored-nation clause. *Id.*, 742. Mr. Hay, Secy. of State, in a note of November 21, 1898, admitted that the American Minister who conducted the negotiations agreed to the interpretation advanced by Switzerland, and that the treaty was ratified in both countries with the distinct understanding that it should apply to reciprocity treaties. He, therefore, concluded "under these circumstances we believe it to be our duty to acknowledge the equity of the reclamation presented by your Government. Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." (*Id.*, 747–748.)

[5] See stress laid by the Arbitrators in their Award in the North Atlantic Coast Fisheries Arbitration on the correspondence between Mr. Adams and Lord Bathurst in 1815, in dealing with the solution of Question II, *Proceedings*, North Atlantic Fisheries Arbitration, I, 89. It will be observed that this correspondence antedated the treaty concerned which was concluded Oct. 20, 1818.

[6] See Attitude of the Supreme Court of the United States, Preparatory Work, *supra*, § 533D; also, The Interpretation of Treaties by the Permanent Court of International Justice, Deference for the Form of a Text, *supra*, § 533F.

See memorandum of Dec. 15, 1928, sent by Mr. Hackworth, the Solicitor for the Dept. of State, to Mr. Mitchell, the Solicitor General, interpretative of Art. III of the Jay Treaty of 1794, between the United States and Great Britain, Hackworth, Dig., V, § 494.

§ 535. [1] See systems of rules such as those contained in Vattel, Book II, Chap. XVII; Phillimore, 2 ed., II, Chap. VIII; Hall, 8 ed., §§ 111–112; Woolsey, 6 ed., 173–174; Wharton, Dig., II, § 133.

[2] This has been notably true with reference to the following statement by Vattel, Book II, § 263: "The first general rule of interpretation is that *it is not permissible to interpret what has no need of interpretation*. When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurdity, there is no ground for refusing to accept the meaning which the deed naturally presents." Classics of International Law, Vattel, Vol. III (Translation of the Edition of 1758 by Charles G. Fenwick), published by the Carnegie Institution of Washington, 1916, p. 199.

gested above, it is the freedom of contracting States in the development of the art of treaty-making,[3] and also the simplicity of the work of those who are called upon to interpret their achievements, which rather deserve emphasis. There must be intolerance of whatever serves to obscure perception of these considerations.

As has been observed elsewhere, the Permanent Court of International Justice while adverting at times to certain supposed rules of interpretation has not found itself obliged to employ them, at least by way of restricting the use of evidence that was extrinsic to the instrument under consideration.[4] The absence of occasion calling for their invocation has served to transform into dicta the utterances of the tribunal in support of rules of which it has spoken.[5]

Doubtless some supposed rules may be explained as merely illustrative of forms which the application of principles already noted may assume. Thus the recurring statement that the general purposes of a convention prevail over a conflicting signification sought to be attached to any particular terms,[6] appears merely to signify that the considered expression of those purposes in a treaty affords convincing proof of the design of the parties. Respect therefor is merely a mark of deference for the standard of their choice.[7] The frequent declaration that the words of a treaty should be construed in the sense which they would normally or naturally have in their context, and which has found expression without as well as within the Permanent Court of International Justice, betokens merely a point of departure or presumption, that must shrink to insignificance in the face of convincing evidence of opposing design.[8]

That the courts of a contracting State, such as those of the United States, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness,[9] and not to "provide the means of perpetrating or protecting frauds," [10] that their agreement should be interpreted "in a spirt of *uberrima fides,* and in a manner to carry out its manifest purpose,[11]

[3] See The Nature of the Problem, *supra,* § 530.

[4] See The Interpretation of Treaties by the Permanent Court of International Justice, *supra,* §§ 533F–533H.

[5] See, for example, Opinion concerning the Work of Women at Night, Publications, Permanent Court of International Justice, Series A/B, No. 50, 373, 378.

[6] Note the respective contentions of the United States and Great Britain concerning Article I, treaty of June 15, 1846, providing for the San Juan water boundary, and the award of the arbitrator, William I, German Emperor, under Articles XXXIV–XLII, treaty of May 8, 1871. Moore, Arbitrations, I, 213–214, 219–221, 229–231.

See, also, the frequently cited case of the interpretation of Article IX of the Treaty of Utrecht of 1713, between Great Britain and France, providing for the destruction of the port and fortifications at Dunkirk, given by Phillimore, II, § 73, and Hall, Higgins' 8 ed., 393.

See interpretation of Art. I of the convention of Sept. 10, 1857, between the United States and New Granada by Mr. Upham, umpire of the United States and New Granada Joint Commission, with respect to the presentation of and liability for riot claims. Moore, Arbitrations, II, 1375–1378.

[7] The language of Field, J., in *In re* Ross, 140 U. S. 453, 475, suggests no opposing theory.

[8] See *supra,* § 533F. Also Mr. Hull, Secy. of State, to the British Ambassador at Washington, Oct. 6, 1939, Hackworth, Dig., V, 495.

[9] Ubeda *v.* Zialcita, 226 U. S. 452, 454.

[10] Story, J., in The Amistad, 15 Pet. 518, 595, where he added: "But all the provisions are to be construed as intended to be applied to *bona fide* transactions."

[11] Mr. Justice Brown, in Tucker *v.* Alexandroff, 183 U. S. 424, 437. See also Mr. Justice Day in Sullivan *v.* Kidd, 254 U. S. 433, at 439.

and that its terms should be liberally construed,[12] manifests simply an imputation of good faith and high purpose to the executive branch of the Government and to that of other contracting powers. It is recognition of the only reasonable theory on which States professing to be honorable in their relations with each other could be deemed to conclude treaties.

The courts may wisely hesitate to indulge in the presumption that the terms of a treaty were given a signification such as to entail a peculiar sacrifice by one party and involving undertakings beyond the requirements of international law.[13] As Judge Parker, Umpire of the Mixed Claims Commission, United States and Germany, under agreement of August 10, 1922, declared in his opinion in the Lusitania Cases, November 1, 1923: "Treaty provisions must be so construed as best to conform to accepted principles of international law rather than in derogation of them." [14] Such reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such a sense.[15] It does not imply any denial of the right of the parties so to agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude must be regarded as more salutary than one evincing readiness to presume that the contracting States did not attach to the terms of a treaty a signification which they might reasonably have adopted.[16] When

[12] See The Attitude of the Supreme Court of the United States, Concerning a Liberal Construction, *supra*, § 533B.

[13] See The Aroa Mines Case, *supra*, § 532; also Marshall, C. J., in United States *v.* Percheman, 7 Pet. 51, 88; Muscat Dhows Case, Award by the Tribunal at The Hague, Aug. 8, 1905, J. B. Scott, Hague Court Reports, 95, 97.

[14] Consolidated Edition of Decisions and Opinions, 1925, 17, 31.

[15] Thus in the Award in the North Atlantic Coast Fisheries Arbitration, with respect to Question I, it was said: "Considering that the right to regulate the liberties conferred by the treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States (viz., that the right to regulate does not reside independently in Great Britain, the territorial sovereign) must fall on the United States." (*Proceedings*, North Atlantic Coast Fisheries Arbitration, I, 74.) It may be observed that in the estimation of the Tribunal, the United States failed to sustain this burden. *Id.*, 76.

[16] In the case of Rocca *v.* Thompson, 223 U. S. 317, the Supreme Court of the United States, in concluding that under the treaty with the Argentine Confederation of July 27, 1853, a consular officer was not accorded the right to original administration of the estate of a deceased national to the exclusion of one authorized by local law to administer the estate, was careful not to assert that there was any presumption against the conferring of such a right, even though it was declared in the opinion that that right was "primarily committed to state law."

In the case of Faber *v.* United States, 221 U. S. 649, Mr. Justice Lamar declared that the words "other country," in the Cuban treaty of 1903, should be "presumed" to have been used "according to their known and established interpretation," and that "both in the light of our own legislation and in view of the generally accepted interpretation of the word 'imports,' the eighth Article of the treaty cannot be construed to have been intended to give to Cuba an advantage over shipments of merchandise coming into the United States from a port of its own territory, where the collections were in part made as a means for raising revenue for the support of the government of the Philippine Islands." It is to be observed that the Cuban treaty was concluded some time subsequent to the decisions of the Supreme Court in the *Insular Cases* to the effect that Porto Rico and the Philippine Islands were not foreign countries, but territory of the United States. It was reasonable, therefore, to conclude that the United States in contracting with Cuba did not consent to treat them as foreign, or to permit Cuba to enjoy advantages over the United States in essentially domestic shipments from one portion of its territory to another. Thus the case

that signification is one involving no engagement which the law of nations as reflected by the practice of States regards as excessive, there would be slight ground to regard the choice of it as unreasonable.

Contracting States have at times, during the years following the conclusion of an agreement, placed a definite construction on the terms thereof; and this circumstance has been controlling in the minds of arbitrators in construing the compact.[17] In such a case the tribunal has in reality not undertaken strictly to solve any problem of interpretation, regarding the action of the parties as precluding such a task.[18] A court may even feel obliged to sustain their construction of a treaty differing widely from that which it was in fact possible to prove to have been the design of the parties at the time when the agreement was concluded. It has been observed that in 1933, the Supreme Court of the United States did not hesitate to express by way of dictum its deference for the "practical construction" which the contracting parties applied to Article II of the Webster-Ashburton treaty of 1842, long after the consummation of the arrangement.[19] It should be noted, however, that a tribunal may reasonably find in the conduct of the contracting parties contemporaneous with, or shortly after the conclusion of a treaty, evidence of their common design in using particular terms as they did.[20]

It ought to be clear that when the parties themselves agree to construe a

---

is one in which there was solid evidence from which to derive the significance attached to the terms of the treaty.

[17] See Chamberlain & Hookham, Ltd. *v.* Solar Zahlerwerke, Anglo-German Mixed Arbitral Tribunal, 1922, Williams and Lauterpacht, Annual Dig., 1919–1922, Case No. 249. See, also, instances contained in Crandall, 2 ed., § 167.

[18] See, for example, holding of a majority of the arbitrators (Messrs. Lafleur and Mills), June 15, 1911, in the Chamizal Case (concerning the interpretation of the treaties of 1848 and 1853), under convention with Mexico of June 24, 1910, *Am. J.*, V, 785, 805, where it was said: "It appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary."

See, also, Rule 10 of principles adopted by Spanish Treaty Claims Commission, April 28, 1903, Special Report by William E. Fuller, 23.

In his award in the Reserved Fisheries Arbitration under Article I of the reciprocity treaty between the United States and Great Britain of June 5, 1854, the umpire, Mr. John Hamilton Gray, said: "But might it not also be assumed, that where a country had, by a long series of public documents, legislative enactments, grants, and proclamations, defined certain waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions previously used, and adopted, would be mutually binding in interpreting the treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might." (Moore, Arbitrations, I, 449, 458.)

[19] See The Attitude of the Supreme Court of the United States, Miscellaneous Considerations, § 533E, in special relation to the case of Pigeon River Co. *v.* Cox Co., 291 U. S. 138.

[20] See Archdukes of the Habsburg-Lorraine House *v.* Polish State Treasury, Poland, Supreme Court, 1930, Lauterpacht, Annual Dig., 1929–1930, Case No. 248, with editorial note, p. 397.

See *In re* Ross, 140 U. S. 453, 468. See The Interpretation of Treaties by the Permanent Court of International Justice, Some Miscellaneous Considerations, *supra*, § 533H.

treaty in a particular way as, for example, by a declaration accompanying or appended to the instrument,[21] they necessarily solve the question of interpretation, and close the door to a judicial construction at variance therewith.[22]

When the courts regard themselves as competent to undertake the solution of pure questions of interpretation that confront them, it will be found that in general they are increasingly disposed to consecrate themselves to an endeavor to ascertain the sense in which contracting parties employed the terms of instruments in which they sought to express their accord; and it will also be found that those interpreters are likely to be inclined to resent as obstructive of that solution and as uncalled for by any requirement of international law or of logic any so-called rule that would exclude, or divert attention from, such evidence as may be probative of design.

## 8

## THE MOST-FAVORED-NATION CLAUSE

### a

§ 536. **Conditional and Unconditional Pledges.**[1] The United States Tariff Commission, in discussing the practice of the United States with respect to the

[21] See Declaration accompanying treaty between the United States of America, the British Empire, France, and Japan Relating to Their Insular Possessions and Insular Dominions in the Pacific Ocean, of Dec. 13, 1921, U. S. Treaty Vol. III, 3096.

[22] "The Permanent Court of International Justice must of course follow any interpretation of an instrument which may have been agreed upon by the parties after the instrument had taken final form, though it has been scrupulously attentive to the facts in its willingness to find any such agreement. In the *Jaworzina Case,* it refused to admit the power of the Conference of Ambassadors to give a binding interpretation to its own previous decision after the task entrusted to the Conference had been fulfilled, saying that 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.'" (Manley O. Hudson, The Permanent Court of International Justice, New York, 1934, § 534, citing Publications, Permanent Court of International Justice, Series B, No. 8, 37.)

§ 536. [1] See generally, United States Tariff Commission, Reciprocity and Commercial Treaties, Washington, 1919; United States Tariff Commission, Tariff Bargaining under Most-Favored-Nation Treaties, Washington, 1933, 73 Cong., 1 Sess., Senate Doc. No. 7; United States Tariff Commission, Extent of Equal Tariff Treatment in Foreign Countries, Report No. 119, second series, Washington, 1937; documents in Moore, Dig., V, 257–319; Wallace McClure, A New American Commercial Policy (As Evidenced by Section 317 of the Tariff Act of 1922), New York, 1924; same author, "German-American Commercial Relations," *Am. J.,* XIX, 689; same author, World Prosperity, New York, 1933, § 69.

See also documents in Hackworth, Dig., V, §§ 500–504.

Giuseppe Cavaretta, *La Clausola della Nazione Più Favorita,* Palermo, 1906; Crandall, Treaties, 2 ed., § 172; R. A. Farra, *Les Effets de la Clause de la Nation La Plus Favorisée,* Paris, 1910; François Hepp, *Théorie Générale de la Clause de la Nation La Plus Favorisée en Droit International Privé,* Paris, 1914; J. R. Herod, Favored Nation Treatment, New York, 1901; Stanley K. Hornbeck, The Most-Favored-Nation Clause in Commercial Treaties, Madison, 1910 (appearing also in *Am. J.,* III, 395, 619 and 797), with extensive bibliography; John A. Kasson, Information Respecting Reciprocity and the Existing Treaties, Washington, 1901; A. H. Washburn, "The American Interpretation of the Most-Favored-Nation Doctrine," *Virginia Law Rev.,* I, 257.

See, also, Report of the Sub-Committee (Mr. Wickersham, Rapporteur) on The Most-Favored-Nation Clause, adopted by the Committee of Experts for the Progressive Codification of International Law, April, 1927, League of Nations Publications, V.Legal.1927.V.10, *Am. J.,* XXII, *Special Supplement,* 133; Quincy Wright, "The Most-Favored-Nation Clause,"

construction of undertakings to yield most-favored-nation treatment as set forth in commercial treaties, made the following statement in 1933:

> Briefly defined, the most-favored-nation clause is simply a pledge of non-discrimination against the commerce of the other party to the treaty, or a pledge to make the other party equally favored with any third country. The customary wording, however, has been a pledge to grant to the other party treatment not less favorable than may be granted to the "most favored" among other countries.
>
> The unconditional form of the obligation is simply a promise to refrain from any discrimination, and to apply to all products of the other treaty country every advantage that may be granted to the like product of any other foreign country. . . .
>
> In contrast, although conditional most-favored-nation treaties also obligate this Government to extend to the other party to the treaty every concession made to any third country, this obligation is qualified by the very important condition that if the concession to the third country was granted in exchange for an equivalent, it will be extended under the treaty only for an equivalent concession. . . .
>
> Two points may be stressed regarding most-favored-nation treatment generally: First, neither the conditional nor the unconditional type of most-favored-nation clause in commercial treaties makes any promise which in itself limits the height of import duties; and second, both forms of the clause promise equality of tariff rates only for the same or similar articles. Both forms allow the utmost diversity of tariff rates; they forbid only discriminations resulting in a higher rate on the product of one country than on the like product of another country. Accordingly, if the exports of two countries were wholly dissimilar, a government, though it had pledged most-favored-nation treatment to both countries, might impose high duties on all imports from the one and leave all imports from the other free of duty, since the most-favored-nation clause promises equality of tariff treatment only for "like" articles; *e.g.*, articles within the same tariff classification.[2]

In 1919, the same body was able to state that it had been the practice of the United States almost without exception to employ the conditional form of the most-favored-nation clause and to maintain the conditional construction. The Commission added:

> The American position began with the making of the very first treaty of the United States, and from then until the present time the guiding prin-

---

*Am. J.*, XXI, 760; N. Ito, *La Clause de la Nation La Plus Favorisée*, Paris, 1930; Baron Boris Nolde, "*La Clause de la Nation La Plus Favorisée et les Tarifs Préférentiels*," *Recueil des Cours*, 1932, I, 1; same writer; "*Problèmes Modernes du Régime de la Nation La Plus Favorisée*," *Rev. Droit Int.*, 3 *sér.*, XIV, 185; R. Riedl, *La Clause de la Nation La Plus Favorisée*, Vienna, 1928; Royal Institute of International Affairs, Information Department, Memorandum on The Most-Favored-Nation Clause as an Instrument of International Policy, London, 1933.

[2] Tariff Bargaining Under Most-Favored-Nation Treaties, Report of the Chairman of the United States Tariff Commission, March 29, 1933, Senate Doc. No. 7, 73 Cong., 1 Sess., 4–5.

See also statement in Hackworth, Dig., V, at beginning of § 501.

ciple in the commercial treaty-making policy of the United States has been that of bargaining between individual nations on the basis of reciprocal and progressive giving of favor for favor and concession for concession.

American statesmen have contended for equality of opportunity to bargain, but not for identity of treatment; for the removal and prevention of discriminations, but not for the same terms to all States at all times and in relation to all trade. A survey of the treaties to which the United States has been a party shows that this principle has been written expressly into nearly all of the most-favored-nation clauses.[3]

In 1933, the Commission declared that prior to 1922, the commercial treaties of the United States contained (with only three exceptions) conditional rather than unconditional pledges of most-favored-nation treatment on the part of that country.[4] The United States was able to take the stand that reciprocal commercial concessions were not gratuitous privileges, but were given for a valuable consideration, and, therefore, not to be regarded as within the scope or purview of the most-favored-nation clause as it found expression in treaties to which the country was a party.[5]

The United States has, however, taken the position that where a State has granted tariff favors to another for a compensation and has subsequently generalized those favors by granting them gratuitously to other countries, they should likewise be yielded to the United States without compensation under the provisions of a treaty containing the most-favored-nation clause.[6]

According to American opinion, the political or geographical relations between two States may be such as to afford a reasonable basis of reciprocal commercial concessions which other countries may not justly claim the right to share through the operation of the most-favored-nation clause. Geographical and

[3] United States Tariff Commission, Reciprocity and Commercial Treaties, Washington, 1919, 39.

"The general design of the most-favored-nation clauses, as they are expressed in various treaties, is to establish the principle of equality of treatment. . . . The test of whether this principle is violated by the concession of advantages to a particular nation, is not the form in which such concession is made, but the condition on which it is granted. The question is whether it is given for a price, and whether this price is in the nature of a substantial equivalent, and not of a mere evasion." (J. B. Moore, "Opinion upon the question whether Congress can pass a special tariff act for Cuba, without violating the most-favored-nation clause in treaties with other countries," Jan. 14, 1902, p. 4, *citing* opinion of Mr. Olney, Atty. Gen., 21 Ops. Attys. Gen., 80, 82, 83.)

[4] United States Tariff Commission, Tariff Bargaining under Most-Favored-Nation Treaties, Report No. 65, second series, Washington, 1933, 5.

[5] Mr. Adams, Secy. of State, to Mr. Hyde de Neuville, French Minister, Dec. 23, 1817, Am. State Pap., For. Rel. V, 152, and following; Mr. Sherman, Secy. of State, to Mr. Buchanan, Minister to Argentine Republic, No. 303, Jan. 11, 1898 and No. 336, April 9, 1898, MS. Inst. Arg. Rep., XVII, 306, 337, Moore, Dig., V, 277; Mr. Adee, Acting Secy. of State, to Russian Chargé d'Affaires *ad interim*, July 30, 1895, For. Rel. 1895, II, 1121, Moore, Dig., V, 276. For further diplomatic correspondence indicating the view of the United States, see documents contained in Moore, Dig., V, 257–288; Mr. Wilson, Acting Secy. of State, to the Chargé d'Affaires *ad interim* of Argentina, March 15, 1911, For. Rel. 1911, 5.

See, also, Bartram *v.* Robertson, 122 U. S. 116; Whitney *v.* Robertson, 124 U. S. 190; Thingvalla Line *v.* United States, 24 Ct. Cl. 255.

*Cf.*, however, Mr. Fish, Secy. of State, to Mr. Garcia, Argentine Minister, May 14, 1869, MS. Notes to Argentine Leg., VI, 71, Moore, Dig., V, 262. See, also, Appendix C of United States Tariff Commission's Report on Reciprocity and Commercial Treaties, 1919, p. 453.

[6] See Mr. Hull, Secy. of State, to Mr. Bliss, Ambassador to Argentina, May 23, 1933, Hackworth, Dig., V, § 503.

commercial (and possibly also political) relations were deemed by the United States to be accountable for, and to justify the special terms of its reciprocity treaty with the Hawaiian Islands of January 30, 1875, which was, however, not to take effect until a law to carry it into operation should have been enacted by the Congress of the United States.[7] Subsequently, the exceptional relations between the United States and Cuba, acknowledged by treaty, were regarded as of a character such as to enable the former to enact a special tariff act with respect to the latter, without violating the most-favored-nation clause in treaties between the United States and other States.[8]

Even a discrimination of a geographical character, such as one manifested by a law providing for the levying of a lower rate of tonnage dues on vessels sailing from certain foreign places, appears to have been judicially regarded in the United States as not at variance with the most-favored-nation clause in conventions with States whose ports were outside of the privileged area.[9]

It was declared by Mr. Gresham, Secretary of State, in 1894, that the payment by a State of a bounty on the exportation of an article produced or manufactured in its territory, could not on principle justify another country into the territory of which the article was imported, in levying an additional or countervailing duty, when the commerce between such States was to receive, pursuant to convention, the most-favored-nation treatment. "It is understood," he said, "when treaties against discriminating duties are made, that governments reserve the right to favor (by duties or by bounties) their own domestic production or manufacture."[10] A different position was, however, taken by Mr. Olney, Attorney General, in 1894, and by Mr. Sherman as Secretary of State, in 1897, concerning the effect of countervailing duties utilized in tariff acts of August 27, 1894, and of July 24, 1897.[11]

[7] Art. V, Malloy's Treaties, I, 915, 917. Also United States Tariff Commission, Report on Reciprocity and Commercial Treaties, 1919, 418–420; documents in Moore, Dig., V, 263–267; Mr. Adee, Acting Secy. of State, to Mr. Somow, Russian Chargé d'Affaires *ad interim*, July 30, 1895, For. Rel. 1895, II, 1121, Moore, Dig., V, 276; Bartram *v.* Robertson, 122 U. S. 116; Whitney *v.* Robertson, 21 Fed. 566.

[8] "We have in the case of the United States and Cuba a remarkable example of those special and exceptional relations, physical and political, which, not being estimable simply in terms of commerce, are universally recognized as the surest foundation for the mutual exchange of exclusive advantages; relations, moreover, which are expressed in valid public acts, whose legal effect all nations have acknowledged." (J. B. Moore, in opinion cited *supra*, in this section, 14.)

See The Five Per Cent. Discount Cases, 243 U. S. 97.

[9] North German Lloyd S.S. Co. *v.* Hedden, 43 Fed. 17; also opinion of Mr. Maury, Acting Atty. Gen., Sept. 19, 1885, 18 Ops. Attys. Gen., 260.

*Compare* Report of Mr. Bayard, Secy. of State, to the President, Jan. 14, 1889, concerning operation of acts of Congress of June 24, 1884, and June 19, 1886, H. Ex. Doc. 74, 50 Cong., 2 Sess., Moore, Dig., V, 288. See the existing statutory law with reference to amount of tonnage duties as contained in 46 U.S.C.A. § 121.

See Correspondence between the United States and Colombia as to whether a proclamation of President Harrison of March 15, 1892, suspending the free admission into the United States of certain articles produced in or exported from Colombia, in accordance with Section 3 of the McKinley Act of October 1, 1890, should be regarded as a violation of the treaty between the United States and New Granada of December 12, 1846, For. Rel. 1894, Append. I, 451–503; For. Rel. 1894, 198–199.

[10] Report of Mr. Gresham, Secy. of State, to the President, Oct. 12, 1894, For. Rel. 1894, 236; German Memorandum concerning additional duty on German sugar, July 16, 1894, *id.*, 234; President Cleveland, annual message, Dec. 3, 1894, *id.*, IX–X.

[11] Opinion of Mr. Olney, Atty. Gen., Nov. 13, 1894, 21 Ops. Attys. Gen., 80, 82; also Mr. Sherman, Secy. of State, to the German Chargé d'Affaires *ad interim*, Sept. 22, 1897, For.

It is important to observe that the question concerning the application of the most-favored-nation clause to special reciprocal commercial agreements is one where the traditional policy of a contracting party in relation to the character of its commitments is regarded as decisive of its stand and as governing its attitude at the time of negotiation. This circumstance removes to a large degree the general problem of construction and the method of its solution from the field of pure interpretation. Thus the effort to ascertain as by judicial process the sense which both parties to a treaty sought to attach to a particular pledge, has given way to attempts to fortify constructions relied upon by reference to their relation to well-known national policies.[12]

The United States Tariff Commission pointed out in 1919, that the practice of making reciprocity treaties called for the conditional construction of the most-favored-nation clause, and that that construction, if persisted in, was to be expected to occasion frequent controversies between the United States and European countries.[13] Moreover, the use of that clause, as conditionally construed, assured only such treatment as the other party to a treaty might accord freely to third States.[14] It did not make for the equal treatment of trade with all nations. Definiteness of understanding on the part of contracting parties as to the significance of the pledge in a particular treaty might be a deterrent of a controversy as to construction, but it could not accomplish more.[15]

Under the guidance of its Tariff Commission the United States in 1922 en-

---

Rel. 1897, 178. In relation to the Act of Congress of July 24, 1897, 30 Stat. 205, see Downs *v.* United States, 187 U. S. 496.

See, also, in this connection, S. K. Hornbeck, Most-Favored-Nation Clause in Commercial Treaties, 70–75, United States Tariff Commission, Report on Reciprocity and Commercial Treaties, 1919, 433.

[12] Thus it might be contended in behalf of the United States that its traditional stand, well known to other contracting powers, was not one from which it could admit that it had in fact departed in concluding a reciprocity treaty.

See factual situation in United States *v.* Domestic Fuel Corporation, 71 F. (2) 424, where at 434, the Court declared: "As we view the matter, since, in 1932, coal was legally imported into the United States from Canada and Mexico duty free, the law, as contained in the statute and the British treaty, entitled the coal imported in that year from the United Kingdom of Great Britain and Ireland to free entry, without any reference to the treaty with Germany."

[13] Report on Reciprocity and Commercial Treaties, 1919, p. 42, where it is stated: "The evidences show that the conclusion of reciprocity treaties is likely to lead to claims from States outside the agreement which, if granted, will defeat the purposes of the treaties, and which, if not granted, occasion the preferring of a charge of disloyalty to treaty obligations. The practice of making reciprocity treaties requires the conditional construction of the most-favored-nation clause. But the use by the United States of the conditional interpretation of the most-favored-nation clause has for half a century occasioned, and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries."

See, also, Assist. Secy. Rogers to Senator Walsh, Feb. 4, 1932, *Cong. Rec.*, Vol. 75, 7446.

[14] See in this connection the views of Mr. Hughes, Secy. of State, expressed before the Senate Committee on Foreign Relations, February 2, 1925; also biographical sketch of Mr. Hughes as Secretary of State, in *The American Secretaries of State and Their Diplomacy*, 1929, Vol. X, pp. 312–315.

[15] Declared the Department of State in an aide-mémoire delivered to the French Foreign Office on September 19, 1927: "Unless the principle of equality of treatment to all is admitted there can be no confidence in the stability of trade relations, and the beginning of such discriminatory action can only lead to its extension throughout the world, thus creating trade groups, combinations against weaker nations, reprisals and a long train of political and economic dangers."

acted legislation which revealed a change in its tariff policy, and in the theory upon which thereafter commercial treaties were to be negotiated. The Tariff Act of September 21, 1922, fixed a single standard of rates for import duties which was applicable alike to all foreign countries with the exception of Cuba.[16] As a means, however, of securing equality of treatment for American commerce the Act of 1922 made special provision in section 317 contemplating recourse to a retaliatory penalty as against a State which through its customs duties discriminated in fact against the commerce of the United States by placing it at a disadvantage in comparison with the commerce of any foreign country.[17] While no specific exception was made in favor of a foreign State which as a party to a reciprocity treaty with a third State was making concessions thereto in return for an equivalent, it may be greatly doubted whether the Congress regarded such an arrangement as discriminatory within the meaning of the section of the Act.[18] After the enactment of the Act it was felt that the United States should not conclude commercial arrangements which were not in harmony therewith; and

[16] Ch. 356, 42 Stat. 858. Section 320 (at p. 947) provided "That nothing in this Act shall be construed to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or the provisions of the Act of December 17, 1903, Chapter I."

"The policy of the American Tariff Law makes no discrimination whatsoever between articles imported from different countries. Furthermore discrimination in world trade against the United States has practically ceased." (Aide-mémoire delivered by the American Chargé d'Affaires to the French Foreign Office, September 19, 1927.)

[17] It was there provided:

"(a) That the President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of any foreign country whenever he shall find as a fact that such country —

"Imposes, directly or indirectly, upon the disposition in or transportation in transit through or re-exportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country;

"Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

"(b) If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is hereby authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such articles of said country as he shall deem the public interests may require shall be excluded from importation into the United States.

"(c) That any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation." (42 Stat. 944.)

[18] Discussions in the Senate on August 11, 1922, resulting in amendments to Section 317 of the Bill as reported by the Finance Committee of that body, and which were embodied in Section 317 of the Act of September 21, 1922, reveal the fact that the Senate seems to have been generally of opinion that reciprocal concessions under a reciprocity treaty between two foreign States would not necessarily constitute a discrimination against the commerce of the United States within the meaning of that section. See *Cong. Rec.*, Vol. LXII, Part 11, pp. 11245–11249. This thought or design on the part of Senators is of utmost significance; and in the construction of the Act it renders unimportant the question whether, in a technical sense, an exclusive concession granted by one State to another in compensation for an equivalent constitutes a discrimination against the commerce of a third State.

it was regarded as inconsistent with the spirit of the Act to enter into arrangements yielding special concessions for a special price.[19]

Numerous arrangements according mutual, unconditional most-favored-nation treatment in customs matters were effected by exchanges of notes in 1923, and during the following years.[20] Treaties declaratory of the same principle were likewise concluded. That with Germany, signed on December 8, 1923, was the first to become effective,[21] and was in turn followed by others of like tenor.[22] Article VII of the treaty with Germany contained the following provisions:

> Each of the High Contracting Parties binds itself unconditionally to impose no higher or other duties or conditions and no prohibition on the importation of any article, the growth, produce or manufacture, of the territories of the other than are or shall be imposed on the importation of any like article, the growth, produce or manufacture of any other foreign country.
>
> Each of the High Contracting Parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other High Contracting Party than are imposed on goods exported to any other foreign country.
>
> Any advantage of whatsoever kind which either High Contracting Party may extend to any article, the growth, produce, or manufacture of any other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article the growth, produce or manufacture of the other High Contracting Party.
>
> * * * *
>
> With respect to the amount and collection of duties on imports and exports of every kind, each of the two High Contracting Parties binds itself

[19] See address of Secy. Hughes on the Monroe Doctrine, Nov. 30, 1923, contained in Charles E. Hughes, The Pathway of Peace, Representative Addresses, 1921–1925, New York, 1925, 142, 161–162; also Mr. Hughes, Secy. of State, to President Harding, Jan. 15, 1923, MS. Dept. of State, Hackworth, Dig., II, 57.

[20] See Agreement with Brazil, signed October 18, 1923, U. S. Treaty Vol. IV, 3969; Agreement with Czechoslovakia, signed October 29, 1923, *id.*, 4056, prolonged by Agreement signed December 5, 1924, *id.*, 4058; Agreement with Guatemala, signed August 14, 1924, *id.*, 4298; Agreement with Nicaragua, signed June 11, 1924, and July 11, 1924, *id.*, 4520; Agreement with the Dominican Republic, signed September 25, 1924, *id.*, 4088; Agreement with Greece, signed December 9, 1924, *id.*, 4281; Agreement with Finland, signed May 2, 1925, *id.*, 4129; Agreement with Esthonia, signed March 2, 1925 (ratification by Esthonian Parliament notified to the Government of the United States, August 1, 1925), *id.*, 4102; Agreement with Rumania, signed February 26, 1926, *id.*, 4608; Provisional Commercial Agreement with Latvia, signed February 1, 1926 (ratification by Latvian Saeima notified to the Government of the United States, April 30, 1926), *id.*, 4398; Agreement with Haiti, signed July 8, 1926, *id.*, 4301.

[21] U. S. Treaty Vol. IV, 4191, 4193.

[22] See, for example, Article VII, treaty with Hungary, June 24, 1925, U. S. Treaty Vol. IV, 4318, 4320; Article VII, treaty with Esthonia, December 23, 1925, U. S. Treaty Vol. IV, 4105, 4107; Article VII, treaty with Austria, June 19, 1928, U. S. Treaty Vol. IV, 3930, 3932; Article VII, treaty with Norway, June 5, 1928 and Feb. 25, 1929, U. S. Treaty Vol. IV, 4527, 4530; Article VI, treaty with Poland, June 15, 1931, U. S. Treaty Vol. IV, 4572, 4575.

See in this connection, Mr. Hughes, Secy. of State, to the President, Jan. 15, 1923, For. Rel. 1923, Vol. I, 127; the same, in an instruction to American diplomatic officers, Aug. 18, 1923, Hackworth, Dig., V, § 502.

See discussion by the author in "The Position of the United States on the Most-Favored-Nation Clause in Commercial Treaties," published by American Council, Institute of Pacific Relations, 1929, and drawn upon by him in the development of the present section of this work.

to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third State, and regardless of whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation, be extended to the other High Contracting Party, for the benefit of itself, its nationals and vessels.[23]

This article exemplified the new policy of the United States.[24]

In 1939, the United States Court of Customs and Patent Appeals reached the conclusion that the levy of contingent duties on certain goods imported from Germany at the rate of 50 per centum ad valorem while similar merchandise was being admitted, or was subject to admission from other countries at a lower rate, was in contravention of the provisions of the treaty.[25] The tribunal was, moreover, not of opinion that it was the design of the Congress in the Tariff Act of 1930, that the scheme of contingent duties therein laid down was to be operative as against the unconditional most-favored-nation clause as registered in the treaty with Germany above quoted.[26]

Although the levying of countervailing duties may be inconsistent with the unconditional most-favored-nation pledge yielded by treaty to an exporting State, if applied to articles that are admitted free of duty when imported from a third State,[27] the same difficulty is not apparent in a case where the pledge is of lesser scope and is not unconditionally given.[28]

In 1931, the Legal Adviser of the Department of State announced that the recent change in the treaty-making policy of the United States "as regards matters of commerce" did not affect the earlier treaties prior to 1923, which did not contain the unconditional most-favored-nation clauses; that those treaties had consistently been interpreted by the Department of State as requiring a showing of reciprocity on the part of the country claiming the benefits of a treaty between the United States and some other country.[29]

[23] "But these provisions of article VII, together with others, were abrogated as from October 14, 1935, by an agreement between the two Governments on June 3, 1935. . . . The treaty was, however, followed by 10 other treaties containing similar provisions." (Hackworth, Dig., II, 58.) For the text of the agreement of June 3, 1935, see U. S. Treaty Vol. IV, 4221.

[24] In explanation of it see Mr. Hughes, Secy. of State, to Senator Lodge, Chairman, Committee on Foreign Relations, United States Senate, March 13, 1924, For. Rel. 1924, II, 183.

For treaties and agreements of the United States embodying the most-favored-nation clause up to July 31, 1940, see Dept. of State Bulletin, Aug. 3, 1940, 96.

[25] John T. Bill Co., Inc., Victor Distributing Co. *v.* United States, 104 F. (2d) 67.

[26] See Honoré Marcel Catudal, "The Most-Favored-Nation Clause and the Courts," *Am. J.*, XXXV, 41.

[27] See International Commerce Co. *v.* United States, T.D. 47493, Hackworth, Dig., V, § 503.

[28] See Douglas Fairbanks *v.* United States, T.D. 43643, Hackworth, Dig., V, § 503; also other cases there cited.

[29] Memorandum by Mr. Hackworth, Oct. 30, 1931, Hackworth, Dig., V, § 502.

Concerning the contention of the Department of State in 1933, that the annual quota for prunes allotted to the United States by Germany was, in the circumstances, a violation of the unconditional most-favored-nation pledge as contained in Art. VII of the treaty of

It may be observed that the Government of the United States "has uniformly included in its treaties and agreements with other countries during recent years a specially stated exception in favor of its commerce with Cuba and also in favor of its commerce with its own dependencies." [30]

The Act of Congress of June 12th, 1934, amendatory of the Tariff Act of 1930,[31] marked a new step in the tariff policy of the United States, yet one in complete harmony with the unconditional most-favored-nation principle.[32] There was conferred upon the President authority "to enter into foreign trade agreements with foreign governments or instrumentalities thereof," and also to proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements as might be required or appropriate to carry out any foreign trade agreement that the President might enter into under the Act. No proclamation was to be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. It was further provided that:

> The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: Provided, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.[33]

---

commerce with that country, of Dec. 8, 1923, see Mr. Hull, Secy. of State, to Mr. Dodd, Ambassador to Germany, Oct. 9, 1933, Hackworth, Dig., V, § 503.

Concerning the discriminatory aspect of levies of taxes under the Revenue Act of 1932, on imports of coal from Great Britain and Germany, because the balance of trade in coal with those countries had been unfavorable to the United States, and as applying a criterion that was at variance with the most-favored-nation clause in treaties with them, see United States *v.* Domestic Fuel Corporation, 71 F. (2d) 424; also Mr. Hull, Secy. of State, to President Roosevelt, May 10, 1933, Hackworth, Dig., V, § 503, footnote.

See Agreement for the Non-Application of the Most-Favored-Nation Clauses in Respect of Certain Multi-Partite Economic Conventions of 1934, U. S. Treaty Vol. IV, 5546, and note of transmittal from Mr. Hull, Secy. of State, to the President, May 10, 1935, Hackworth, Dig., V, § 504.

[30] Mr. Hull, Secy. of State, to the Ambassador to Argentina, May 23, 1933, Hackworth, Dig., V, § 504.

See also Mr. Barnes, Chief of Treaty Division, Dept. of State, to Mr. J. L. Gerry, Aug. 20, 1937, Hackworth, Dig., V, § 504.

[31] 48 Stat. 943.

[32] See statement by Department of State of April 5, 1935, in Dept. of State Press Releases, April 6, 1935, 218–220.

[33] The Act further declared: "Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: *Provided,* That the duties payable on such an article shall

Pursuant to this authority the President duly concluded numerous so-called Reciprocal Trade Agreements. These in varying form provided for unconditional most-favored-nation treatment as between the contracting parties.[34] The agreement, for example, with Brazil, of February 2, 1935, declared in Article I:

> The United States of America and the United States of Brazil will grant each other unconditional and unrestricted most-favored-nation treatment in all matters concerning customs duties and subsidiary charges and in the method of levying duties, and, further, in all matters concerning the rules, formalities, and charges imposed in connection with the clearing of goods through the customs.
>
> * * * *
>
> Any advantage, favor, privilege, or immunity which has been or may hereafter be granted by the United States of America or the United States of Brazil in regard to the above-mentioned matters, to a natural or manufactured product originating in any third country or consigned to the territory of any third country shall be accorded immediately and without compensation to the like product originating in or consigned to the territory of the United States of Brazil or the United States of America, respectively.[35]

The significant feature of the new policy was the bi-partite setting employed for a so-called generalization of tariff rates for the benefit not only of the contracting parties, but also for that of such foreign countries as did not discriminate against the United States by non-generalization of rates to it; [36] and perhaps of equal significance was the withholding from such countries as might so discriminate the benefits of concessions yielded under particular agreements.[37]

---

in no case be increased or decreased by more than 50 per centum of the duties now payable thereon." (48 Stat. 944.)

The authority of the President to enter into foreign trade agreements was extended in point of time by the Joint Resolution of March 1, 1937, 50 Stat. 24, and by that of April 12, 1940, 54 Stat. 107, which terminated his authority on the expiration of three years from June 12, 1940.

[34] See Green H. Hackworth, "Legal Aspects of the Trade Agreements Act of 1934–I," *A.B.A.J.*, XXI, 570; Francis B. Sayre, American Commercial Policy, Dept. of State, Commercial Policy Series, No. 6.

[35] U. S. Executive Agreement Series, No. 82. See, also, Art. I of Reciprocal Trade Agreement with Canada, of Nov. 15, 1935, *id.*, No. 91. *Cf.* form of Reciprocal Trade Agreement with Honduras, of Dec. 18, 1935, *id.*, No. 86.

See also Temporary Commercial Arrangement between the United States and Italy, effected by exchange of notes signed Dec. 16, 1937, U. S. Executive Agreement Series, No. 116.

[36] See statement of policy of the United States concerning Generalization of Tariff Concessions, April 1, 1935, Dept. of State Press Releases, April 6, 1935, 212–216.

It should perhaps be noted that while the Trade Agreements Act was not designed to exclude the use of multi-partite agreements, only bi-partite agreements have in fact been entered into in pursuance of the enactment.

[37] See, for example, the President to Mr. Morgenthau, Secy. of the Treasury, Feb. 1, 1936, in relation to the generalization of tariff concessions, in connection with the proclamation on that date of the trade agreement with Honduras, signed Dec. 18, 1935, Dept. of State Press Releases, Feb. 8, 1936, 143–146.

On Sept. 12, 1935, the United States deposited with the Pan American Union at Washington, its ratification of the convention opened for signature July 15, 1934, Concerning the Nonapplication of Most-Favored-Nation Clause in respect of Certain Multilateral Economic Conventions. U. S. Treaty Vol. IV, 5546. See Recommendation of the Seventh International Conference of American States on Multilateral Commercial Treaties, approved Dec. 24, 1933,

Obviously, there was no room to charge such discrimination against countries that were faithful to their unconditional pledge to the United States as employed, for example, in the treaty with Germany quoted above.[38]

In relation to the matter of interpretation recourse to an unconditional most-favored-nation policy, howsoever exemplified, lessened opportunity for divergent opinions concerning the scope of what might be properly claimed under a treaty, both through the textual precision and clarity of the pledges that were given, and also through the cumulative extrinsic evidence of common design to depart from a system or practice productive on the one hand of essentially preferential and reciprocal concessions specially paid for by the country to which they were yielded, and on the other, of the use of the pledge in a general yet undefined form.

b

§ 537. **Consular and Other Privileges.** In numerous treaties to which the United States is a party the most-favored-nation clause has been employed with reference to privileges that were conceded to consular officers, and also in relation to privileges yielded in behalf of other persons in respect to a variety of matters. The pledge has usually assumed a broad and undefined form. If, on the one hand, it has not in terms disclosed undertakings of conditional aspect, it has not, on the other, given expression to a defined promise of unconditional treatment.

According to the weight of American judicial opinion, the consular officer of a foreign State whose treaty with the United States contains a pledge of most-favored-nation treatment for the benefit of such an individual, becomes entitled to enjoy numerous privileges embracing those pertaining to the administration of the estates of deceased intestate countrymen and kindred matters, as they are conceded in conventions of the United States with other countries, without an affirmative showing of reciprocal treatment by his own country.[1] The Supreme Court of the United States in construing in 1931, Article XVII, embracing the most-favored-nation clause, of the Consular Convention between the United States and Italy of May 8, 1878, declared that it might be assumed "that the article contemplates reciprocity with respect to the rights and privileges sought,

---

Report of the Delegates of the United States of America to the Seventh International Conference of American States, Dept. of State, Conference Series No. 19, 275.

[38] Inasmuch as those countries became the immediate beneficiaries of concessions yielded by the United States to the parties to the new bi-partite arrangements, the instruments that registered accord in pursuance of the Act of 1934, were in reality more than reciprocal trade agreements, and sharply to be contrasted with the so-called reciprocity treaties of earlier years to which the Tariff Commission had referred in its report of 1919.

§ 537. [1] See, for example, *In re* Wyman, 191 Mass. 276; Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122; *In re* D'Adamo's Estate, 212 N. Y. 214; cases in Crandall, Treaties, 2 ed., § 173. See Consuls, The Most-Favored-Nation Clause, *supra*, § 482.

Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, Sept. 26, 1895, and Oct. 11, 1895, claiming by virtue of the most-favored-nation clause of Article XIX of the treaty between the United States and Spain, of Oct. 27, 1795, the benefit of Article IX, of the Spanish-German consular treaty of Feb. 22, 1870, For. Rel. 1895, II, 1210 and 1212; Mr. Speed, Atty. Gen., June 26, 1866, 11 Ops. Attys. Gen., 508.

*Compare* Mr. Buchanan, Secy. of State, to the Chevalier Hülsemann, May 18, 1846, MS. Notes to German States, VI, 130, Moore, Dig., V, 261.

and there is no suggestion that Italy has not recognized the right of consuls of the United States to take the effects of the citizens of the United States dying in Italy in circumstances similar to those in which the present claim of the Italian Consul General is pressed." [2] Accordingly, it was held that in virtue of the clause, an Italian Consul General was entitled to the benefit of Article VI of the treaty between the United States and Persia of 1856, providing, under certain conditions, for the delivery to such an officer of the net assets of the estate of a deceased countryman.

The position of the Department of State is, and has been, "that the most-favored-nation clause in Consular Conventions, such as that in Article 17 of the Consular Convention with Italy, does not confer an unconditional right to most-favored-nation treatment, but that such most-favored-nation treatment is conditioned upon reciprocal treatment being accorded by the country invoking the provision." [3] The Department, has, moreover, accentuated its position in relation to the matter of fiscal concessions, such as exemptions from the payment of customs duties, being of opinion that the most-favored-nation clause should not be regarded as conferring the right to enjoy such privileges as may be yielded by treaty to a third State, in the absence of a showing that the State whose convention with the United States contains the clause is itself prepared to make like reciprocal concessions.[4] As a matter of fact, the Department of State is understood to follow the practice of ascertaining whether American consular officers within the territory of another contracting party are permitted to enjoy particular privileges, exemptions or immunities of whatsoever kind, before it will advise that consular officers of that party within American territory are entitled to enjoy like concessions therein. The rule of reciprocity is not in its operation inequitable; and if the application of it contravenes the design of the contracting parties in relation to the terms of a particular treaty, the breach is not likely to be harmful, or to produce solid cause of umbrage.

The most-favored-nation clause is not regarded as embracing in its scope engagements pertaining to the extradition of fugitives from justice.[5] Nor does it

[2] Santovincenzo *v.* Egan, 284 U. S. 30, 38. But see Estate of Clausen, 202 Cal. 267.

[3] Memorandum of Mr. Hackworth, Legal Adviser of the Dept. of State, Oct. 30, 1931. Hackworth, Dig., V, § 502; also Mr. Castle, Assist. Secy. of State, to the Minister to Switzerland, Jan. 15, 1931, Hackworth, Dig., V, § 502.

The form of the most-favored-nation pledge with respect to consular privileges may be such as to make it obvious that there is required reciprocal action of both parties in the treatment of the consular officers of the other in order to secure the full privileges which either may extend to such officers of another State. See, for example, Art. XXVIII of treaty with Spain of July 3, 1902, Malloy's Treaties, II, 1710; and in this connection, Mr. Kellogg, Secy. of State, to the Spanish Ambassador, at Washington, April 25, 1927, Hackworth, Dig., V, § 503.

According to Art. 29 of the consular treaty between Germany and the Union of Socialist Soviet Republics, of Oct. 12, 1925: "The consular officials of each contracting party shall, subject to reciprocity, exercise in the territory of the other party the same functions as the consular officials of the same category and rank of the most favoured nation." (Brit. and For. St. Pap., CXXII, 758.)

[4] Such was the stand taken by the United States in correspondence with the Italian Government, in 1926, in harmony with the views of the Solicitor for the Department of State, expressed in a memorandum of Jan. 14, 1926. See Consuls, Customs Duties, *supra*, § 473.

[5] "Engagements of extradition, whether of fugitives from justice or from service, stand in each case on particular stipulations of treaty, and are not to be inferred from the 'favored-

necessarily entitle a contracting party to enjoy the benefits of a special arrangement with a third State concerning the nature and limits of contraband.[6] A law of a State of the United States exempting from pilotage American coastwise vessels has been construed to establish no discrimination of which a foreign State could justly make complaint by virtue of a convention providing that no higher charges should be imposed on its vessels than those payable in the same ports by vessels of the United States.[7] The most-favored-nation clause in a commercial treaty is not deemed by the Department of State to be applicable to special arrangements with third States conferring privileges pertaining to international air navigation.[8] American courts have not regarded the clause as applicable to concessions conferred by so-called liquor treaties,[9] or to privileges growing out of workmen's compensation acts.[10] In 1931, "The Solicitor for the Department of State [Mr. Hackworth] expressed the view that the establishment of a customs union would not constitute an exception to the most-favored-nation provisions in the treaty of friendship, commerce, and consular rights of December 8, 1923, with Germany, . . . and of June 19, 1928, with Austria." [11]

There may be difficulty in determining whether a particular privilege conferred by treaty is essentially a reciprocal concession given for a valuable consideration, and, according to the traditional American view, beyond the operation of the most-favored-nation clause.[12] What stands out is the frequency and variety of uses of the undefined pledge in treaties to which the United States is a party. It has been employed, for example, with reference to the prerogatives and immunities of diplomatic agents,[13] to privileges conferred upon nationals of the contracting parties pertaining to residence,[14] trade,[15] disposition of property,[16]

---

nation' clause in treaties." (Mr. Cushing, Atty. Gen., Oct. 14, 1853, 6 Ops. Attys. Gen., 148, 156. The words quoted are from the caption of the opinion.)

[6] The James and William, 37 Ct. Cl. 303, 307, where the terms of the most-favored-nation clause in the treaty with France of 1778 were not deemed to be such as to entitle that State to the benefits of the Jay treaty of 1794, respecting contraband. Declared Nott, C. J.: "The definition of what should be regarded as contraband or not contraband was not a favor, but a mutual and reciprocal obligation."

[7] Mr. Justice White in Olsen *v.* Smith, 195 U. S. 332, 344.

This case may not appear to be germane to the subject under discussion. It is referred to merely as an instance where it was judicially concluded that an arrangement designed to yield national reciprocal treatment to the vessels of the contracting parties in relation to a particular matter was not violated by the exemption conferred by law upon American coastwise vessels.

[8] See Mr. Kellogg, Secy. of State, to the Japanese Ambassador at Washington, Oct. 8, 1926, Hackworth, Dig., V, § 504.

[9] See The Yulu, 71 F. (2d) 635.

[10] See Lukich *v.* Department of Labor and Industries, 176 Wash. 221, 29 Pac. (2d) 388.

[11] Hackworth, Dig., V, § 504.

[12] Declared the Supreme Court of the United States in the course of its opinion through Mr. Justice Day, in the case of Sullivan *v.* Kidd, 254 U. S. 433, at 441: "The most-favored-clause . . . has been held in the practice of this country to be one not extending rights acquired by treaties containing it because of reciprocal benefits expressly conferred in conventions with other nations in exchange for rights or privileges given to this Government." See comment on this language by Perry, C. J., in 1929, in the case of Hawaiian Trust Co. *v.* Smith, 31 Haw. 196, 208–209.

See, Mr. Olney, Secy. of State, to Mr. Dun, Minister to Japan, Nov. 12, 1896, For. Rel. 1896, 429, Moore, Dig., V, 314.

[13] Art. II, treaty with Persia, Dec. 13, 1856, Malloy's Treaties, II, 1372.

[14] Art. I, treaty with Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

[15] Art. IV, treaty with Japan, Feb. 21, 1911, U. S. Treaty Vol. III, 2713.

[16] Art. V, convention with Great Britain, March 2, 1899, Malloy's Treaties, I, 775.

the adjustment of disputes,[17] and the prosecution and defense of rights in the courts.[18] When the clause is used to describe the varying and flexible scope of privileges of which the value is incapable of nice measurement, and without reference to a commercial bargain there is doubtless ground for the claim that the pledge was designed to be unconditional.[19] Such is at least a reasonable inference, even though it may fail to warrant a presumption. It ought always, however, to be permitted, upon a proper showing, to establish a different design.

When a treaty such, for example, as that concluded between the United States and Finland, February 13, 1934,[20] contains the pledge of unconditional treatment in most explicit form, as in an article pertaining to import or export duties,[21] and in another article pertaining to the privileges incidental to residence and commerce,[22] employs the pledge in general and undefined terms, it may be contended that the difference in the form was not inadvertent, and that as expressed in such latter article the pledge marked the manifestation of a narrower design. It needs constantly to be borne in mind, however, that the matter of design is one of fact of which the ascertainment is derivable from all the evidence, intrinsic and extrinsic to the document, that is probative thereof, and is not necessarily to be governed by the contrasting forms of unrelated provisions.

[17] Art. V, treaty with Persia, Dec. 13, 1856, Malloy's Treaties, II, 1373.
[18] Art. IV, treaty with Siam, Dec. 16, 1920, U. S. Treaty Vol. III, 2831.
[19] See Hawaiian Trust Co. *v.* Smith, 31 Haw. 196.
[20] U. S. Treaty Vol. IV, 4138.
[21] Art. VII.
[22] Art. I.

See Mr. Polk, for the Secy. of State, to Mr. Reinsch, American Minister to China, Jan. 19, 1917, in relation to the application of the most-favored-nation clause in the treaty of June 18, 1858, between the United States and China, to the concessions obtained by Japan in Manchuria and Eastern Mongolia under the Sino-Japanese treaty of May 25, 1915, For. Rel. 1917, 287.

# TITLE F

## TERMINATION OF TREATIES

### 1

§ 538. **Preliminary.**[1] In examining the processes by which treaties and other international agreements are terminated, it becomes important to ascertain whether a particular act or occurrence has served to put an end to the compact, or has merely given one of the parties the privilege of doing so. The right of a State to terminate a treaty or to free itself from the obligation to heed the terms of such an instrument, must not be confused with its power to effect such an achievement. Exercise of the right, whenever it is found to exist, can never afford just ground of complaint. Exercise of the power is to be regarded as lawful only when it is within the limits of the right. When it is unlawful in the sense that it violates the contractual obligation towards another State, the termination of the compact does not serve to free the covenant-breaker from the consequences of the breach.

If a contracting party becomes free to denounce a treaty, and by so doing to relieve itself of the burden of further performance, it must be attributable to the design of the parties, express or implied, when they entered into the agreement that the occurrence of certain events or the commission of certain acts such as those which subsequently took place or were committed, should create that privilege. The ascertaining of that design at that time, or of necessary implications therefrom, calls for the performance of a task that lies in the field of interpretation, and hence of one which is not necessarily facilitated by the invocation of special rules.

In the mind of the Department of State, "Treaties can be lawfully modified or terminated only by processes prescribed or recognized or agreed upon by the parties to them." [2] Those parties may in fact through a fresh arrangement prolong indefinitely the operation of a desired plan notwithstanding the cessation of the life of the agreement which was productive of it.[3]

"A treaty made for a specific purpose or for a limited duration expires," it is said, "upon the fulfilment of its purpose or by the lapse of time." [4] It remains

§ 538. [1] See general statement in Hackworth, Dig., V, at beginning of § 505.

[2] Statement made by the American Ambassador to Japan, to the Japanese Minister for Foreign Affairs, under instructions from the Dept. of State, April 29, 1934, Dept. of State Press Releases, April 30, 1934, 245.

See Art. XIV of Convention on Treaties, adopted by the Sixth International Conference of American States at Habana, Feb. 20, 1928, Final Act, Habana, 1928, 140.

[3] See, for example, the action of the United States and Great Britain, in giving permanent effect to Art. IV of their General Arbitration Treaty of April 4, 1908, as described in Hackworth, Dig., V, § 505, and revealed in the Award of the North Atlantic Coast Fisheries Arbitral Tribunal of Sept. 7, 1910.

[4] Memorandum by Dr. Scott, the Solicitor for the Dept. of State, June 12, 1909, Hackworth, Dig., V, § 506.

in each case to determine whether the conditions which called forth the particular convention were temporary in character and have in fact ceased to exist. In some cases such a conclusion may be obvious.[5] In others it may not be, and may be fairly challenged as unsound.[6]

2

§ 539. **Notice Pursuant to Agreement.** Treaties frequently provide in substance that after a specified lapse of time, either contracting State — if it be a bi-partite arrangement — "shall have the right" to give notice to the other of an intention to terminate the agreement, and that at the expiration of a designated period of time after the giving of such notice, the treaty shall "wholly cease and determine." [1] The act which manifests the exercise of such a right is commonly referred to as that of denunciation. Denunciation by a party to a multipartite arrangement by notice in pursuance of its terms serves merely "to terminate the treaty only so far as such party is concerned, unless of course the treaty provides otherwise." [2]

"A long series of conventions signed by the Central American States provide that successive denunciations shall not terminate the convention until the number of parties is reduced to two." [3] This is an instance of a not infrequent provision contemplating the termination of a multi-partite treaty in case the number of unilateral denunciations causes the number of parties remaining steadfast to the arrangement to be less than a required minimum.[4]

[5] See Mr. Hughes, Secy. of State, to Representative Hull, May 28, 1924, Hackworth, Dig., V, § 506, in relation to the conventions concluded by the United States with certain of the Allied and Associated Powers, providing in each case for the drafting of the nationals of one country into the military service of the other.

"As a result of an exchange of notes in 1933 Belgium and the United States found themselves in accord upon the view that the agreement relating to military penal jurisdiction effected by an exchange of notes in 1918 had lapsed and become null and void since the circumstances which gave rise to the agreement no longer existed." (Hackworth, Dig., V, § 506.)

[6] See Mr. Hull, Secy. of State, to the Attorney General, May 4, 1937, in which it was declared that the convention between the United States and Great Britain, of Jan. 23, 1924, for the prevention of the smuggling of intoxicating liquors had not been terminated by reason of the repeal of the Eighteenth Amendment to the Constitution of the United States, Hackworth, Dig., V, § 506.

§ 539. [1] Art. XIX, treaty between the United States and Japan, of Nov. 22, 1894, Malloy's Treaties, I, 1035.

See Mr. Hull, Secy. of State, to the Japanese Ambassador at Washington, July 26, 1939, giving notice of termination by the Government of the United States of the treaty with Japan concluded Feb. 21, 1911, in accordance with the terms of Art. XVII thereof, Dept. of State Bulletin, July 29, 1939, 81.

[2] J. W. Garner, Reporter, in Comment on Art. 34 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Special Supplement*, October, 1935, 1182. See, also, Tobin, Termination of Multipartite Treaties, Chap. III, where numerous instances are given.

According to Art. 15 of the Convention on Rights and Duties of States, concluded at the Seventh International Conference of American States at Montevideo, Dec. 26, 1933, U. S. Treaty Vol. IV, 4809, "The present Convention shall remain in force indefinitely but may be denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the Convention shall cease in its effects as regards the party which denounces but shall remain in effect for the remaining High Contracting Parties."

[3] Tobin, Termination of Multipartite Treaties, 199, citing conventions of Feb. 7, 1923, Conference on Central American Affairs (Washington, 1923), 296.

[4] See, for example, Art. 16 of Convention concerning Economic Statistics, opened for signature at Geneva, Dec. 14, 1928, Hudson, Int. Legislation, No. 210.

It should be obvious that the parties to a treaty may, if they so desire, bring about its termination by a subsequent arrangement purporting in terms to do so.[5] "According to universal diplomatic practice there is nothing unfriendly in the giving of notice to terminate a treaty in the courteous manner provided for this purpose by the treaty itself."[6]

Notice of a design to terminate a treaty must, in order to be effectual, be clearly expressed. It is not to be implied from an inquiry merely suggesting negotiations for a new agreement.[7] Precise indication of particular Articles sought to be terminated (when a part rather than the whole of a convention is to be denounced) must be given, and in strict conformity with the requirements of the agreement.[8] Notice may doubtless be withdrawn prior to the date when the treaty would otherwise have been terminated by virtue of the notice through its operation.[9] On October 28, 1919, the American Government informed that of Greece that until a notice of withdrawal was received from the latter and accepted by the former, the Greek notice of denunciation of the treaty of December 10/22, 1837, received on March 1, 1919, was regarded by the Government of the United States as having due force and effect in accordance with the provisions of Article XVII of the treaty.[10] On February 10, 1920, Secretary Lansing informed the Greek Minister at Washington that having been informed by him of the action of the Council of Ministers of Greece published in the *Official Journal* of December 27, 1919, announcing that the denunciation, as of March 1, 1919, had been canceled, the American Government accepted the withdrawal of the notice of denunciation, and that the treaty would continue in force until January 26, 1921.[11]

In legal contemplation there is no objection to a conditional withdrawal of notice of termination of a treaty if accepted by the State to which it is addressed.[12]

[5] See, for example, Art. 1 of treaty between the United States and Mexico, of April 13, 1937, U. S. Treaty Vol. IV, 4502; also numerous other illustrative documents in Hackworth, Dig., V, § 507.

[6] Mr. Knox, Secy. of State, to the Ambassador to Russia, Dec. 17, 1911, For. Rel., 1911, 698.

[7] Correspondence between Mr. Fish, Secy. of State, and Mr. Perez, Colombian Minister, 1871, For. Rel. 1871, 243, 246, 247.

[8] Correspondence between the United States and Guatemala in 1888, concerning the denunciation of certain Articles of the treaty between those States of March 3, 1849. For. Rel. 1888, 149–151, Moore, Dig., V, 326; Mr. Olney, Secy. of State, to Mr. Young, Minister to Guatemala, Jan. 30, 1896, For. Rel. 1895, II, 775, Moore, Dig., V, 327.

Concerning the question whether Article XXIX of the treaty between the United States and Great Britain of May 8, 1871, was terminated by the notice of termination of Articles XVIII to XXV, and of Article XXX, given to the British Government July 2, 1883, see Moore, Dig., V, 327–335, and documents there cited.

Regarding the notification given by the Turkish Government to terminate the treaty of Commerce and Navigation with the United States, of Feb. 25, 1862, see Davis' Notes, U. S. Treaty Vol. (1776–1887) 1371, and documents there cited, Moore, Dig., V, 795–801.

[9] Report of Gen. Foster, Secy. of State, to the President, Dec. 7, 1892, concerning the withdrawal by Mr. Seward, Secy. of State, March 8, 1865, of a previous notice for the termination of the agreement between the United States and Great Britain of April 28–29, 1817, House Doc. No. 471, 56 Cong., 1 Sess., Moore, Dig., V, 323.

[10] For. Rel. 1920, II, 713.

[11] *Id.*, 715. Concerning subsequent events that were antecedent to the expiry of the treaty on Jan. 26, 1921, see documents in Hackworth Dig., V, § 508.

[12] See For. Rel. 1919, Vol. I, 54–67, in relation to a notice given by the Government of the United States, of intention to terminate the treaty with Spain, of July 3, 1902.

Where on one occasion a treaty of commerce contained no stipulation respecting the termination thereof, or the period required for the giving of a notice of termination, the Department of State announced that it felt that it might be assumed that the wishes of the other contracting party (Belgium) that had sought termination, might best be met "by considering that the treaty terminated at the expiration of such a period of notice as customarily is provided for in treaties of commerce and navigation," and that it was pleased to regard the treaty in question as having ceased to be operative at the expiration of one year from the date of the notification from the Belgian Government.[13]

The question concerning the authority of an agency of a State to denounce or terminate in its behalf an international agreement to which it is a party is a domestic matter of which the solution is to be found in the requirements of the domestic law. In behalf of the United States, notice of termination is given by the President, commonly in pursuance of a joint resolution of the Congress; and it has followed the unanimous resolution of the Senate.[14] According to instructions from President Taft, December 15, 1911, the American Ambassador at St. Petersburg gave to the Russian Government on December 17, 1911, official notification whereby the operation of the treaty with that State of December 18, 1832, would terminate, in accordance with its terms, on January 1, 1913.[15] A joint resolution ratifying this action was approved by the President December 21, 1911.[16] The President is not believed, however, to lack authority to denounce, in pursuance of its terms, a treaty to which the United States is a party, without legislative approval.[17] In taking such action, he is merely exercising in

[13] For. Rel. 1920, Vol. I, 207. Also documents in Hackworth, Dig., V, § 508.

[14] See instances contained in Moore, Dig., V, 322–335; also in Crandall, Treaties, 2 ed., § 184.

[15] For. Rel. 1911, 695–699; also House Report No. 179, 62 Cong., 2 Sess., containing Report from House Committee on Foreign Affairs, Dec. 12, 1911, recommending passage of joint resolution 166, introduced Dec. 4, 1911, by Mr. Sulzer, which was not acceptable to the administration.

[16] 37 Stat. 627.

See also documents in Hackworth, Dig., V, § 510.

[17] See Mr. Hay, Secy. of State, to Mr. Leishman, Minister to Switzerland, March 8, 1899, in relation to the notification to the Swiss Confederation "of the intention of the United States to arrest the operation of Articles VIII to XII, inclusive, of the convention signed on the 25th day of November, 1850," For. Rel. 1899, 754; also, *id.*, 757, concerning the acceptance by the Confederation of the notice of denunciation.

Declared Professor Jesse S. Reeves: "It seems to be within the power of the President to terminate treaties by giving notice on his own motion without previous Congressional or Senatorial action. It would seem, on the other hand, that the President cannot be forced by Congress or by the Senate to perform the international act of giving notice." ("The Jones Act and the Denunciation of Treaties," *Am. J.*, XV, 33, 38.)

Declared Chief Justice Hughes, Feb. 3, 1936, in the opinion of the Court in Van Der Weyde *v.* Ocean Transport Co., 297 U. S. 114, 117–118: "We think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress [in the Seamen's Act of March 4, 1915] requested and directed the President to give notice of the termination of the treaty provisions in conflict with the act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to articles XIII and XIV [of the treaty with Sweden and Norway of July 4, 1827] was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it. Norway

behalf of the nation a privilege already conferred upon it by the agreement, and which involves no necessary modification thereof. Denunciation in such case may be regarded as a mere normal incident in the conduct of foreign relations as they are confided to the Executive. Mr. Hackworth has declared that, summarized, the situation appears to be somewhat as follows:

> In some cases treaties have been terminated by the President, in accordance with their terms, pursuant to action by Congress. In other cases action was taken by the President pursuant to resolutions of the Senate alone. In still others the initiative was taken by the President, in some cases independently, and in others his action was later notified to one or both Houses of Congress and approved by both Houses. No settled rule or procedure has been followed.[18]

It may be observed that the American Ambassador to Italy, with the approval of President Roosevelt and the Italian Minister of Foreign Affairs, signed, on December 15, 1936, "a protocol announcing the intention of each Government to terminate the treaty [of 1871] at the end of one year, the protocol being deemed the notice required under the provisions of the treaty." [19]

The abrogation of articles in relation to the reclamation of officers or seamen deserting from merchant vessels and contained in numerous treaties to which the United States was a party, in pursuance of the Seamen's Act of 1915, was effected by a denunciation of the several treaties (containing those articles) in pursuance of their terms, and by withdrawal of the notice of denunciation of

---

agreed to the termination of articles XIII and XIV and her consul cannot be heard to question it."

"In the first place the Court has not said that the President could not give effect to a unilateral denunciation of the treaty without congressional authority, *i.e.*, that the authorization is indispensable. It has likewise not said that the treaty power could not denounce a treaty. But it did say that the President could denounce a treaty if authorized by a congressional act under the circumstances of the case." (S. A. Riesenfeld, "The Power of Congress and the President in International Relations," *Calif. Law Rev.*, XXV, 643, 663.)

[18] Memorandum of the Legal Adviser, Dept. of State, on "Abrogation of Treaties," Jan. 27, 1936, Hackworth, Dig., V, § 509. See also Mr. Moore, Acting Secy. of State, to President Roosevelt, Nov. 9, 1936, Hackworth, Dig., V, § 509, and numerous other documents there quoted or cited.

[19] Statement in Hackworth, Dig., V, § 509; Dept. of State Press Releases, Dec. 19, 1936, 529.

In 1911 the Department of State announced that it had no power to waive the American tariff preference on sugar or any other article included in the existing reciprocity treaty with Cuba, and that such waiver would be a partial abrogation of that treaty, which would require the concurrence of the legislative branch of the Government. See For. Rel. 1911, 106. See also Mr. Phillips, Acting Secy. of State, to Mr. de Chambrun, French Chargé d'Affaires, March 25, 1919, For. Rel. 1919, Vol. II, 229. These and numerous other documents contained in Hackworth, Dig., V, § 509, are illustrative of the fact that the Government of the United States does not normally regard itself as in a position to agree to an arrangement, as by an exchange of notes, that would serve to modify an existing treaty. (See also Agreements Other than Treaties, *supra*, § 508.) Notwithstanding this fact, the Government has at times yielded to minor relaxations by such processes. (See, for example, an instance set forth in For. Rel. 1916, 50.) Again, a State, such as the United States, may fail to object to a proposed arrangement from a party to a multi-partite arrangement, although deemed to be at variance therewith, when the other parties approve: such was the case in the Chinese proposal of 1910 relative to the collection of the Peking *octroi* on certain terms. See statement in Hackworth, Dig., V, § 509, and documents there cited, especially, Mr. Lansing, Counselor for the Dept. of State, to the Minister to China, May 4, 1914, For. Rel. 1914, 119–132.

See also Mr. Hull, Secy. of State, to President Roosevelt, March 19, 1937, in relation to the suspension by the United States of the jurisdiction of the American consular and ministerial courts in Egypt pending the formal ratification of the Montreux Convention by the United States, Hackworth, Dig., V, § 509.

articles other than those pertaining to the matter of reclamation, provided the foreign contracting party was willing to accept the termination of those articles alone. In certain instances where there was unwillingness to do so, the termination of the entire instrument was necessitated.[20]

On October 13, 1934, the German Government gave notice to that of the United States of intention to modify Article VII of the existing treaty of Friendship, Commerce and Consular Rights concluded December 8, 1923.[21] Under Article XXXI of that treaty setting forth the procedure as to termination, such notice would have resulted in termination of the entire treaty as of October 14, 1935, unless the modifications were agreed upon by the two governments before that date. Inasmuch as the treaty was deemed to contain valuable provisions in respect of the residence and establishment of citizens of either country in the territory of the other, and provisions relating to navigation and consular rights, the two Governments agreed to the conclusion of a new arrangement which in effect retained all provisions of the existing treaty except those which the German Government had indicated a desire to modify.[22] That agreement was signed on June 3, 1935, and assumed the form of a treaty which was proclaimed by the President, October 25, 1935.[23]

3

§ 540. **Later Agreement Superseding Earlier One.** Such Articles of a treaty as are incorporated in a later one are thereby superseded or revoked.[1] A

[20] See Memorandum accompanying communication of Mr. Phillips, Acting Secy. of State, to the Senate, March 27, 1919, Senate Doc. No. 2, 66 Cong., 1 Sess.

See also Mr. Bryan, Secy. of State, to the Minister to Bolivia, May 29, 1915, For. Rel., 1915, 6. See numerous documents in Hackworth, Dig., V, § 508 in relation to the matter.

See Reclamation of Deserting Seamen, *supra*; § 484. Also Hackworth, Dig., I, § 144, and documents there cited.

See Cargo and Tonnage Duties, *supra*, § 207A, in relation to the ineffectual effort of the Congress through the Merchant Marine Act of June 5, 1920, to cause the President to effect the termination of provisions in treaties serving to restrict the United States from imposing discriminatory cargo and tonnage duties.

See correspondence between the United States and France in 1909 (For. Rel. 1909, 248–254), concerning the termination of commercial agreements of May 28, 1898, Aug. 20, 1902, and Jan. 28, 1908.

The American Government, concluding that the American-Hellenic Treaty of Extradition of May 6, 1931, U. S. Treaty Vol. IV, 4290, was "entirely useless" by reason of the failure of the Greek authorities on two occasions "to deny the just requests of the United States" made thereunder for the surrender to itself of a fugitive from its justice, gave formal notice of the denunciation of the treaty to the Greek Government on November 6, 1933, "with a view to its termination at the earliest date possible under its pertinent provisions." (Dept. of State Press Releases, Nov. 11, 1933, 257.) "That date was Nov. 1, 1937. The United States and Greece concluded and signed on Sept. 2, 1937 a protocol of interpretation of the article of the treaty which had given rise to the divergent views of the two Governments in the Insull case. Thereafter the United States, on Sept. 29, 1937, withdrew its notice of denunciation. The Greek Government ratified the interpretive protocol by a law of Feb. 26, 1938, making it legally effective as of the date of its signature. It was not regarded as necessary to submit the protocol to the Senate since it did not change the treaty as interpreted by the United States." (Hackworth, Dig., V, § 508, footnote.)

[21] U. S. Treaty Vol. IV, 4193.

[22] Dept. of State Press Releases, June 8, 1935, 424; also, Mr. Hull, Secy. of State, to Dr. Luther, German Ambassador at Washington, April 24, 1935, Dept. of State Press Releases, May 4, 1935, 318.

[23] U. S. Treaty Vol. IV, 4221.

§ 540. [1] *In re* Ross, 140 U. S. 453, 465–467, Moore, Dig., V, 363; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, No. 181, Jan. 7, 1886, MS. Inst. Great Britain, XXVII, 640, Moore, Dig., V, 364.

treaty is superseded by a subsequent agreement between the parties covering all of the same subject matter.[2] Declared Judge Augustus N. Hand in 1922: "The recent subsequent treaty of peace with Germany, signed August 25, 1921, must prevail over the Treaty of 1799, so far as any of its provisions are inconsistent with the former treaty."[3]

The Department of State announced the conclusion in 1939, that the Montreux Convention of 1937, in force between the United States and Egypt, superseded, with respect to Egypt, all of the capitulatory provisions contained in the treaty between the United States and Turkey of 1830.[4] It also took the position in 1933, that the treaty of 1830 "should be regarded as having been terminated in all parts as between the United States and Turkey upon the entry into force of the treaty of establishment and sojourn of October 28, 1931."[5]

The effect of a later convention or of particular articles thereof upon the former or upon portions of it, is sometimes definitely announced.[6] Thus the treaty between the United States and Cuba of May 29, 1934, provided that the Treaty of Relations concluded between the two countries on May 22, 1903, should cease to be in force and be "abrogated" from the date when the new treaty went into effect.[7] Again, the treaty of Friendship, Commerce and Consular Rights between the United States and Norway of June 5, 1928, together with an additional article of February 25, 1929, made provision concerning the extent to which the Treaty of Commerce and Navigation concluded by the United States and the King of Norway and Sweden on July 4, 1827, was supplanted.[8] By such procedure there is greatly lessened, and at times eliminated, danger of grounds of dispute concerning the effect of an agreement upon the provisions of its predecessor.

It is doubtless a sound proposition of law that in the case of a multi-partite treaty, supersession by a later agreement calls for acquiescence therein by all

[2] La Republique Française *v.* Schultz, 57 Fed. 37.

[3] Junkers *v.* Chemical Foundation, 287 Fed. 597, 598. See, also, Art. 22 (a) of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement,* October, 1935, 661.

[4] Mr. Murray, Chief of Division of Near Eastern Affairs, Dept. of State, to the Chargé d'Affaires *ad interim* in Cairo, Jan. 17, 1939, Hackworth, Dig., V, § 507.

[5] Memorandum by Mr. Hackworth, Legal Adviser of the Dept. of State, March 18, 1933, Hackworth, Dig., V, § 507.

[6] The Hay-Pauncefote convention of Nov. 18, 1901, announced in Art. I, that it superseded the Clayton-Bulwer Treaty of April 19, 1850; but it was declared in the preamble of the later convention that the design thereof with respect to facilitating the construction of a ship canal to connect the Atlantic and Pacific Oceans, was "without impairing the 'general principle' of neutralization" established in Art. VIII of the earlier agreement. Malloy's Treaties, I, 782.

[7] Art. I, U. S. Treaty Vol. IV, 4054. *Cf.* provisions of Art. III in relation to agreements of 1903, concerning coaling and naval stations.

See, also, Art. 13 of Convention for the Revision of the General Act of Berlin of Feb. 26, 1885, and the General Act and Declaration of Brussels of July 2, 1890, U. S. Treaty Vol. IV, 4854.

[8] U. S. Treaty Vol. IV, 4527, 4539.

According to Art. XXX of the treaty of Friendship, Commerce and Consular Rights between the United States and Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4202, nothing in that arrangement was to be construed to limit or restrict in any way "the rights, privileges and advantages accorded to the United States or its nationals or to Germany or its nationals, by the Treaty between the United States and Germany restoring friendly relations, concluded on August 25, 1921."

States that were parties to the original arrangement.[9] Nevertheless, it must be borne in mind that in the process of supplanting a multi-partite treaty by another, a predominant group of States may produce the consummation of a fresh amendatory convention without consulting or obtaining the definite approval of some parties to the original agreement, and in various ways encourage them to withhold disapproval of what has taken place.[10] As a matter of fact, agreements providing in terms for the supplanting of previous arrangements pertaining to like or kindred matters not infrequently serve to cause the parties to the new arrangement to be subject to differing and perhaps inconsistent sets of obligations.[11] For that reason, there is incorporated in the Harvard Draft Convention on The Law of Treaties a plan embodying restrictions designed to effect a consistent result in the case of a multi-partite arrangement.[12]

## 4

## CHANGED CONDITIONS

### a

§ 541. **In General.** It is not easy to determine what changes in conditions confronting the parties to a treaty serve to permit either of them to free itself from the burdens of the compact. The term "changed conditions," unless given a somewhat narrow signification, fails to indicate the basis of a definite legal right. Nor does it reveal the precise grounds on which a contracting State may fairly rely in justification of abrogation. A diplomat may anticipate, with reason, that a particular State, as soon as the development of its power suffices, will attempt to rid itself of inconvenient obligations imposed by a treaty concluded at a time when military or political weakness rendered acquiescence imperative. It requires, however, something more than the sheer power of a contracting State to disregard with impunity the terms of a valid treaty, in order to establish a legal right to do so.[1] Reliance, therefore, on a change of conditions which refers merely to the development of the power of such a State to a point where it may safely ignore the terms of its agreement, is an appeal to force rather than to law.[2] The German invasion of Belgium in 1914, regardless of the terms of the

[9] See comment by Prof. Garner on Art. 22 (a) of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 1013.

[10] See Harold J. Tobin, The Termination of Multipartite Treaties, New York, 1933, 248–249.

[11] Instances are numerous. See, for example, Art. 184 of the International Sanitary Convention of Dec. 3, 1903, Malloy's Treaties, II, 2107; Art. XCI of the Hague Convention of Oct. 18, 1907, for the Pacific Settlement of International Disputes, *id.*, 2243; Art. 8 of the International Telecommunication Convention of Dec. 9, 1932, U. S. Treaty Vol. IV, 5382.

[12] According to Art. 22 (b): "Two or more of the States parties to a treaty to which other States are parties may make a later treaty which will supersede the earlier treaty in their relations *inter se*, only if this is not forbidden by the provisions of the earlier treaty and if the later treaty is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose." (*Am. J.*, XXIX, *Supplement*, October, 1935, 661.)

§ 541. [1] See Validity, Consent, *supra*, § 493.

[2] In the course of discussions between the United States and Great Britain, relating to the Clayton-Bulwer Treaty of April 19, 1850, Mr. Blaine, Secretary of State, in a note of instruction to Mr. Lowell, Minister at London, Nov. 19, 1881, said that the "treaty was made

treaties of 1839, will, in view of the pleas of German statesmen, long be deemed to be an impressive modern illustration of such an appeal.[3]

If changed conditions ever serve on principle to confer upon a contracting State the right to free itself from obligations laid down in a treaty, it is because those conditions mark the existence of a new order of things which in a broad sense were not contemplated by the parties at the time of the conclusion of their agreement and which render highly unreasonable a demand for performance. This general requirement needs, however, explanation. That which causes a demand for performance to be unreasonable, and which, conversely, clothes a party with freedom to rid itself of the obligation to perform is the coming into being of a new condition of affairs which was not only not brought to the attention of the parties when they concluded their agreement, but also one which, if it had then been brought to their attention, would have necessarily produced common acknowledgment that the agreement would be inapplicable, and hence permit a party to regard it as no longer binding in case that condition or situation should subsequently arise. This requirement, which refers the matter to the thinking of the contracting parties when they concluded their agreement, or to such implications from their thought at that time as are impregnable, involves primarily a fact-finding endeavor. No formula offers a substitute for it, or points unerringly to what needs to be ascertained. The phrase *rebus sic stantibus* is an unhelpful guide. It is oftentimes employed to indicate that changes of conditions under some circumstances confer upon a contracting party some freedom by way of escape from the burdens of an existing treaty. It fails, however, to reveal linguistically the distinctive character of such changes as are to be deemed to produce such a result. Moreover, lack of agreement concerning what the phrase necessarily signifies renders it incapable of isolating, in

---

more than thirty years ago, under exceptional and extraordinary circumstances which have long ceased to exist — conditions which at best were temporary in their nature and which can never be reproduced." (For. Rel. 1881, 554.) For that reason, he sought a revision of its terms. His successor, Mr. Frelinghuysen, in 1882 and 1883, maintained that the compact was no longer binding on the United States, asserting that for various reasons it was at least "voidable." He did not, however, expressly refer to changed conditions. For. Rel. 1882, 271; *id.*, 1883, 418, 477. Lord Granville, in behalf of Great Britain, vigorously opposed these contentions. For. Rel. 1882, 302, 305; *id.*, 1883, 484, 529. In a memorandum addressed to the President in 1896, Mr. Olney, Secy. of State, after reviewing the attitude of Messrs. Blaine and Frelinghuysen, concluded that "upon every principle which governs the relations to each other, either of nations or individuals, the United States is completely estopped from denying that the treaty is in full force and vigor. If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter." (Moore, Dig., III, 203, 209.) For a full abstract of the discussions relating to the Clayton-Bulwer Treaty, 1881–1883, see Moore, Dig., III, 189–197; concerning negotiations preliminary to the conclusion of the Hay-Pauncefote treaty of Nov. 18, 1901, *id.*, III, 210–219. But see, also, Hon. J. W. Foster, The Practice of Diplomacy, 303, *citing* Report of Senate Committee on For. Rel. Jan. 10, 1891, contained in Reports of Com. on For. Rel., U. S. Senate, 1789–1901, IV, 187, 191.

See, in this connection, Sir John Fischer Williams, "The Permanence of Treaties," *Am. J.*, XXII, 89.

[3] See the reference to the violation of the treaty of 1839, in Art. 232 of the Treaty of Versailles of June 28, 1919; Ch. de Visscher, Belgium's Case, A Juridical Enquiry, London, 1916, Chap. III.

a descriptive sense, those situations where a change of conditions is, or should be acknowledged to confer upon a contracting State the privilege of rightly demanding freedom from its contractual obligations. To refer, on the other hand, to those situations as illustrative of the applicability of a doctrine roughly described as that of *rebus sic stantibus,* is believed to serve no useful purpose in the effort to mirror what the requirements of logic or the practice of States may ordain.[4]

That practice as revealed in the relevant documents shows the frequent unwillingness of States to confine their assertions of a right to freedom to those relatively few situations where, as suggested above, reference to the thought of the contracting States at the time they endeavored to agree, establishes the validity of the claim. Today if a contracting State smarts sufficiently under a contractual restraint that has been imposed by another, or under one which although accepted without compulsion seemingly works grave hardship upon it, the sufferer may be expected to invoke any substantial change of conditions that has taken place since the conclusion of the arrangement, as a ground of release.[5] It may thus attempt to disguise a repudiation that is attributable primarily to the power or resolution of the repudiator.[6] When a contracting State invokes the doctrine of changed conditions as a ground of release under circumstances where the change has served to render the contractual burden incompatible with the obvious interests of the complainant, the other party or parties, with a desire to avoid a unilateral denunciation that might in the particular case be regarded as without excuse, are likely to be disposed to endeavor to save the situation by agreeing to termination or revision.[7] Such practices are

[4] See study by Dr. Chesney Hill entitled "The Doctrine of 'Rebus Sic Stantibus' in International Law" with excellent bibliography, University of Missouri Studies, IX, No. 3, July, 1934; also data assembled by Prof. Garner in his Comment as Reporter on Art. 28 of Harvard Draft Convention on The Law of Treaties, *Am. J.,* XXIX, *Supplement,* October, 1935, 1096–1124; Tseng Yu-Hao, The Termination of Unequal Treaties in International Law, Shanghai, 1931; Charles Fairman, "Implied Resolutive Conditions in Treaties," *Am. J.,* XXIX, 219.

[5] See, for example, "Statement of the Chinese Government explaining the Termination of the Sino-Belgian Treaty of November 2nd, 1865," Nov. 6, 1926, Publications, Permanent Court of International Justice, Series C, No. 16, Vol. I, 271, 275.

See Steps towards the Relinquishment of Extraterritorial Jurisdiction, *supra,* § 265.

[6] In a note of March 24, 1936, communicated by the German Ambassador at London to the British Foreign Office, it was said in respect to German denunciation of the Locarno Pacts: "The German Government, being convinced that by the Franco-Soviet military alliance the legal and political conditions on which the Rhine Pact of Locarno was based have been removed, have determined for their part to restore at last their full sovereignty over the entire territory of the Reich." (Correspondence with the German Government regarding the German Proposals for an European Settlement, March 24–May 6, 1936, British White Paper, Miscellaneous No. 6 [1936], Cmd. 5175.) See, also, statement by Herr von Ribbentrop, in behalf of Germany, before the Council of the League of Nations, March 19, 1936, League of Nations, *Official Journal,* 1936, 334, 336–337.

See attitude of the Persian Government in denouncing in 1927 capitulatory privileges yielded by its treaties, as reflected in Ahmad Khan Matine-Daftary, *La Suppression des Capitulations en Perse,* Paris, 1930, § 140.

[7] The success of the effort of Turkey between the years 1914 and 1923 to gain recognition of the termination of capitulatory privileges which it had yielded in numerous agreements concluded in the course of a long period of years, was exemplified in the provisions of the Treaty of Lausanne of July 24, 1923. Turkey had bluntly asserted the right of unilateral denunciation on the ground, among others, that changes of conditions to which it adverted were productive of it. Its reasoning, however unsatisfactory to the States with which it dealt,

believed to be as pregnant with meaning to the life of the international society as others which reveal the disposition of some States to follow what, in a juridical sense, may be regarded as a sounder course, at least in refraining from asserting on loose grounds that changes of conditions beget a basis of freedom; and they emphasize accordingly, the unrealistic quality of statements of the law that fail to take cognizance of such recurrent pleas for freedom as are fairly to be anticipated. Existing practices also serve another purpose. They accentuate the fact that the durability of treaties does not necessarily rest upon the enunciation of rules indicative of the impropriety of conduct that is of repudiatory aspect, or which, conversely, accentuate the validity of excuses that are fairly applicable in particular classes of situations. Durability depends upon the care with which contracting States themselves avoid the employment of the art of treaty-making, even when it marks the termination of a war between former enemies, as a means of procuring undertakings that substantial changes in the power or interests or conditions of life of a contracting party will surely arouse it to make utmost endeavor to break down.[8]

Declaring that the provisions of the International Load Line Convention signed at London July 5, 1930,[9] had been carefully formulated "to promote safety of life and property at sea" in time of peace by regulating the competitive loading of merchant ships employed in the customary channels of international trade, and that the conditions envisaged by the convention had been, for the time being, almost wholly destroyed, and that the partial and imperfect enforcement of the convention could operate only to prejudice victims of aggression whom it was the avowed purpose of the United States to aid; and also that

---

is perhaps of less significance than the realization by those States of their own interest in agreeing, under the circumstances confronting them, to a new régime by a method that purported to base the unshackling of Turkey from what it had sought to rid itself, on a conventional basis. See Steps Toward the Relinquishment of Extraterritorial Jurisdiction, *supra*, § 265.

See character of changed conditions invoked by Tevfik Rüstü Aras, Turkish Minister for Foreign Affairs, in his telegram to the Secretary General of the League of Nations, April 10, 1936, as a reason for seeking fresh negotiations looking to the consummation of an arrangement that should supplant the Convention Relating to the Régime of The Straits, of July 24, 1923, League of Nations, *Official Journal*, 1936, 504. See Convention regarding the Régime of the Straits, July 20, 1936, British White Paper, Turkey No. 1 (1936), Cmd. 5249.

In the Case of the Free Zones of Upper Savoy and the District of Gex, the Permanent Court of International Justice, in its Judgment of June 7, 1932, did not pass upon the question concerning the effect of changed conditions upon the obligation of a contracting party under an existing treaty. See Publications, Permanent Court of International Justice, Series A/B, No. 46, 156–157. The case, however, was the means of enabling the French Government to express the following view through the oral argument of M. Basdevant on April 20, 1932:

"*Je crois pouvoir me borner à constater que c'est une règle reconnue du droit international que les obligations internationales résultant d'un traité sont rendues caduques par le changement des circonstances, lorsque, du moins, ce changement a un caractère suffisamment important. . . .*

"*A cet égard, il suffit, je crois, de constater que la règle que j'énonçais tout à l'heure est reconnue. Il est donc permis de dire qu'il est admis en droit international qu'un changement essentiel dans les circonstances en vue desquelles un traité a été conclu entraîne la caducité des obligations découlant de ce traité, lorsqu'il est intervenu à cet effet — c'est-à-dire pour constater ce changement — un acte faisant droit pour les Parties.*" (Publications, Permanent Court of International Justice, Series C, No. 58, 405–406.)

[8] See Agreements Between States, Preliminary, *supra*, § 489.

[9] U. S. Treaty Vol. IV, 5287.

it was an implicit condition to the binding effect of the convention "that those conditions envisaged by it should continue without such material change as has in fact occurred"; and that "under approved principles of international law it has become, by reason of such changed conditions, the right of the United States of America to declare the convention suspended and inoperative," President Roosevelt on August 9, 1941, exercising in behalf of his country what he declared to be "an unquestioned right and privilege under international law," proclaimed and declared the convention "suspended and inoperative" in the ports and waters of the United States, in so far as the United States was concerned, "for the duration of the present emergency." [10]

The opinion of the Acting Attorney General upon which the President relied contained the statement: "It is a well established principle of international law, *rebus sic stantibus,* that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a State adversely affected by such essential change." [11] One may well doubt whether international law embraces a principle such as that so described. There was doubtless good reason for the United States to proclaim its freedom from the further operation of the International Load Line Convention, at least during the continuance of the war. That reason was, in substance, the circumstance that it could not possibly have been the design of the contracting parties when they concluded the Convention, that it should remain necessarily binding upon the coming into being of the conditions to which both the Acting Attorney General and the President referred; and that when those conditions did come into being, a contracting party confronted with a situation such as that which prevailed in July 1941, might, by appropriate action, free itself, at least for the time being, from the burdens of the arrangement. Hence, it is to be regretted that the Acting Attorney General, departing from this simple approach, saw fit to rely upon a phrase that in itself wholly failed, as has been suggested above, to reveal the exact requirements of international law, and which as it stands must serve to encourage unscrupulous States to endeavor to rid themselves of the burdens of inconvenient contractual arrangements on specious and unconvincing grounds.[12]

[10] Proclamation No. 2500, Dept. of State Bulletin, Aug. 9, 1941, 114. The President based his proclamation upon an opinion of the Acting Attorney General of July 28, 1941, 40 Ops. Attys. Gen., No. 24, in which he concluded that peacetime commerce and voyages were assumed as the basis of the convention; that the existing situation with respect to shipping was wholly different from that obtaining at the time the convention had been signed; and that the conditions essential to the operation of the convention and assumed as the basis for it were almost in complete abeyance. He pointed out that of the thirty-six countries which had become parties to the convention, ten were at war and sixteen were under military occupation, and that in these circumstances, the Government of the United States was free to declare the convention inoperative or suspended. Dept. of State Bulletin, Aug. 9, 1941, 114.

It may be observed that while provision was made for the denunciation of the agreement in Art. 25, there was no textual arrangement providing for the exercise of the privilege of suspension.

[11] 40 Ops. Attys. Gen. No. 24, p. 3.

[12] It may well be doubted whether the Department of State would be prepared to acquiesce in the reasoning of the Attorney General in so far as he invoked the doctrine of *rebus sic stantibus* as declaratory of a principle of international law.

It should be observed that Art. 20 makes provision for modifications of the convention

## b

## Political Changes

### (1)

§ 542. **Changes in Form of Government.** It is accepted doctrine in which the United States has long acquiesced, that a change in the form of the government of a contracting State does not serve to terminate its treaties, or necessarily justify the attempt of any party to terminate them. Thus, Mr. Jefferson, as Secretary of State on April 28, 1793, advised President Washington in response to his inquiry whether the United States should consider itself still bound to respect its treaties with France, in view of the change in the form of the government of that State, that the treaties between the two countries "were not the treaties between the United States and Louis Capet, but between the two nations of America and France, and the nations remaining in existence, though both of them have since changed their form of government, the treaties are not annulled by these changes." [1] As Professor Moore has well said: "The principle of the continuity of States has important results. The State is bound by engagements entered into by governments that have ceased to exist." [2]

Contracting States may of course manifest a design expressed in the terms of their agreement or revealed in evidence decisive of their thought concerning the sense in which they used the terms of their choice, that by reason of the character of undertakings embraced in their compact, the arrangement shall not survive the establishment of such a governmental régime by either party as may be utterly opposed to the philosophy productive of them. Evidence of such a design may, however, be lacking; and it should not be lightly imputed to the parties when the objectives sought to be achieved, or the obligations specifically imposed were typical of the contractual practices of the time, and were not commonly regarded as marking the imposition of unreasonable burdens essentially detrimental to the State which accepted them, and which their representatives in exercising due authority to bind their independent principals deemed it to be mutually advantageous for the latter to agree to observe. It ought to be clear that the mere attachment of a subsequent régime that gains control by any process of the government of a contracting State to a political theory that

---

through future conferences to be convoked under conditions that are specified. Possibly through the procedure thus laid down there was open to the United States a simple and appropriate means of securing acknowledgment of the full measure of its equities.

§ 542. [1] Writings of Jefferson, P. L. Ford's ed., VI, 219, 220, Moore, Dig., V, 335–336; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Feb. 21, 1877, MS. Inst. Haiti, II, 91, Moore, Dig., V, 337.

"It is well settled that a change in the form of government of a State does not serve to terminate treaties." (Hackworth, Dig., V, § 511.)

[2] Moore, Dig., I, 249, citing Rivier, *Principes du Droit des Gens,* I, 62. See, also, *In re* Lepeschkin, Switzerland, Federal Court, 1923, Williams and Lauterpacht, Annual Dig., 1923–1924, Case No. 189.

According to Art. 24 of the Harvard Draft Convention on The Law of Treaties: "Unless otherwise provided in the treaty itself, the obligations of a State under a treaty are not affected by any change in its governmental organization or its constitutional system." *Am. J.,* XXIX, *Supplement,* October, 1935, 662. See, also, materials cited by Prof. Garner, Reporter, in his Comment, *id.,* 1044–1055.

is opposed to the making of commitments such as have been registered in a treaty to which their country became a party, does not suffice to clothe that country with a legal right to terminate the agreement. If it did, such State would lack the capacity to bind itself in relation to matters concerning which its primary interests demanded the consummation of an enduring arrangement, beyond such period of time as the philosophy then prevailing within its domain might obtain. This would be true despite the uncertainty as to the length of time within which such a change of thought might take place, and regardless also of any commonly accepted tests indicative of the reasonableness of the conclusion that would challenge as untenable the theory of existing commitments. For these reasons, the assertion that a radical change in the social order of a contracting party confers upon it the right to free itself from contractual obligations which it accepted through the agency of a previous governmental régime, is believed to be not only heedless of the significance of the elements entering into the thought of the contracting parties when they essayed to contract, but also to ignore the full measure of the capacity of the parties at that time to make enduring commitments.[3] Moreover, with its unconcern for the design of the parties when they endeavored to contract, the assertion in reality transfers the claim to freedom to terminate a treaty from the domain of law to that of policy, and to plant it squarely on the sands of expediency.

There is no necessary relaxation of the principle here discussed when a contracting State which has experienced a change of thought agrees in vigorous terms to undo what its former rulers previously exacted of those of another,[4] or when the parties to a fresh agreement, acknowledging that the arrangements previously concluded between them "do not correspond with their mutual interests," proceed to agree that they shall be "considered as annulled and abrogated."[5] Even in such situations, it is not without significance that it is through the medium of a new contractual arrangement that the termination of existing provisions is wrought.[6]

### (2)

### Changes in the Identity of a State

### (*a*)

**§ 543. Loss of State Life through Absorption by Another State.** When a State relinquishes its life as such through incorporation into or absorption by

[3] See, in this connection E. A. Korovin, "Soviet Treaties and International Law," *Am. J.*, XXII, 753, 763. Also Comment by Prof. Garner on Art. 24 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 1054–1055.

[4] See, for example, Arts. I and II of Treaty of Friendship between Persia and Russia of Feb. 26, 1921, Brit. and For. St. Pap., CXIV, 901.

[5] See Art. VI of the Treaty of Friendship between Russia and Turkey of March 16, 1921, Brit. and For. St. Pap., CXVIII, 992.

[6] According to Art. 11 of the Convention on Treaties, which was adopted on Feb. 18, 1928, at the Sixth International Conference of American States: "Treaties shall continue in effect even though the internal constitution of the contracting States has been modified. If the organization of the State should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions." (Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 199.)

another State, the treaties of the former are believed to be automatically terminated. The complete loss of international personality in consequence of the extinction of State life produces this result. Accordingly, the method or process whereby extinction is wrought is believed to be immaterial, likewise the absence of a formal announcement by the new sovereign proclaiming its invocation of the legal principle.

The stand taken by the United States in respect to the matter has not been uniform. It did not regard its treaties concluded with the Two Sicilies in 1855 as terminated in consequence of the annexation of the Two Sicilies to Sardinia in 1860; and even after the establishment of the Kingdom of Italy, it regarded these treaties as in force with respect to the territories with reference to which they had been concluded. Likewise, the United States deemed its treaty with Sardinia, of 1838, to be in force with respect to Sardinia, after the establishment of the Kingdom of Italy, although not to be applicable to other parts of the Kingdom of Italy.[1] Conventions subsequently concluded between the United States and Italy in 1868 and in 1871, embraced in their operation the territories with respect to which the earlier treaties had been concluded, and, therefore, in one sense superseded them.[2]

Again, the United States denied in 1876,[3] and for different reasons, in 1908,[4]

§ 543. [1] Mr. Fish, Secy. of State, to Aristarchi Bey, Turkish Minister, Sept. 18, 1876, MS. Notes to Turkey, I, 170, Moore, Dig., V, 345.

[2] Treaty Vol. (1776–1887), Davis' Notes, 1236–1237.

[3] Declared Mr. Fish, Secy. of State, to Aristarchi Bey, Turkish Minister, Sept. 18, 1876: "While it may be true that, as a general rule, when one country is absorbed by another the treaties of perhaps the more inconsiderable of the two are often regarded as annulled, it is believed that the absorption of a State is not always attended by an admitted annulment of its treaties. The union between the United States and Texas was effected by the legislation of the parties. It necessarily canceled the treaties between Texas and foreign powers, so far at least as those treaties were inconsistent with the Constitution of the United States, which requires customs duties to be uniform throughout the Union. The treaties of Algiers with other governments were also annulled by the conquest of that country by France. This conquest was made pursuant to a regular war of such notoriety that its origin, progress, and result could not fail to come to the knowledge of all the parties having treaties with Algiers and to be regularly recorded as an historical fact. Such was not the character of the contest by which the Porte acquired the ascendancy which it afterwards claimed in Tripoli. That contest was of a comparatively obscure character, and, as was believed, had been but faintly and imperfectly recorded in the published annals of the time. The Two Sicilies and certain of the States of the Church were conquered by the arms of Sardinia. The United States at the time of that conquest had a treaty of commerce with the Two Sicilies, which it did not regard as canceled, thereby; nor did it regard the treaty of commerce which it had with Sardinia itself as applicable either to the Two Sicilies or to the States of the Church." (MS. Notes to Turkey, I, 170, Moore, Dig., V, 345.)

[4] In an instruction to the American Minister at Constantinople, of Sept. 3, 1908, it was declared:

"1. That the treaty of 1805 was made with all necessary formalities.

"2. That prior to 1835, as well as after that date, the real sovereignty over Tripoli rested in the Ottoman Porte.

"3. That inasmuch as prior to 1835 the Ottoman Porte permitted Tripoli to make war and peace and negotiate treaties, the treaties so negotiated must be considered as binding upon Turkey as well as upon Tripoli.

"4. That the affair of 1835 was not in any proper sense a conquest by Turkey of Tripoli, but was merely the assumption by Turkey of a more complete governmental control over Tripoli.

"5. That this being the true nature of the affair of 1835, Turkey cannot treat the earlier Tripolitan treaties as abrogated by conquest.

"6. That Turkey herself, from 1835 until 1873, appears to have considered all treaties made with Tripoli prior to 1835 as binding upon her, Turkey.

that its treaty concluded with Tripoli on June 4, 1805, was terminated by reason of the ascendancy of the Ottoman Porte over Tripoli in 1835 and thereafter. Nevertheless, Mr. Sherman, as Secretary of State, informed the Japanese Minister at Washington, June 25, 1897, with reference to the proposed annexation of the Hawaiian Islands by the United States, that

> The history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other States. It needs no stipulation in a formal annexation treaty to work this result, for it attends *de facto* annexation however accomplished. The forcible incorporation of Hanover into the Prussian Kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas to Statehood in our Union by joint resolution extinguished the treaties of the independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption, that determines treaties. It does not even follow that the existing treaties of the absorbing State extend to the acquired territory. The treaties of the German Empire are held not to apply to the ceded French provinces of Alsace and Lorraine.[5]

It is not believed that the treaty of Peace and Amity concluded between the United States and Tripoli on June 4, 1805,[6] survived the assumption of dominion

---

"7. That by making with Great Britain, France and Italy, treaties in effect abrogating the earlier Tripolitan treaties with these governments and extending over Tripoli the general treaties of the Ottoman Empire, Turkey recognized that until Tripolitan treaties were so terminated or abrogated, they were of full force and vigor.

"8. As a resultant of the foregoing, it follows that the American treaty of 1805 must be considered as of full force and vigor until it shall be abrogated by a new treaty with the Ottoman Porte.

"In view of these findings, you are now instructed to present Mr. Coffin's commission to the Ottoman Government to whom it is addressed, with a request that that Government be pleased to issue to Mr. Coffin an exequatur." (Mr. Adee, Acting Secy. of State, to the Ambassador to Turkey, Hackworth, Dig., V, § 512.)

[5] MS. Notes to Jap. Leg. I, 521, *citing* Halleck's Int. L., Ch. 18, sec. 35, and Dana's Wheaton, sec. 275, Moore, Dig., V, 349.

It may be observed that in the Joint Resolution of July 7, 1898, 30 Stat. 750, providing for the annexation of Hawaii, the Congress provided that the existing treaties of Hawaii with foreign States should be replaced by the treaties between the United States and such foreign States.

Concerning the treaty between the United States and the Netherlands of Oct. 8, 1782, see Davis' Notes, U. S. Treaty Vol. (1776–1887), 1235, Moore, Dig., V, 344; concerning the treaty between the United States and Hanover and Nassau, see Davis' Notes, 1234.

Concerning the effect of the cession by Spain to the United States of the Zulu Archipelago on certain protocols of Spain with Germany and Great Britain, conceding exceptional trade privileges to vessels of those States, see Magoon, law officer, Division of Insular Affairs, War Department, Oct. 8, 1900, Magoon's Reports, 316, Moore, Dig., V, 351, 352.

See case of absorption of Loochoo by Japan and its effect on the treaties between the United States and Loochoo of July 11, 1854, Moore, Dig., V, 346.

The treaty between the United States and the Independent State of the Congo, of Jan. 24, 1891 (Malloy's Treaties, I, 328), appears to have been regarded by both Belgium (after its annexation of the latter State), as well as by the United States as remaining in force until its termination, on July 1, 1917, after a Belgian notice of the previous year. See For. Rel. 1916, 33–36; For. Rel. 1920, Vol. I, 207–209. See also Hackworth, Dig., V, § 512, and documents there cited.

[6] Malloy's Treaties, II, 1788.

by Italy over Tripoli as sovereign thereof in 1911.[7] A notice of October 30, 1912, from the Italian Chargé d'Affaires at Washington to Secretary Knox announced, and the response from the latter of February 28, 1913, recognized "the cessation of the special régime formerly enjoyed by foreigners in Tripolitania and Cyrenaïca by virtue of the Capitulations of the Ottoman Empire," and the substitution therefor of the "dispositions of the general law" of Italy.[8] Secretary Knox added that the appropriate American diplomatic and consular officers had been instructed "to conform to the legal situation thus established in Libya," and that the American Consulate at Tripoli would thenceforth be administered as subordinate to the Consulate General at Genoa under the supervision of the American Embassy at Rome. It should be noted that the "special régime formerly enjoyed by foreigners" in so far as it had reference to American privileges of extraterritorial jurisdiction in Tripoli was not attributable to the Capitulations of the Ottoman Empire, but rather to the definite provisions of the treaty with Tripoli of 1805[9] — a fact which the United States itself had had occasion to emphasize in previous correspondence with the Ottoman Empire.[10] The statement by Secretary Knox, marking as it did acquiescence in a new régime that served to terminate or supplant the exercise of American extraterritorial jurisdictional privileges in Tripoli, amounted to an acknowledgment that Italy, by virtue of a principle of international law, was under no obligation to the United States to heed the terms of its treaty with Tripoli on which those privileges were dependent.[11] This action did not constitute acceptance of a fresh agreement superseding an existing treaty, but rather seemed to indicate a taking cognizance of the freedom which international law itself appeared to yield to the Italian sovereign in consequence of events which had taken place. Early in 1925 the Department of State informally proposed to the Italian Embassy at Washington an exchange of notes designed to acknowledge that the operation of the treaty with Tripoli ceased upon its annexation by Italy, and that the existing treaties between the United States and Italy became applicable to Tripoli. The response was a memorandum from the Italian Government expressing the view

[7] See For. Rel. 1912, 632–633. According to the Italian note of October 30, 1912, it was "in consequence of the recognition by the foreign powers" of Italian sovereignty over the regions mentioned that the special régime referred to had ended, "in conformity with universally accepted principles of international law."

[8] For. Rel. 1913, 608–611; U. S. Treaty Vol. III, 2698–2699; also Mr. Knox, Secy. of State, to the American Ambassador at Rome, Dec. 5, 1912, For. Rel. 1912, 633.

[9] See Article XVIII and XIX, Malloy's Treaties, II, 1792.

[10] See Mr. Fish, Secy. of State, to Mr. Maynard, Nov. 9, 1875, For. Rel. 1875, 1316, Moore, Dig., V, 345–346.

[11] This conclusion is believed to have been justified despite the fact that Secretary Knox in his note of February 28, 1913, to the Italian Chargé d'Affaires failed to refer to the inadvertent error of the latter which attributed to the Capitulations of the Ottoman Empire rather than to the treaty between the United States and Tripoli of June 4, 1805, the basis of the special régime enjoyed by American citizens in the territories over which Italy had acquired the sovereignty, and of which the cessation was announced.

Declared Mr. Kellogg, Secy. of State, to Senator Sheppard, March 22, 1929: "It may be needless to remark that treaty relations with Tripoli were terminated in 1913 when the Department of State, by a note dated February 28 (Foreign Relations of the United States for 1913, page 609) addressed the Italian Embassy, stating that the appropriate diplomatic and consular representatives had been instructed to conform to the legal situation there established." (Hackworth, Dig., V, § 512, footnote.)

that the treaty of 1805 became automatically extinct upon the annexation of Tripoli.[12] It was declared that the treaty had been aimed principally to put an end to piracy practiced by the State of Tripoli at the time when the treaty was concluded, and that it should be viewed in the same light as other treaties made at the same time between the Christian and Arab States, all of which, since the conditions which they were designed to meet were no longer present, had no other value than that of a purely historical document. Moreover, it was declared that even if there were admitted within certain limits the point of view that the annexation of a territory does not always and necessarily imply the termination of treaties concluded by a foreign government with that of the territory, it should still be remarked that according to international practice the keeping in force of those treaties should appear in an explicit manner at the time when the annexation was notified, either by a reservation formulated by the State to which the fact of annexation was communicated and accepted by the State communicating it, or by a statement made by the latter State while making the communication, or separately. It was added that the proposal made by the United States that its treaties with Italy be extended to Tripoli could not be fulfilled by Italy, for the reason that as the Italian colonies had ordinances of their own and as not all of the rules current in the Kingdom were applicable to the colonies, it was difficult to believe that the application as a whole of the treaties in force between the United States and Italy could be extended to Tripolitania, special colonial provisions not appearing to lend themselves in a general way to such a course.[13]

When in March, 1938, Germany obliterated the State of Austria and absorbed what had been the territory thereof, the cessation of the life of one of the parties to all treaties to which Austria had up to that time been a party served in legal contemplation to mark the end of the contractual relationship with what had been that country. Such appears to have been the view of the Department of State.[14] It is not sought to be intimated, however, that through those treaties there may not have come into being for the benefit of other parties thereto some rights that were capable of surviving the particular agreement to which their life was due.

Whether a State has succeeded in causing the extinction of another, as by forcible annexation of its entire territory, is a fact the existence of which may

[12] The memorandum under date of April 7, 1925, was delivered by the Italian Chargé d'Affaires to an officer of the Department of State on April 8, 1925.

[13] The foregoing paragraphs of this section embody, with some modification and enlargement, an editorial by the author entitled "The Termination of the Treaties of a State in consequence of its Absorption by Another — The Position of the United States," in the *Am. Jour. of Int. Law*, Vol. XXVI, 133.

"Whatever may have been the original position of governments in all these cases of total annexation, one fact stands out; namely, that in practically every case the final outcome was the acceptance, expressly or by acquiescence, of the principle that where the effect of the annexation was to extinguish the international juridical personality of the annexed State, the bipartite treaties with other Powers to which it was a party at the time of annexation, were terminated." (J. W. Garner, Reporter, comment on Harvard Draft Convention on The Law of Treaties, Art. 33 (b), *Am. J.*, XXIX, *Supplement*, October, 1935, 1167–1168.)

[14] See memorandum of Mr. Hackworth, the Legal Adviser, Dept. of State, Mar. 18, 1938, Hackworth, Dig., V, § 512; also communication from Dept. of State, to the German Embassy, April 29, 1938, Hackworth, Dig., V, § 512.

not be apparent for a protracted period. An interval of suspended animation may thus, for some time, precede either the extinction of State life, or the resumption of normal activities that are characteristic of such life. In the latter situation, the ultimate survival of that life places the case outside of the class of instances where the termination of a treaty is wrought through the extinction of a contracting party.[15]

Whether the accession of territory imposes a legal duty upon the new sovereign to make its existing treaties applicable thereto — a matter which is obviously unrelated to that pertaining to the termination of international agreements — must of course be referred to the design of the parties as manifested in the terms of their agreements or in necessary implications from their thought when they purported to contract. In the absence of express provision, it may be difficult to conclude that there should be imputed to the parties a design that accessions of areas not geographically appurtenant to, and not administratively incorporated into, the domain of the new sovereign should be regarded as within the purview of, and subject to the operation of, its existing treaties.[16] It would, however, doubtless be agreed that the annexation by the United States of a country contiguous to its continental territory, and its admission as a State of the Union, should cause the extension to the acquired area of the existing treaties of the United States.[17] It may be regarded as advantageous to all concerned that the conventions of an annexing State replace as far as may be practicable those concluded by a country which has ceased to exist as a State, and be made applicable to the territory acquired.[18]

[15] Ethiopia, despite the effort of Italy to crush out its life as a State through subjugation, is perhaps an example of survival.

On Aug. 1, 1941, the Department of State declared "that the United States Government did not recognize the absorption of Latvia by the Soviet Union nor the Soviet regime in Latvia nor the legality of the so-called nationalization laws or other acts or decrees passed or issued by that regime"; and on Sept. 10, 1941, it declared that "this Government considers that the legal existence of the Treaty of Friendship, Commerce and Consular Rights, as well as of all other treaties between the United States and the Republic of Latvia, has not been affected by the occupation of Latvia by foreign military forces." (Communications from Mr. Henderson, Assistant Chief, Division of European Affairs, to Mr. Robert H. Law, Jr., Aug. 1, 1941, and Sept. 10, 1941.)

[16] Both Great Britain and the United States regarded the reciprocal privileges contained in Article XXI of the treaty of May 8, 1871, providing for the free entry of the produce of the fisheries of the United States and the Dominion of Canada or Prince Edward's Island into those countries, as inapplicable to British Columbia upon the admission of that province into the Dominion of Canada. See Earl of Derby to Sir E. Thornton, British Minister, Aug. 11, 1875. Brit. and For. State Pap., LXVI, 963, 968, Moore, Dig., V, 353.

See, also, Case of Charles E. Heinzeman, with reference to unwillingness of Germany to extend to Alsace and Lorraine the Bancroft naturalization treaties of 1868, For. Rel. 1892, 177, 179, 180; but see Mr. Fish, Secy. of State, to Mr. Bancroft, Minister to Germany, April 14, 1873, For. Rel. 1873, I, 279, 281.

[17] "The former Republic of Texas, upon its admission as a State into the Union on terms of equality with the other States, undoubtedly became bound and privileged by all the treaties of the United States, of which it had become an integral part." (Crandall, Treaties, 2 ed., § 179, p. 429.)

[18] In the case of the cession of territory, the agreement may announce how the treaties of the contracting parties shall be applied with reference to the area which undergoes a change of sovereignty. According to Art. X of the convention between the United States and Denmark, providing for the cession of the Danish West Indies, of Aug. 4, 1916: "Treaties, conventions and other international agreements of any nature existing between Denmark and the United States shall *eo ipso* extend, in default of a provision to the contrary, also to the ceded islands." (U. S. Treaty Vol. III, 2563.)

It may be observed that the Department of State informed the German Embassy at Washington on February 27, 1913, that "the extradition conventions of 1852, 1853, and 1857 between the United States and certain German states would be regarded as extending to the Panama Canal Zone." [19]

It was logical and natural that the Government of the Kingdom of the Serbs, Croats and Slovenes, should have acknowledged to that of the United States in 1921, that it considered the treaties and conventions concluded between the Kingdom of Serbia and the United States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes, as then constituted.[20] The latter Kingdom embodied, in a territorial sense, the enlargement of the former Kingdom, and was the same State with a bigger body. It was also reasonable to contend, as did the United States in substance in 1921, that that Kingdom should regard those agreements as applicable to its territory which had formerly belonged to the Austro-Hungarian Empire.[21] In relation to the matter concerning the applicability of the treaties between the United States and Germany to former Austrian territory, following the annexation of Austria by Germany in 1938, the Legal Adviser of the Department of State declared that "as a general rule territory of the annexed or incorporated State becomes impressed with the treaties of the acquiring State, so far as they are not locally inapplicable." [22]

(*b*)

§ 544. **Where Identity of a State Has Not Been Wholly Lost.** Where a State, although uniting with or becoming a part of another, does not wholly lose its identity or suffer complete loss of its State life, retaining "a territorial identity with full power of action over a subject-matter of a treaty previously concluded," [1] there is reason to claim that the agreement is not terminated by the Union.

Thus Germany, in 1889, admitted that as extradition laws and treaties binding upon all States of the German Empire had not been made, the several

---

According to Article 6 of the convention between the United States and Great Britain concerning Rights in Palestine, of Dec. 3, 1924: "The extradition treaties and conventions which are, or may be, in force between the United States and Great Britain, and the provisions of any treaties which are, or may be, in force between the two countries which relate to extradition or consular rights shall apply to the mandated territory." (U. S. Treaty Vol. IV, 4234.)

[19] See statement in Hackworth, Dig., V, § 512, and documents there cited.

[20] See the Chargé d'Affaires *ad interim* of the Serbs, Croats and Slovenes, to Mr. Hughes, Secy. of State, Sept. 29, 1921, Hackworth, Dig., V, § 512. See, also, Lukich *v.* Department of Labor and Industries, 176 Wash. 221.

[21] See Mr. Hughes, Secy. of State, to Messrs. Defrees, Buckingham, and Eaton, June 4, 1921, Hackworth, Dig., V, § 512, footnote.

According to Article 12 of the treaty between the Principal Allied Powers and the Serb-Croat-Slovene State, of Sept. 10, 1919: "Pending the conclusion of new treaties or conventions, all treaties, conventions, agreements and obligations between Serbia, on the one hand, and any of the Principal Allied and Associated Powers, on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, shall *ipso facto* be binding upon the Serb-Croat-Slovene State." (U. S. Treaty Vol. III, 3736.)

[22] Memorandum by Mr. Hackworth, March 18, 1938, Hackworth, Dig., V, § 512, where it is added: "This matter is usually the subject of an understanding between the annexing State and other treaty States at the time of the annexation, or of an affirmative declaration by the annexing State acquiesced in by other treaty countries."

§ 544. [1] Crandall, Treaties, 2 ed., § 179, p. 431.

States thereof "were not hindered from regulating extradition by treaties with foreign States or by laws enacted for their own territory," and that with the United States extradition continued to be regulated by treaties with Prussia, Bavaria and Baden, concluded long before the formation of the Empire.[2]

On June 13, 1921, Secretary Hughes declared that the treaty of commerce and navigation of May 1, 1828, with Prussia, "was regarded by the contracting parties as in force at the time of the declaration of war between the United States and the Government of Germany on April 6, 1917."[3] The applicability of the treaty with Prussia to the entire German Empire was acknowledged by the German Government in 1913.[4] Obviously, a claim that bases the continued applicability of a treaty on the continuity of life of a contracting party differs sharply from one which for any reason charges a non-contracting party with the burdens that grow out of a treaty which it never accepted.

It will be recalled that the United States has not admitted that privileges which it has acquired by treaty from a foreign country, such as those pertaining to extraterritorial jurisdiction, cease to be operative in consequence of the establishment of a protectorate over that country by a third State. In such case, the retention of the international personality by the foreign contracting party, quite apart from the character of the concessions which it may have yielded, is believed to justify the American stand.[5]

(*c*)

§ 544A. **Losses of Territory or of Territorial Control.** The continuity of the statehood of a contracting party remains unaffected by its loss of even a substantial portion of its territory, and so precludes assertion of the claim that the mere diminution of the national domain necessarily yields to such party the privilege of denouncing its existing agreements.[1] It must be obvious, however,

[2] Moore, Dig., V, 355–356; Terlinden *v.* Ames, 184 U. S. 270, 282–286.

Concerning the requirements made by the United States in 1896, in according recognition to the Greater Republic of Central America, comprising Honduras, Nicaragua and Salvador, see For. Rel. 1896, 370, 390.

[3] Communication to Representative Connally, Hackworth, Dig., V, § 512.

See, also, numerous documents, *id.*, respecting the continuing operation of conventions with various German States.

In a decision of the German Supreme Court, of Aug. 13, 1936, it was declared that "The extradition treaties of France with the German States are extinguished as a consequence of the law of January 30, 1934, regulating the reorganization of the German Empire (German Statutes, 1934, Part I, p. 75), because Germany has become a unitarian State by virtue of this statute and the German States have ceased to exist in their capacity as international legal subjects, so that the extradition treaties which they have entered into are extinguished." (*Am. J.*, XXXVII, 739, 740.) See Stefan Riesenfeld, "Decision of the German Supreme Court on Termination of Treaties of the German States," *id.*, 720.

[4] Memorandum of the German Embassy at Washington, to the Dept. of State, Oct. 7, 1913, Hackworth, Dig., V, § 512, footnote.

[5] See The Protection of Backward Communities or of Countries of Unique Civilization, *supra*, § 25.

§ 544A. [1] Mere "territorial changes, whether by increase or by diminution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties. Prussia, after the peace of Tilsit, in 1807, lost almost a third of its territory. The Kingdom of Saxony, by the treaty of Vienna, was reduced to a half of its previous dimensions. France, in 1815 and 1871, and Turkey, in 1829 and 1878, both were deprived of territory. Austria lost, in 1850, its richest province, Lombardy, and, in 1866, Venetia. In none of these cases was the continuity or the identity of the State destroyed, nor was the

that with respect to such treaties or portions thereof as pertain in special degree to territory which has been relinquished, there may be solid grounds for claiming that freedom from the burden of further performance follows the loss of sovereignty.[2] It may not be difficult to establish that such was the design of the contracting States when they perfected their agreement. Thus, to the necessary implications of that design are in every case to be assigned the legal result.

It is said that the United States "accepted as a fact" the transfer of the Sudetenland to Germany and the transfers of parts of Slovakia and Ruthenia to Hungary, and of Teschen to Poland.[3] It is also said that after the German military occupation of Czechoslovakia in March, 1939, the Department of State informed the Treasury Department that in view of that occupation of the Provinces of Bohemia, Moravia and Slovakia by German armed forces and the assumption of control over those areas by German authorities, the Department, while not recognizing any legal basis for the assumption of so-called "protection" over this territory, was constrained by force of the foregoing circumstances to regard these provinces as being, at the time, under the *de facto* administration of the German authorities. Accordingly, the Department observed that it perceived no objection to the Treasury, under such regulations as it might issue, regarding as German for customs purposes, including the application of rates of duties, goods coming from the Provinces of Bohemia, Moravia and Slovakia.[4]

It is believed that a State may reasonably assert that the continued applicability of a treaty which it has concluded with another to particular portions of the territory of that other is unaffected by the efforts of third States to control those portions as by prescribing conditions of life that are to prevail therein, unless or until such other contracting State makes relinquishment of sovereignty thereof. It will be recalled that the United States was unwilling to admit that the endeavor of the Principal Allied Powers to subject portions of Turkish territory to the operation of the Mandatory System at the close of World War I, sufficed, without its consent, and at a time when Turkey was in theory the territorial sovereign, to impair or destroy American privileges which were there applicable and which were attributable to an existing treaty with the Turkish sovereign.[5]

---

general force of its international obligations held to be impaired." (Moore, Dig., I, 248, *citing* Martens, *Traité de Droit International,* I, § 68; Rivier, *Principes du Droit des Gens,* I, 63–65.)

[2] It is the impossibility of the execution of the treaty by the former sovereign which, according to Art. 26 of the Harvard Draft Convention on The Law of Treaties, relieves it of the burden of performance. *Am. J.,* XXIX, *Supplement,* October, 1935, 662.

[3] Hackworth, Dig., V, § 512, footnote, *citing* Mr. Berle, Assist. Secy. of State, to American Diplomatic and Consular Officers, Jan. 4, 1940.

See Quincy Wright, "The Munich Settlement and International Law," *Am. J.,* XXXIII, 12.

"Upon the occupation of the Sudeten areas of Czechoslovakia by Germany the Treasury Department notified collectors of customs, on November 10, 1938, that from and after that date products of its areas should be regarded as products of Germany and therefore would not receive the benefit of the trade agreement with Czechoslovakia. On December 30, 1938 the Treasury Department issued a similar notice to collectors of customs with respect to the occupation of areas by Poland and Hungary." (Hackworth, Dig., V, § 512.)

[4] Hackworth, Dig., V, § 512, *citing* Mr. Welles, Acting Secy. of State, to the Secy. of the Treasury, March 17, 1939, Dept. of State Press Releases, March 17, 1939, p. 200.

[5] See The Relation of the United States to the Mandatory System, *supra,* § 26A.

(*d*)

§ 545. **Formation of a New State by Separation from Another.** The question may arise whether the burdens imposed by a treaty cease to be operative with respect to areas which, for any reason or by any process, are subsequently relinquished by a contracting State and become the territory of another. Those areas may through such relinquishment constitute the entire domain of a new State whose birth is coincident and intimately associated with the change of sovereignty, or they may merely mark the enlargement of the territory of an existing State.[1] In both situations the areas transferred may reveal either the decimation or the unsubstantial diminution of the domain of the transferor. The question is not solved by the bare acknowledgment that the former contracting sovereign is not to be held responsible for failure to cause the agreement to be operative within the territory that has ceased to be its own. The solution seemingly depends first, upon whether the contracting States sought in fact to enter into an arrangement that should run with the land despite any change of sovereignty that might ensue; and secondly, upon whether the former sovereign of the area concerned was competent so to burden its territory and incidentally bind the successor to the sovereignty thereof.

In many situations it will be difficult to find evidence that warrants such a design, even if the matter of competence be not injected as a decisive factor.[2] The character of the provisions normally registered in an executory agreement concerning, for example, friendship, commerce and consular rights, must inspire great doubt whether it was the design of the parties that such provisions should remain applicable to areas over which either party relinquished sovereignty. If, however, a provision is one which they endeavored so to associate with a particular area that it should be binding upon any transferee, the competence of the contracting grantor to impress such a restriction on uses of its territory for the lasting benefit of an alien interest, may well be challenged, if it can be shown by the successor to the sovereignty that the grant was inherently detri-

§ 545. [1] In the latter situation, the concrete practical question confronting the transferee is likely to be whether or to what extent its existing treaties are to be regarded as applicable to the areas which it has acquired, rather than the question whether it is bound by the provisions of treaties concluded by the former sovereign which prior to the transfer were applicable to those areas. Of course, however, the State whose territory is enlarged by accessions from another may be confronted with the solution of the problem whether it is burdened with restrictions appertaining to its new territory and which the former contracting State sought permanently to attach thereto. Thus the matter of competence of a contracting grantor to yield a permanent concession that runs with the land presents a question which any transferee may have to encounter. The solution of it is not necessarily connected with the relation which the area subjected to a change of sovereignty bears to the coming into being of the new sovereign.

[2] In the earlier edition of this work the author went so far as to say (Vol. II, 86): "When a new State is formed out of territory formerly belonging to another, as Panama or the Republic of Texas, or when a State comes into being as the result of separation from another, as in the case of Sweden and Norway, the treaties of the old State are regarded as still binding upon the new one, at least in so far as they relate to matters of peculiarly local concern."

It is understood that the Government of the United States did not regard its consular convention with Colombia of May 4, 1850, Malloy's Treaties, I, 314, or its extradition convention with Colombia, of May 8, 1888, *id.*, I, 323, as binding upon Panama when it became a State in 1903. See documents in Hackworth, Dig., V, § 512.

mental to the area concerned or to the occupants thereof.[3] It is not sought to be intimated that a territorial sovereign lacks competence to grant by treaty a concession designed to be permanently associated with a particular area, and which is not open to such an objection.[4] The zone yielded by Panama to the United States "in perpetuity" for the construction, maintenance and operation of an inter-oceanic canal through the convention of November 18, 1903, is an instance of assumed competence.[5] It is here desired merely to point to the nature of the problem to be solved and the test to be applied in the solution of it when the transferee challenges the competence of its predecessor to do what it did.

The practice of States has not revealed clearness of thought or uniformity of action. Policy rather than law has at times influenced the decisions of interested parties. Situations where the dissolution of a union of two States has presented a special and cognate problem concerning the effect of continuity of statehood of members of the union upon their respective obligations under an antecedent treaty have perhaps served to contribute to the confusion of mind. Obviously, such cases are to be distinguished from those where through a transfer of sovereignty, howsoever produced, it is asserted or denied that the transferee is burdened with the contractual obligations of its predecessor.

Mr. Adams, Secretary of State, in 1823, with reference to the inquiry whether Colombia in its war of independence was bound by the provision of Article XV of the treaty between the United States and Spain, of October 27, 1795, declaring that "free ships shall also give freedom to goods," said:

> To all the engagements of Spain with other nations, affecting their right and interests, Colombia, so far as she was affected by them, remains bound in honor and in justice. The stipulation now referred to is of that character.[6]

[3] There may be difficulty in finding agreement concerning the appropriate test to be applied in determining whether a grant is to be regarded as inherently detrimental to the area concerned. Moreover, that difficulty may be enhanced with the changes of thought which the international society is constantly undergoing in relation to the matter. Those changes at least suffice to warn a territorial sovereign as well as a foreign contracting State seeking to profit from the acts of the former that successors to the sovereignty over particular areas are likely to become increasingly disposed to claim a detriment sufficient to invalidate the competence of a grantor in cases where a distinct benefit to those areas is not apparent as a consequence of what has been yielded.

[4] See Certain Limitations of the Right of Control over What Pertains to the Territory of a State, In General, Servitudes, *supra*, §§ 152–153.

[5] Art. II, Malloy's Treaties, II, 1350.

[6] Communication to Mr. Anderson, Minister to Colombia, May 27, 1823, Brit. and For. State Pap., XIII, 480, Moore, Dig., V, 341; Opinion of Mr. Hassaurek, Commissioner, in case of the Atlantic & Hope Insurance Company *v.* Ecuador, United States and Ecuadorean Claims Commission under Convention of Nov. 25, 1862, Moore, Arbitrations, III, 3220, 3223.

Concerning the duty of Texas to regard as in force Articles V and VI of the treaty between the United States and Mexico of April 5, 1831, see Moore, Dig., V, 343, and documents there cited.

The Republic of Panama, by Art. XX of its convention with the United States of Nov. 18, 1903, agreed that if by virtue of any existing treaty, in relation to the territory of the Isthmus of Panama, whereof the obligations should descend to or be assumed by the Republic of Panama, there should be "any privilege or concession in favor of the Government or the citizens and subjects of a third power relative to an interoceanic means of communication which in any of its terms may be incompatible with the terms of the present convention,"

One may be permitted to doubt the soundness of Mr. Adams' view. If Colombia was bound to respect the stipulation quoted, it was due to the fact that by its own conduct it was not in a position to deny that the rule laid down in the treaty had been accepted by itself as a requirement of international law.[7]

Upon the dissolution of the union of Norway and Sweden in 1905, the Norwegian Chargé d'Affaires at Washington, in the course of a communication to the Secretary of State, said:

> One of the direct consequences of the dissolution of the union between Norway and Sweden is the cessation of any community between the two States as regards the conventions and international agreements jointly concluded by them with one or several other States. If these conventions and agreements could be heretofore considered as involving the joint responsibility of Norway and Sweden for the obligations placed upon each thereby, the Norwegian Government then deems itself from this time responsible only for the obligations in the said joint conventions and agreements which concern Norway. This likewise applies to the international conventions to which Norway and Sweden have jointly adhered. As for the conventions and agreements concluded separately by Sweden during the union and adhered to by Norway, the Norwegian Government holds that it cannot be considered to be responsible for the fulfillment of obligations thereby placed upon Sweden.
>
> On the other hand, the Norwegian Government is of the opinion that all the conventions and international agreements concluded by Norway with one or several other States, either jointly with Sweden, or separately, or as an adhering party, continue in full force and effect, as heretofore, between Norway and the other contracting party or parties without any change in their provisions being effected by the dissolution of the union.[8]

The foregoing statement is self-explanatory. The dissolution did not betoken a change of sovereignty. In respect to both Norway and Sweden there was continuity of statehood.

The Principal Allied Powers, incidental to their determination of the conditions under which certain new States that came into being as a consequence of World War I, such as Czechoslovakia and Poland, should live their lives, proceeded to specify in treaties with those countries what existing agreements the

---

to cancel or modify such treaty in due form. It was declared that in case an existing treaty contained no clause permitting its modification or annulment, the Republic of Panama would procure its modification or annulment in such form that there should not exist any conflict with the stipulations of the convention with the United States. Malloy's Treaties, II, 1355. Also declaration of Berlin Conference of 1878, with respect to Servia, Brit. and For. State Pap., LXIX, 934, 961.

[7] See Mr. Forsyth, Secy. of State, to Mr. Semple, Chargé d'Affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV, 58, Moore, Dig., V, 341.

[8] Mr. Hauge, to Mr. Root, Secy. of State, Dec. 7, 1905, For. Rel. 1905, 873; also Mr. Gripp, Swedish Minister, to Mr. Root, Nov. 20, 1905, *id.*, 872. See also Mr. Root to the Japanese Minister at Washington, Nov. 10, 1905, For. Rel. 1905, 867.

"Notwithstanding the political changes in Egypt and its independence from the Ottoman Empire, in 1929 the Department of State took the position that the treaty of 1830 between the United States and the Ottoman Empire, 2 Treaties, etc. (Malloy, 1910), 1318, was still applicable to Egypt." (Hackworth, Dig., V, § 512.)

latter should be obliged to accept. The varied and comprehensive demands made of them, embracing requirements to accept numerous multi-partite arrangements as embodied in postal, telegraphic and radio-telegraphic, sanitary and other conventions, did not appear to rest upon or accentuate conditions which international law exacted of the transferees of sovereignty as the price of the acquisition of the territories that came to them, but rather to exemplify a policy which the Principal Allied Powers deemed it to be reasonable to apply.[9]

In none of its treaties which the United States concluded with States that came into being as a result of events which were associated with World War I was there any intimation that a legal duty rested upon those States to accept any obligation towards the United States that might have been incorporated in the provisions of its treaties with their respective predecessors when their sovereignty had extended over areas which were relinquished.[10]

5

§ 546. **Denunciation by One Party.** That circumstances may justify a contracting State in freeing itself by its own act from the burdens of a treaty, as by denouncing the agreement, is not at variance with the principle imposing upon such a State a legal duty normally to respect scrupulously its contractual obligations. Greatest difficulty arises, however, in determining whether in the particular case grounds of justification are at hand. Obviously the decisions of domestic courts sustaining legislative or other action effecting abrogation are indecisive of the question whether there has been a violation of a legal duty towards another contracting party.[1]

It may be futile to attempt to enunciate rules pointing decisively to the circumstances when abrogation by one party is to be excused. It is to be acknowledged, however, that failure of a contracting State to observe a material stipulation of its agreement is deemed to justify another party in taking such a step.[2] This

[9] See Arts. 19, 20 (and Annexes) and 21, of treaty between the Principal Allied Powers and Czechoslovakia, Sept. 10, 1919, U. S. Treaty Vol. III, 3705–3707; Arts. 17, 18, 19 (and Annexes) and 20 of treaty between the Principal Allied Powers and Poland, June 28, 1919, *id.*, 3720–3723.

Inasmuch as the dissolution of the Austro-Hungarian Monarchy which was effected in consequence of the World War marked the separation of entities whose existence as States preceded and survived that event, the treaties of peace concluded by the Principal Allied Powers with Austria and with Hungary, respectively, were not illustrative of a situation where a new State succeeded an old one as the transferee of its territory. See The Dismemberment of the Austro-Hungarian Dual Monarchy, *supra*, § 107A.

[10] See, for example, Treaty of Friendship, Commerce and Consular Rights concluded with Poland, June 15, 1931, U. S. Treaty Vol. IV, 4572; Treaty of Friendship, Commerce and Consular Rights, concluded with Finland, Feb. 13, 1934, U. S. Treaty Vol. IV, 4138.

*Cf.*, however, exchange of notes between Finland and Sweden, Nov. 11, 1919, respecting the validity, after the separation of Finland and Russia, of existing treaties and other engagements concluded between Russia and Sweden, Brit. and For. St. Pap., CXII, 1023.

§ 546. [1] See Acts of Congress at Variance with Treaties, *supra*, § 529.

[2] "It is useless to endeavor to tie the hands of dishonest States beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract." (Hall, Higgins' 8 ed., § 116, p. 409.)

conclusion finds support, moreover, in utterances of the Supreme Court of the United States in 1919,[3] as well as in 1796,[4] in the attitude of the Department of State as exemplified by the views of Secretary Olney in 1896 in relation to the freedom of the United States prior to 1860 to rid itself from the burdens of the Clayton-Bulwer treaty of April 19, 1850,[5] and in those of Secretary Lansing in 1917, concerning the effect of German violations of the treaty with Prussia of 1828; [6] and also in dicta of President Coolidge, in his award as arbitrator (prepared with the assistance of Secretary Hughes) March 4, 1925, in the controversy between Chile and Peru pertaining to Tacna-Arica.[7] The available evidence suffices to justify the conclusion that a contracting State is not to be regarded as guilty of a breach of faith if it duly manifests its election not to go on with a treaty of which a material stipulation has been broken by another party.[8] As Mr. Hackworth properly declared in 1935: "The weight of opinion as expressed, at least in the United States, appears to incline to the view that a State may by its own unilateral act terminate a treaty as between itself and a State which it regards as having violated such treaty." [9] Accordingly,

---

Concerning the rejection by Japan in 1923 of the proposal by China to abrogate the Sino-Japanese agreements of May 25, 1915, see For. Rel. 1923, Vol. I, 826–830.

[3] Charlton *v.* Kelly, 229 U. S. 447, 473.

[4] Ware *v.* Hylton, 3 Dall. 199, 261. Also, Hooper, Administrator *v.* United States, 22 Ct. Cl. 408.

[5] Memorandum for the President, 1896, Moore, Dig., III, 203, 205.

[6] Communication to the Swiss Minister at Washington, in charge of German interests in America, March 20, 1917, American White Book, European War, IV, 415, 417, For. Rel. 1918, Supp. 2, 162, 164.

[7] *Am. J.*, XIX, 394, 398. Declared Secy. Hughes in 1921: "Action by the Congress, in disregard of a treaty, may be justified by the principles governing the operation of contracts in case the action is . . . based on the breach of the treaty by the other party." (Memorandum for President Harding, Oct. 8, 1921, Hackworth, Dig., V, § 509.)

In a note from the American Government to the Governments of Belgium, Czechoslovakia, France, Germany, Great Britain, Irish Free State, Italy, Japan, and Poland, delivered at their respective Foreign Offices, June 23, 1928, in relation to the proposed Treaty for the Renunciation of War (which was subsequently signed Aug. 27, 1928, U. S. Treaty Vol. IV, 5130), it was declared: "It is no less evident that resort to war in violation of the proposed treaty by one of the parties thereto would release the other parties from their obligations under the treaty towards the belligerent State. This principle is well recognized." (Dept. of State, Treaty for the Renunciation of War, Publication No. 468, Washington, 1933, 52, 59.)

[8] One must differ from the conclusion of Professor Garner, in his Comment on Art. 27 of the Harvard Draft Convention on The Law of Treaties that "In the light of what little practice there is, as distinguished from the theoretical statements of writers and the arguments of diplomats, it is submitted that a State does not have the right unilaterally to terminate a treaty as between itself and a party to the treaty which it alone considers to have failed to fulfill its obligations under the treaty." (*Am. J.*, XXIX, *Supplement*, 1089.)

See the contrasting views of Professor McNair in "*La Terminaison et la Dissolution des Traités*," *Recueil des Cours*, 1928, II, 463, 527; also in his Law of Treaties, British Practice, 514.

[9] Memorandum of the Legal Adviser of the Dept. of State, Feb. 27, 1935, Hackworth, Dig., V, § 510. Mr. Hackworth added, however: "Notwithstanding the foregoing, it appears that very rarely has a nation undertaken to abrogate a treaty unilaterally on the ground of violation by another party. . . . It will thus be seen that apparently contrary to the views expressed in courts of the United States and by international law writers and the Department of State, the practice has not been to uphold the right of a State to annul unilaterally an agreement by treaty made with another State. In view of the foregoing and of the early date on which, as appears above, the Treaty of 1923 with Germany will terminate, it may be regarded as advisable for the United States to refrain from attempting to abrogate this treaty by its unilateral action." It should be observed that this supplementary statement had reference to a matter of policy rather than of law.

it may be doubted whether the exercise of that privilege need await the approving award of an international tribunal.[10] That a contracting State may denounce a treaty under circumstances when no breach of a material stipulation has been committed, and perhaps find itself penalized accordingly for so doing, emphasizes the care to be taken by such a State to ascertain whether it has solid grounds for denunciation. Its own opinion that it has, should obviously be sound and be based upon evidence that would satisfy the unbiased minds of neutral judges, at least if it is to be relied upon as the basis of abrogation. In a word, it is the fact of the requisite breach that excuses denunciation; reliance upon that fact is not dependent upon the proof of its existence before or with the aid of an extrinsic body. This is true despite the desirability of obtaining in the particular case an impartial and authoritative opinion acknowledging that existence.

Disagreement between the parties concerning the correct interpretation of the provisions of a treaty or the significance of acts alleged to be at variance therewith may give rise to controversy whether there has been a breach thereof. Thus the very existence of conditions sufficing to justify denunciation may be stoutly denied by the party whose conduct is regarded by another as warranting abrogation.[11] Such has at times been the case where a single contracting State has sought or purported to denounce a multi-partite treaty. Great Britain protested vigorously against the assertion by Russia in 1870, of the right to free itself from the operation of certain provisions of the Treaty of Paris of 1856, as a consequence of the conduct of Turkey in relation to the Black Sea.[12] It should be observed, however, that while there was sharp denial of the right of one State (as distinguished from a group of aggrieved parties) to gain freedom on the strength of its own sole judgment, there was no admission, and probably no cause for admission, that the conduct of Turkey on which Russia relied amounted to a material breach of the treaty,[13] and also that the British protest accentuated, moreover, the fear lest the claim of Russia implied freedom by it to denounce at will other portions of the Treaty.[14]

[10] *Cf.* proposal contained in Art. 27 of the Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, 662.

[11] The Congress, by an Act approved July 7, 1798, which was enacted on account of what it deemed to be repeated violations by France of its treaties with the United States, declared the United States to be of right free and exonerated from its treaties and consular convention with that State, and that they should not, therefore, "be regarded as legally obligatory on the Government or citizens of the United States." France did not, however, admit that this enactment put an end to these agreements. It was subsequently contended that by the convention of Sept. 30, 1800, with France, the United States purchased its release from the previous conventions. Concerning the soundness of this conclusion the author expresses no opinion. See Moore, Arbitrations, V, 4429–4432; Moore, Dig., V, 357–359, and documents there cited; Am. State Pap., For. Rel. II, 344–345.

See Hall, Higgins' 8 ed., § 116.

[12] See Earl Granville, British Foreign Secy., to Sir A. Buchanan, British Ambassador at St. Petersburg, Nov. 10, 1870, Hertslet's Map of Europe by Treaty, III, 1898, in response to communication from Prince Gortchakov, Chancellor of the Russian Empire, to Baron Brunnow, Russian Ambassador at London, Oct. 31, 1870, *id.*, 1892.

[13] See Higgins' 8 ed. of Hall, 411; also Comment by Professor Garner in connection with Art. 27 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 1088–1089.

[14] Declared Lord Granville in part: "We have here an allegation that certain facts have

The protests lodged against Germany in 1935, on account of its denunciation of the military, naval and air clauses of the Treaty of Versailles of June 28, 1919,[15] and again in 1936, by reason of its denunciation in that year of the so-called Rhineland Clauses of that treaty as well as of provisions of the Locarno Treaties of 1925,[16] were attributable to the fact that the denunciator was looked upon as itself the treaty-breaker rather than as a party that was reasonably endeavoring to avail itself of the consequences of a material breach by another. Inasmuch as Germany was regarded on these occasions as unable to establish a good case under the principle on which it sought to rely, it was deemed to be the repudiator of conventional obligations,[17] and the resultant

---

occurred which, in the judgment of Russia, are at variance with certain stipulations of the Treaty, and the assumption is made that Russia, upon the strength of her own judgment as to the character of those facts, is entitled to release herself from certain other stipulations of that instrument. This assumption is limited in its practical application, to some of the provisions of the Treaty, but the assumption of the right to renounce any one of its terms involves the assumption of a right to renounce the whole. This statement is wholly independent of the reasonableness or unreasonableness, on its own merits, of the desire of Russia to be released from the observation of the stipulations of the Treaty of 1856 respecting the Black Sea." (Hertslet's Map of Europe by Treaty, III, 1898–1899.)

According to the Declaration of London of Jan. 17, 1871: "The Plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, assembled to-day in Conference, recognize that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement." (Hertslet's Map of Europe by Treaty, III, 1904, Brit. and For. St. Pap., LXI, 1198.)

Through the Treaty of London of March 13, 1871, Arts. XI, XIII and XIV of the Treaty of Paris of 1856 were said to be abrogated and also the supplementary Special Convention annexed to Art. XIV of that treaty. See Hertslet's Map of Europe by Treaty, III, 1919, Brit. and For. St. Pap., LXI, 7.

Concerning the action of Prince Ferdinand of Bulgaria in announcing the independence of Bulgaria, Oct. 5, 1908, and of Austria-Hungary in announcing the extension of sovereignty over Bosnia and Herzegovina, Oct. 7, 1908, in the light of the Treaty of Berlin of 1878, see comment by Professor Higgins in his 8 ed. of Hall, pp. 413–415.

[15] See German announcement of March 9, 1935, as contained in *New York Times*, March 10, 1935; also, speech of Herr Hitler to the German People, March 16, 1935, *Docs. Int. Affairs*, 1935, I, 58, in which it was contended that the failure of the Allied and Associated Powers to disarm following disarmament by Germany constituted a breach of their undertakings under the Treaty of Versailles which served to free the Reich from further obligation to observe the military, naval and air clauses thereof. (See Arts. 160, 181, and 198, as contained in U. S. Treaty Vol. III, 3399, 3406, and 3411, respectively.)

See British protest of March 18, 1935, and Italian protest of March 21, 1935, both contained in *Docs. Int. Affairs*, 1935, I, 64 and 68. Also French protest in telegram from M. Laval to the Secretary General of the League of Nations, March 20, 1935, League of Nations *Official Journal*, 1935, 569; also, French Memorandum accompanying note of M. Laval to the Secretary General of the League of Nations, April 9, 1935, *id.*

See, in this connection, Viktor Bruns, Germany's Equality Rights as a Legal Problem ("Schriften der Akademie für Deutsches Recht"), Berlin, 1935; also, J. W. Garner and Valentine Jobst III, "The Unilateral Denunciation of Treaties by One Party Because of Alleged Non-Performance by Another Party or Parties," *Am. J.*, XXIX, 569.

[16] See address of Chancellor Hitler to the Reichstag, March 7, 1936, *Int. Conciliation*, No. 319, April, 1936, 165; also German Memorandum addressed to the signatories of the Locarno Pact, March 7, 1936, British White Paper, Germany No. 1 (1936), Cmd. 5118, in which it was contended that the conclusion and acceptance by France of the so-called Franco-Russian Treaty of Mutual Assistance, signed at Paris, May 2, 1935, violated the Locarno Treaties, was directed against Germany, and justified its denunciation of the latter, and gave it freedom to disregard the prohibitive provisions of the Rhineland Clauses of the Treaty of Versailles. (See Arts. 42, 43 and 44, as contained in U. S. Treaty Vol. III, 3351–3352.) See Treaty of Mutual Guarantee Between the United Kingdom, Belgium, France, Germany and Italy, Locarno, Oct. 16, 1925, Brit and For. St. Pap., CXXI, 923.

[17] It was, of course, a difficult task for Germany to convince its former enemies that their conduct in relation to disarmament amounted to a material breach of the Treaty of Ver-

declarations from Geneva and from the other parties were addressed thereunto without reference to the privilege of a State which, faithful to its own contractual undertakings, might seek to avail itself of a material breach committed by one or more others.[18]

As strong political considerations may impel a contracting State to make supreme effort to rid itself of restraints upon the size or location of its military establishment and which it was compelled to accept in a treaty of peace, it is to be expected that such a State will endeavor to draw, even in good faith, from the conduct of other contracting parties which were its former enemies, conclusions that support its own purposes rather than deductions which are convincing to the impartial mind. This duly-appreciated circumstance serves at times to weaken confidence in pleas for freedom to denounce, and also to stiffen the form of declarations that proclaim the sanctity of treaties. In any event, a single contracting State encounters utmost difficulty in availing itself for cause of the privilege of gaining freedom from the burdens of a multi-partite convention. Yet Prussia was successful in so doing when in 1866, it denounced the federative Constitution of the Germanic Confederation.[19]

It may be difficult to determine whether a State has in fact taken appropriate steps to terminate its obligations under a treaty. Notwithstanding the persistence and vehemence of its charges that the agreement has been violated in a material way by another contracting party, the aggrieved party may not in fact denounce the arrangement. Thus in March, 1917, after diplomatic relations with Germany had been severed, the United States, in declining to accept the German proposal for an interpretative and supplementary agreement as to Article XXIII of the treaty of 1799 (revived in the treaty of 1828 with Prussia), made vigorous complaint of the violation by Germany of its contractual obligations. Secretary Lansing, while declaring that the Government was seriously considering whether or not the treaty of 1828 and the revived Articles of earlier conventions had "not been in effect abrogated by the German Government's flagrant violations of their provisions," did not state that the United States regarded those provisions as no longer in force, and did not indicate that the Government saw fit to avail itself of rights which German misconduct had served to confer upon it.[20] Nor did the alleged violation by Greece in

---

sailles, or that the consummation of the Franco-Russian Treaty of Mutual Assistance was sharply at variance with the arrangement at Locarno. Without discussing the German contentions it suffices to observe that they failed in fact to satisfy opinion in Europe or America. Nevertheless, the Government of the United Kingdom, through an exchange of notes with the German Government on June 18, 1935 (British Treaty Series, 1935, No. 22, Cmd. 4953), agreed to an enlargement of the German Navy that more than tripled the tonnage yielded to that force under the Treaty of Versailles.

[18] See Resolution of the Council of the League of Nations, April 17, 1935, League of Nations, *Official Journal*, 1935, 551–552; also, Resolution of that body of March 19, 1936, *id.*, 1936, 340; Proposals signed by representatives of Belgium, France, the United Kingdom and Italy, March 19, 1936, British White Paper, Germany No. 2 (1936), Cmd. 5134.

[19] See Prussian Declaration to the Germanic Diet on the Causes of War with Austria, June 14, 1866, Hertslet's Map of Europe by Treaty, III, 1652. Also, in this connection, Carlton J. H. Hayes, Political and Social History of Europe, New York, 1928, Vol. II, 189–190.

[20] Mr. Lansing, Secy. of State, to the Swiss Minister in charge of German interests in America, March 20, 1917, American White Book, European War, IV, 415, 417, where he

1932, of certain provisions of its extradition convention with the United States of May 6, 1931,[21] cause the latter to abrogate the arrangement, or to do more than to avail itself of the privilege of giving formal notice of denunciation at the earliest time when such action was permitted under the terms of the convention.[22]

It is not apparent how the breach of a treaty necessarily clothes another party offended by such action with the privilege of freeing itself from the contractual burden of another treaty concluded with the offender, unless there be solid evidence of common design that the right of abrogation may be exercised in such a contingency. It may be observed that on July 26, 1939, Secretary Hull notified the Japanese Ambassador at Washington that the Government of the United States, acting in accordance with the procedure prescribed in Article XVII of the Treaty of Commerce and Navigation concluded between the United States and Japan on February 21, 1911, gave notice thereby of a desire that the treaty be terminated, and that, having thus given notice, would expect the treaty, together with its accompanying protocol, to expire six months from date.[23] The attempt was not made, as by a retaliatory process, to effect immediate abrogation of the treaty on the ground that Japanese failure to respect what the Government of the United States conceived to be Japanese obligations under the so-called Nine Power Treaty of February 6, 1922,[24] justified an endeavor by the United States to free itself immediately from the burdens imposed upon it by the earlier convention. As a matter of fact Secretary Hull's note contained no intimation that American dissatisfaction with the Japanese attitude on the treaty of 1922 was a reason for the desire to terminate the Treaty of 1911.

## 6

## OUTBREAK OF WAR BETWEEN CONTRACTING PARTIES

### a

§ 547. **In General.** Inasmuch as in earlier times few treaties were supposed to survive the outbreak of war between the contracting parties, and as the dissolution of numerous types of agreements long proved to be coincident with the occurrence of such an event, it was natural that the fact of termination should be attributed to such an outbreak, and that statements of the law should

---

added: "It would be manifestly unjust and inequitable to require one party to an agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities." See Jesse S. Reeves, "The Prussian-American Treaties," *Am. J.*, XI, 475, 501-507.

See Memorandum of Mr. Knox, Secy. of State, Dec. 9, 1910, concerning the existing extradition convention with Italy, For. Rel. 1910, 654, 656.

[21] U. S. Treaty Vol. IV, 4290.

[22] See Dept. of State Press Releases, Nov. 11, 1933, 257. See also *supra*, § 539.

[23] Dept. of State Bulletin, July 29, 1939, 81.

[24] U. S. Treaty Vol. III, 3120.

refer to termination as an effect of war.[1] It may be fairly doubted, however, whether the outbreak of war between the contracting parties causes or produces the termination of an agreement subsisting between them. If the arrangement fails to survive, it is believed to be for the reason that the parties were of common mind when they essayed to contract that it should cease and determine were they to embark upon war with each other.[2] If this be correct, the outbreak of war is merely an event upon the occurrence of which the agreement comes to an end in virtue of the design of the parties; and in the ascertainment of that design may be found the solution of the question whether a particular agreement is to be deemed to survive their assumption of the rôle of enemies. Conclusive evidence of their thought as well as bases of impregnable inferences therefrom may be within reach. When they are, it is unnecessary to seek guidance elsewhere.

The tendency, however, to look for a causal connection between the outbreak of war and the dissolution of treaties has been widespread and persistent. It has been productive of conflicting opinions and has diverted both diplomatic and judicial opinion from exploring the uses of the simpler test that is suggested.[3]

§ 547. [1] In the earlier edition of this work the author, following the traditional usage, employed the phrase "Effect of War" as the title of the subdivision beginning with § 547. Such is also the title of Art. 35 of the Harvard Draft Convention on The Law of Treaties.

Declared Lord Bathurst, British Foreign Secretary, to Mr. Adams, the American Minister at London, Oct. 30, 1815: "It has been urged, indeed, on the part of the United States, that the treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties: she cannot, therefore, consent to give to her diplomatic relations with one State a different degree of permanency from that on which her connexion with all other States depends." (Am. State Pap., For. Rel. IV, 354.)

[2] "I submit . . . that the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded. . . . If the above is the true test, the problem which must be faced by international lawyers is that of formulating a series of presumptions to meet the cases where the words used in the treaty itself do not show clearly what was the intention of the parties at the time when they made it." (Sir Cecil J. B. Hurst, "The Effect of War on Treaties," *Brit. Y.B.*, 1921–1922, 37, 39–40.) *Cf.* McNair, Law of Treaties, British Practice and Opinion, 531–532.

[3] See views of publicists in Moore, Dig., V, 381–385; Lauterpacht's 6 ed. of Oppenheim, II, § 99; Crandall, Treaties, 2 ed., § 181; compilation of documents on Effect of War on Treaties, prepared by Joseph R. Baker and Louis W. McKernan, in "Selected Topics Connected with the Laws of Warfare," as of August 1, 1914, Department of State, June, 1919, 220–269; Art. 35 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 664, and Comment by Professor Garner, Reporter, *id.*, 1183–1204.

"The misconception sometimes betrayed on the subject is due to the failure to note the narrow sense in which the word treaties has frequently been used in this relation. By a classification originating with the earlier publicists, and often repeated by their successors, treaties have been divided into two classes — *pacta transitoria*, or 'transitory conventions,' as the words have been unfortunately translated, and 'treaties, properly so-called.' In the former class were included international compacts by which a status was permanently established, or a right permanently vested; and, in the latter, compacts which looked to future action, and the execution of which presupposed the continuance of a state of peace between the contracting parties. In accordance with the distinction thus drawn it was said that 'treaties' were terminated by war, the word treaties being used in a limited technical sense. As a result of this double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side and denied on the other, when in reality the word was used by the parties in different senses — by the one in its general and usual sense and by the other in its special and restricted sense." (J. B. Moore, in *Columbia Law Rev.*, I, 209, 216–217, Moore, Dig., V, 383.)

In contrast to the views of early publicists, reflected as late as 1912 in those of the Institute of International Law,[4] Dana was of opinion that the test of survival is to be found in the nature of the provisions concerned and not in the origin of the war.[5] According to Professor Moore, the principle is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war "depends upon their intrinsic character." "If," he declares, "they relate to a right which the outbreak of war does not annul, the treaty itself remains unannulled." [6]

b

§ 548. **Stipulations Applicable to a State of War.** Stipulations of a treaty designed to be applicable to a state of war should not be abrogated by the occurrence of an event in contemplation of which they have been agreed upon. The provisions of Article XIII of the treaty between the United States and Spain of October 27, 1795, to the effect that in the event of war between the contracting parties, one year after the proclamation thereof should be allowed to the merchants in the cities and towns where they lived, for collecting and transporting their goods and merchandise, was of such a character.[1] Upon the outbreak of the Spanish-American war in 1898, the United States was informed that the Spanish Government regarded the whole of the treaty of 1795 as abrogated, but would probably accept a special arrangement embodying the provisions of Article XIII in case of such a proposal by the United States. In declining to accede to this suggestion, the Department of State declared that it did "not consider treaty provisions expressly applicable to war between contracting parties as abrogated by war," and, therefore, could not propose or make any new agreement embodying the conditions of the early treaty.[2]

Upon the outbreak of war with Germany in 1917, the United States found itself confronted with Articles XXIII and XXIV of the treaty with Prussia of July 11, 1799, which had been revived by Article XII of the treaty with that State of May 1, 1828.[3] These, contemplating a state of war between the contracting parties, made provision for the treatment of nationals of either in the territory of the other, and embraced stipulations concerning prisoners of

[4] According to the Regulations Regarding the Effect of War on Treaties of 1912: "All treaties, the application or interpretation of which shall have been the direct cause of the war, in consequence of the official acts of either of the governments before the opening of hostilities," are terminated automatically by the war. Art. II, par. 2, *Annuaire*, XXV, 611, J. B. Scott, Resolutions, 172.

[5] Dana's Wheaton, Dana's Note, No. 143.

[6] Moore, Dig., V, 383, *quoting* article in *Columbia Law Rev.*, I, 209, 217.

§ 548. [1] Malloy's Treaties, II, 1644.

[2] Mr. Day, Secy. of State, to Mr. Hay, American Ambassador at London, telegram, May 8, 1898, For. Rel. 1898, 972. See, also, Mr. Hay to Mr. Day, May 10, 1898, *id.*, 973.

"If it were true that war abrogates such stipulations [as Art. XIII of the treaty of 1795 with Spain], they would be subject to the singular fate of ceasing to be in force whenever they should become applicable." (Mr. Moore, Acting Secy. of State, to Mr. Wheeler, May 3, 1898, 228 MS. Dom. Let. 245, Moore, Dig., V, 376, note.)

See, also, Art. XXII of the treaty with Mexico, of Feb. 2, 1848, Malloy's Treaties, I, 1118.

See Art. 35 (a) of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 664, and Comment thereon by Professor Garner, Reporter, *id.*, 1183, 1190–1194.

[3] Malloy's Treaties, II, 1494–1495, and 1499.

war.[4] Notwithstanding the suggestion from the Department of State in March, 1917, that flagrant violations by Germany of the treaty of 1828 freed the United States from the obligation to respect the terms of the arrangement, it was not intimated that if war ensued between the contracting parties, that event would serve in itself to mark the termination of the articles in question.[5] It may be observed that President Wilson on May 8, 1917, a month after the declaration by the United States of the existence of a state of war with Germany, advised the Secretary of State that his country could not ignore Article XXIII of the treaty of 1799, that it was made for war, not peace, and that Germany's playing fast and loose with the obligations of the treaty did not afford the United States a sufficient ground for repudiating its promises under it.[6] During the progress of the war, the United States acted upon such a basis.

The making of war by a contracting party upon another may constitute a material breach of their agreement and so justify the latter in freeing itself from the burdens of the arrangement.[7] Again, following the outbreak of war, and during the life of an arrangement which was designed to survive such a contingency and also to be operative during the conflict, the action of a particular party may amount to a material breach. When it does, the privilege of denunciation may be exercised by an aggrieved party with as much reasonableness as if the breach occurred in time of peace.[8]

### c

§ 549. **Stipulations Creating Permanent Rights.** "Treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not," declared the Supreme Court of the United States in 1823, "cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."[1] Inasmuch as the decision in the case in

[4] According to Art. XXIV of the treaty of 1799: "It is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."

[5] Denunciation by One Party, *supra*, § 546; also correspondence with the Swiss Minister at Washington in charge of German affairs, American White Book, European War, IV, 413–417.

See, in this connection, Jesse S. Reeves, "The Prussian-American Treaties," *Am. J.*, XI, 475, 507–510.

[6] For. Rel. 1918, Supplement, Vol. II, 170.

See also Memorandum from the Office of the Solicitor for the Department of State, to the Secretary of State, April 9, 1925.

[7] See preamble of Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, U. S. Treaty Vol. IV, 5131, where such freedom was seemingly acknowledged in a recital which referred to the matter from a different angle in declaring that a signatory Power which should thereafter seek to promote its national interests by resort to war "should be denied the benefits furnished by this treaty." Such denial implied freedom to withhold them.

[8] See Denunciation by One Party, *supra*, § 546. See, also, Neutralized States, *supra*, § 29.

§ 549. [1] Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 494, where rights of a British corporation, protected by the treaty of peace with Great Britain

which these words were uttered was to the effect that rights of private property already vested under a treaty were not divested by the occurrence of a subsequent event such as the termination of the treaty under which they had become vested, the words of the Court in relation to the survival of treaties after the outbreak of war between the parties are to be regarded as *dicta*.[2] They are believed, however, to have been a correct enunciation of principle.

It must of course be apparent that a treaty may be the means of establishing or creating or recognizing a permanent state of things of which the duration is unassociated with the extent of the life of the agreement. In such a situation the contracting parties may be more concerned with the permanence of the achievement attributable to their arrangement rather than with that of the compact which was productive of it.[3] A different situation arises, however, where a treaty is employed to register undertakings designed to be themselves of permanent operation, and involving long-continued or protracted commitments by the parties, despite the outbreak of war between them. It may be difficult to find proof of such a design in the text of the agreement or elsewhere. The character of the provisions of a treaty may, however, furnish abundant evidence of such a purpose. Thus, arrangements for the payment of a public debt are fairly to be regarded as an instance, and as contemplating the continuance of the contractual obligation until the debt is paid. The outbreak of war between the debtor and the creditor would serve merely to suspend payments by the former to the latter.[4]

---

of 1783, and confirmed by the Jay treaty of 1794, were challenged. See, also, Carneal *v.* Banks, 10 Wheat. 181; Sutton *v.* Sutton, 1 Russ. & Myl. 663.

[2] Declared Washington, J.: "Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war." (Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 494.)

[3] Declared the Supreme Court of the United States in 1929, in the course of its decision in Karnuth *v.* United States, 279 U. S. 231, at 236: "There seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts."

[4] According to Art. I of the claims convention with Spain of Feb. 17, 1834, the latter engaged to pay to the United States "the sum of twelve millions of rials vellon, in one or several inscriptions, as preferred by the Government of the United States, of perpetual rents, on the great book of the consolidated debt of Spain, bearing an interest of five per cent. per annum." (Malloy's Treaties, II, 1659.) Notwithstanding a decree of the Spanish Government, April 30, 1898, declaring all of its agreements with the United States to be terminated by the war then existing, the former Government in 1899, at the solicitation of the United States, declared that "the Government of His Majesty, wishing to give a proof of its constant good faith, has already taken the proper steps in order to guarantee completely the interests of the holders of the debt of 1834, without this resolution prejudicing in the least the matter which must be resolved by common agreement between the two Governments concerned." (For. Rel. 1899, 709–710.) On Dec. 20, 1899, the two sums of twenty-eight thousand, five hundred dollars each, representing installments for the years 1898 and 1899, were paid. *Id.*, 708, 713. See, also, documents in Moore, Dig., V, 376–380.

The provisions of a treaty enabling the nationals of either contracting party thereafter to acquire immovable property within the territory of the other would hardly in themselves betoken a design to create a privilege that would survive the shock of war. Thus, while the occurrence of war between the parties would doubtless not affect acquisitions of property previously made in pursuance of the agreement, it would be difficult to maintain that it was their design that the privilege should survive that event.[5]

d

§ 550. **Certain Other Classes of Agreements.** A treaty of alliance requires the existence of a singleness of purpose and relationship between the contracting States which can only last while peace endures between them, and which they may be far from desiring to re-establish after they have been enemies. Accordingly, the parties must be deemed to have contemplated the termination of such an arrangement whenever they become opposing belligerents.[1]

Stipulations pertaining to commerce, navigation and consular rights are not in themselves of permanent character. While they endure, they necessitate the constant yielding by the parties of benefits which could not well be yielded, or which there might be no disposition to yield, during the existence of a state of war between them. This is true also with respect to kindred provisions concerning, for example, social intercourse, or pertaining to the enjoyment of economic and political benefits such as are embraced in conventions pertaining to naturalization.[2] In all these situations one encounters utmost difficulty in deriving from the bare fact of agreement, as expressed in the usual terms of a bi-partite convention, a solid basis for the conclusion that the parties sought to have their mutual undertakings live after war ensued, or that there was to be a mere suspension thereof while they remained opposing belligerents.[3] Due

[5] Mr. Bayard, Secy. of State, to Messrs. L. & E. Lehman, June 23, 1885, 156 MS. Dom. Let. 80, Moore, Dig., V, 374.

Concerning the effect of the War of 1812 on rights acquired by the United States through the treaty of 1782–1783, with respect to fishing privileges within British territorial waters on the northeast coast of America, see documents in Moore, Dig., I, 767–780; J. Q. Adams, The Fisheries and the Mississippi, Washington, 1822.

§ 550. [1] See Rivier, II, 137; Fauchille, 8 ed., § 1049; Lauterpacht's 6 ed. of Oppenheim, II, § 99.

"War, however, automatically terminates: Agreements of international associations, treaties of protection, control, alliance, guaranty; treaties concerning subsidies, treaties establishing a right of security or a sphere of influence, and, generally, treaties of a political nature." (Regulations of the Institute of International Law, 1912, Regarding the Effect of War on Treaties, Art. II, par. 1, *Annuaire,* XXV, 611, J. B. Scott, Resolutions, 172.)

See Karnuth *v.* United States, 279 U. S. 231.

[2] *Cf.* Hall, Higgins' 8 ed., § 125.

[3] According to Art. 35 (b) of the Harvard Draft Convention on The Law of Treaties: "Unless otherwise provided in the treaty itself, a treaty which does not expressly provide that the obligations stipulated are to be performed in time of war between two or more of the parties, and which by reason of its nature and purpose was not manifestly intended by the parties to be operative in time of war between two or more of them, is suspended as between the hostile belligerents during the continuance of a war between two or more of the parties, and unless contrary provision is made at the conclusion of the war, it will again come into operation when the state of war is ended." (*Am. J.,* XXIX, *Supplement,* October, 1935, 664–665.) One may well doubt whether these provisions, particularly with respect to bi-partite agreements, are declaratory of a requirement of international law, and are to be deemed other than as a proposal for acceptance by interested States.

respect for the thought of the parties at the time of contracting, in the absence of evidence to the contrary, compels the conclusion that they were or must have been far from agreeing to be bound to go on with their old arrangements after they had become enemies.[4] Even the likelihood of their readiness, upon the resumption of peace to agree to arrangements similar to some of those embodied in a previous text would fail to justify the imputation to the parties of a common willingness to relinquish freedom to decline to renew what had formerly been accepted. The Supreme Court of the United States appeared to be aware of this in concluding as it did in 1929, that the provision in Article III of the Jay Treaty with Great Britain, of November 19, 1794, permitting the nationals of the contracting parties freely to pass and repass into their respective territories on the continent of America, failed to survive the War of 1812.[5] In some instances, however, American tribunals, searching for a rule of law indicative of an effect or lack of effect of war between the parties to treaties upon their agreements, rather than for proof of the design of the parties, and dismayed by the diversity of opinion concerning what such a rule should entail, have endeavored to find a reasonable basis for conclusions that would sustain the particular agreements under consideration.[6] This judicial quest which has usually marked unconcern for the elements that enter into the requisite performance of the interpretative task, reveals a tendency to set up standards or tests which appeal to the minds of the judges rather than are shown to have influenced the thinking of the parties.[7]

[4] One can not fail to be impressed by the extraordinary effort made by the contracting parties in some treaties concluded by the United States in the nineteenth century, as exemplified in the texts thereof, to prevent the implication that even provisions designed to be applicable during a state of hostilities between the contracting parties should not cease and determine upon the outbreak of war between them. See Stipulations Applicable to a State of War, *supra*, § 548. Such effort suggests that in the minds of the contracting parties, if there was an applicable rule of international law attributable to the outbreak of war, it was one which pointed to the termination upon the occurrence of that event of such agreements as did not fall within a special and relatively narrow category.

[5] Declared the Court, in a unanimous opinion through Mr. Justice Sutherland: "The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties." (Karnuth *v.* United States, 279 U. S. 231, 239–240.) The author does not share the view of Professor Garner that the decision in this case "cannot be defended in the light of practice and jurisprudence." (Comment as Reporter on Art. 35 of Harvard Draft Convention on The Law of Treaties, *Am. J.*, XXIX, *Supplement*, October, 1935, 1187.)

[6] Declared Judge Cardozo in behalf of the Court in the case of Techt *v.* Hughes, 229 N. Y. 222, at 247: "No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation."

[7] Declared Judge Mack, in the case of The Sophie Rickmers, 45 F. (2) 413, at 419: "Such parts of treaties of commerce as affect at least the transportation of goods should, in my

It may be observed that Secretary Lansing declared in 1918, in relation to provisions with reference to real property that "as to the present effectiveness of these provisions of the treaties with Austria-Hungary and the various States of the German Empire, you are informed that in view of the present state of war between the United States and Austria-Hungary and Germany, the Department does not regard these provisions as now in operation." [8]

The practice of States from the close of the Crimean War until the present time has been significant. Treaties marking the resumption of peace between the former belligerents have generally failed to indicate common acknowledgment that former conventions, especially if bi-partite arrangements, other than those which purported to establish a permanent condition of things, or to regulate the conduct of the parties when or as belligerents, were designed to survive the outbreak of war between the contracting parties, or that they did, in consequence of the operation of a rule of international law, survive such an event.[9] Frequently a treaty of peace has contained appropriate provision for the reëstablishment of prior agreements, or has permitted the temporary operation thereof

---

judgment, be so interpreted, if reasonably possible, as again to bring about for that time the status which prevailed before the war. The resumption of trade relations marks a resumption of the ways of peace. The processes of law, at least in the absence of a contrary determination by the executive branch of the government, should favor rather than retard the early restoration of pre-war conditions."

In the case of Techt *v.* Hughes, the Court of Appeals of New York held, in 1920, that the privilege to take land in the United States by descent, as conferred upon Austrian nationals by Article II of the convention between the United States and Austria of May 8, 1848, should be deemed to have survived the outbreak of war between the United States and Austria-Hungary in 1917. (229 N. Y. 222.) This conclusion was based upon "the general principle . . . that treaties which it is reasonably practicable to execute after the outbreak of hostilities, must be observed then as in the past." "The belligerents," it was said, "are at liberty to disregard them only to the extent and for the time required by the necessities of war." (*Id.*, 242. *Citing* Regulations adopted by the Institute of International Law Regarding the Effect of War on Treaties, *Annuaire,* XXV, 648, J. B. Scott, Resolutions, 172; Hall, Higgins' 7 ed., 399; Westlake, II, 35; Oppenheim, 2 ed., II, § 99.) It was added that such was the principle which must guide the judicial department of the government when called upon to determine during the progress of a war whether a treaty should be observed in the absence of some declaration by the political departments of the government that it had been suspended or annulled. (229 N. Y. 242.) It may be observed that the "principle" invoked fails to take cognizance of the fact that the contracting parties may have been, and probably were, quite unwilling to agree that the continuance of a privilege such as that of taking land by descent should be dependent upon the circumstance that the exercise of it was not impracticable after the outbreak of hostilities. In a word, the basis of the "principle" runs counter to the probable design of the parties when they essayed to contract. Until it is realized that in each case the question is one of fact rather than of law, and that the solution is to be found in the minds of the contracting parties, there may be anticipated a repetition of judicial statements which fail to be convincing or to furnish authoritative guidance. See, also, in this connection, State *v.* Reardon, 120 Kansas, 614; Goos *v.* Brocks, 117 Neb. 750.

*Cf.* Flensburger Dampfercompagnie *v.* United States, 73 Ct. Cls. 646, where the tribunal in interpreting the statutory law of the United States (Rev. Stat. § 4229), pertaining to tonnage duties applicable to certain German vessels entering American ports between July 14, 1919 and Nov. 11, 1921, took occasion to observe that the termination of the treaty between the United States and Prussia of 1828, was effected under the terms of the treaty of peace with Germany of 1921, six months after the date of the exchange of ratifications of the latter.

[8] Communication to the Alien Property Custodian, Sept. 10, 1918, For. Rel. 1918, Supplement Vol. II, 309.

[9] "*Bilateral Treaties. All treaties between Great Britain and an enemy State were regarded as* ipso facto *terminated by the war and as requiring express revival by the Treaty of Peace if it was desired that they should be in force again upon the conclusion of peace.*" **(McNair, Law of Treaties, British Practice and Opinions, 549.)**

pending the conclusion of fresh arrangements. Reference to those agreements has assumed various forms; sometimes they have been "confirmed," sometimes "re-ëstablished," sometimes "maintained." In almost every case, however, the compact terminating a war has marked the establishment of a new contractual relationship rather than the modification of an existing one. Arrangements concerning former treaties have not implied a recognition of their survival by operation of law, but simply an acknowledgment of the value of their provisions as a basis for fresh covenants.[10]

[10] According to Art. XXXII of the Treaty of Paris, of March 30, 1856, concluded by Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, it was declared that: "Until the treaties or conventions which existed before the war between the belligerent powers have been either renewed or replaced [*ou renouvelés ou remplacés*] by new acts, commerce, both import and export, shall be conducted reciprocally on the basis of provisions in force before the war; in all other matters, the subjects of the contracting parties shall be accorded the most-favored-nation treatment." (*Nouv. Rec. Gén.*, XV, 780; Brit. and For. State Pap., XLVI, 17.)

Art. XVII of the treaty of Zurich, of Nov. 10, 1859, concluded by Austria, France and Sardinia, provided that all the treaties and conventions between Austria and Sardinia which had been in force before April 1, 1859, were confirmed [*confirmés*] in so far as they were not supplanted by the new treaty. *Nouv. Rec. Gén.*, XVI, Part 2, p. 537.

According to Art. II of the treaty of Vienna, concluded Oct. 30, 1864, between Austria and Prussia on the one side, and Denmark on the other, "all the treaties and conventions concluded before the war between the high contracting parties are reëstablished [*établis dans leur vigueur*] in so far as they are not abrogated or modified by the tenor of the present treaty." (*Nouv. Rec. Gén.*, XVII, Part 2, p. 475.)

See, also, Art. XIII of Treaty of Prague, of Aug. 23, 1866, between Austria and Prussia, *Nouv. Rec. Gén.*, XVIII, 348; Art. XI of Treaty of Frankfort, of May 10, 1871, between France and Germany, *Nouv. Rec. Gén.*, XIX, 693, and Art. XVIII of additional convention of Dec. 11, 1871, *Nouv. Rec. Gén.*, XX, 863; Art. X of Treaty of Constantinople, Jan. 27/Feb. 8, 1879, between Russia and Turkey, *Nouv. Rec. Gén., 2 sér.*, III, 470. According to Art. XI of the treaty of peace between Chile and Peru, of Oct. 20, 1883, the commercial relations between the two countries were to be placed, pending the conclusion of a special treaty, on the same footing as prior to April 5, 1879. Brit. and For. State Pap., LXXIV, 351. See, also, Art. III of treaty of peace between Spain and Chile, of June 12, 1883, *id.*, 721.

According to Art. VI of the treaty of peace between Japan and China of April 17, 1895, all former treaties between those States were regarded as having been abrogated by the war. *Nouv. Rec. Gén., 2 sér.*, XXI, 644.

In a communication by the Sublime Porte to the several ambassadors at Constantinople, May 14, 1897, specifying conditions for the suspension of hostilities in the war between Turkey and Greece, it was declared that "all the treaties between Turkey and Greece being abolished by the fact of war, their renewal ought to be based on the general principles of international law." (French Yellow Book, Affairs of the Orient, May to Dec. 1897, No. 1.) In their reply of May 23, 1897, the ambassadors said that "if the existing treaties between the two belligerents are on principle annulled by the state of war and require renewal, certain privileges and immunities have been conceded to Greek subjects by virtue of arrangements with the Great Powers, and would not, in consequence thereof, become extinct by reason of the rupture between Turkey and Greece." (*Id.*) Art. XI of the treaty of peace between Greece and Turkey of Nov. 22/Dec. 4, 1897, made provision for the conclusion of certain fresh agreements between the contracting parties on specified bases. See, also, Art. XII, Brit. and For. State Pap., XC, 428; and protocol B, *id.*, 430.

The treaty of peace between the United States and Spain, of Dec. 10, 1898, made no reference to former agreements between those States. Malloy's Treaties, II, 1690. Art. XXIX of the treaty of July 3, 1902, declared that all treaties, agreements, conventions and contracts between the United States and Spain prior to the Treaty of Paris, should be "expressly abrogated and annulled," with the exception of the claims convention of Feb. 17, 1834. *Id.*, 1710.

Art. XII of the treaty of peace between Japan and Russia, of Aug. 23/Sept. 5, 1905, proclaimed the annulment by the war of the treaty of commerce and navigation between those States. For. Rel. 1905, 826.

Art. V of the treaty of peace between Italy and Turkey, of Oct. 18, 1912, announced that all the treaties and conventions subsisting between those States prior to the war should again "enter into immediate effect," and that the two Governments, as also their respective

e

§ 550A. **Aspects of Multi-Partite Agreements.** In the case of multi-partite agreements, especially of those which embody rule-proclaiming provisions that have woven themselves into the fabric of the international life of numerous contracting parties, deference for the common design at the time of contracting may lead to conclusions which might not be reached with respect to a bi-partite arrangement of different content.[1] Thus, there may be solid grounds for the conclusion that it was the plan of the parties that the agreement should not cease or determine in case, for example, two of their number should become opposing belligerents, or that as between those belligerents, the operation of particular provisions should not survive the conflict after a period of suspension during hostilities, or that such provisions should be operative as between a belligerent and a neutral party, or as between belligerents that were not opposing each other. The point to be observed is that the same methods are applicable for the solution of questions concerning the possible termination of both multi-partite and bi-partite agreements, notwithstanding the fact that in the case of the former, the application of those methods may produce different conclusions from those that may be reached in the case of the latter.[2]

In respect to multi-partite agreements there is an increasing tendency to make appropriate provision for desired suspensions during the period of war as between any contracting parties.[3] Where no such provisions have been made, and

---

subjects, should be placed towards one another in the identical situation in which they had been before the outbreak of hostilities. *Am. J.*, VII, Supp., 59; *Nouv. Rec. Gén.*, 3 *sér.*, VII, 8.

The treaty of peace concluded by Bulgaria, Greece, Montenegro and Servia, with Turkey, at London, May 17/30, 1913, made no reference to former treaties. Brit. and For. State Pap., CVII, Part 1, 656, *Am. J.*, VIII, Supp., 12. See, also, similar omission from the treaty of peace concluded by Bulgaria, with Greece, Montenegro, Roumania, and Servia, July 28/Aug. 10, 1913. Brit. and For. State Pap., CVII, Part 1, 658, *Am. J.*, VIII, Supp., 13. By Art. IV of the treaty of peace between Bulgaria and Turkey, of Sept. 16/29, 1913, it was agreed to put in force [*à remettre en vigueur*] and for a specified period a former treaty of commerce and navigation, and a specified consular declaration. Brit. and For. State Pap., CVII, Part 1, 709, *Am. J.*, VIII, Supp., 31. By Art. II of the treaty of peace between Turkey and Greece, of Nov. 1/14, 1913, the treaties, conventions and acts subsisting between those States at the time of the rupture of diplomatic relations were to be restored [*remis intégralement en vigueur*] upon the signature of the new convention. Brit. and For. State Pap., CVII, Part 1, 894, *Am. J.*, VIII, Supp., 46. See, also, Art. I of treaty of peace between Servia and Turkey, of March 1/14, 1914, *Nouv. Rec. Gén.*, 3 *sér.*, VIII, 643. Also reference to treaties cited in this paragraph in Crandall, Treaties, 2 ed., § 181, p. 455.

§ 550A. [1] See Harold J. Tobin, The Termination of Multipartite Treaties, New York, 1933. To the author of that excellent study, in which close attention is paid to the practice of contracting States, this author acknowledges his indebtedness.

[2] "The subject matter of multi-partite commercial conventions differs from that of the ordinary bi-partite commercial treaty. . . . Where multi-partite conventions call for the setting up of an international commission or union, such as the river commissions and the copyright and industrial property unions, it is difficult to apply a theory of exchange of advantages which is intended to fit the case of a treaty involving a simple bargain between two States. . . . While it may be assumed that it was frequently not the design of the parties to a bi-partite commercial treaty granting special favors to each other that the stipulations of such a treaty should survive in wartime, such is not necessarily the case in dealing with the multi-partite treaties mentioned above. The double obligation of a multi-partite treaty, that between any two of the signatories between themselves, and that of each to the group as a whole, must be considered." (*Id.*, 85–87. Also, *id.*, 122.)

[3] See, for example, Art. 20 of Convention regarding the Régime of the Straits, July 20, 1936, British White Paper, Turkey No. 1 (1936), Cmd. 5249, 19; Art. XXII of Treaty

in situations where many if not all of the parties were participants in a war engaging numerous States, the articles of peace settlements have at times, in pursuance of the policy of the powers which controlled the provisions thereof, specified what previous agreements should be given force thereafter. That policy has not always reflected or purported to be responsive to any requirements of international law, or to the design of the original parties at the time of contracting; nor has it always been made dependent upon the consent of all of the parties to earlier arrangements. Thus, the decision to give life to the provisions of an ante-war agreement, or to establish the applicability of such an arrangement to contracting parties that were opposing belligerents in the conflict, has oftentimes failed to signify more than that the States which dictated the terms of the peace settlement were governed by considerations of expediency.

f

§ 551. **The Treaty of Versailles with Germany.** The treaty of peace concluded with Germany at Versailles, June 28, 1919, made elaborate provision with reference to the former conventions of every sort to which Germany had been a party. It manifested, however, no sense of legal obligation on the part of the Allied and Associated Powers, so-called, to heed any guiding principle indicative of an effect of war upon treaties; yet some provisions in relation to bi-partite arrangements appeared to reveal an understanding that they were generally not supposed to survive the outbreak of war between the contracting parties.

In relation to prior multi-partite arrangements the thought appears to have prevailed that numerous agreements being still in force, although suspended in their operation in relation to Germany during the period of hostilities, should be made applicable to Germany (such applicability being in many cases regarded as beneficial to that country) on such terms as the Allied and Associated Powers might see fit to prescribe. The provisions agreed upon reflected such a policy. Thus, it was declared that from the coming into force of the treaty, such multilateral treaties, conventions and agreements of an economic or technical character as were enumerated should "alone be applied" as between Germany and those of the Allied and Associated Powers as were parties thereto.[1] Special undertakings were exacted of Germany as a condition for the application to it of specified postal and telegraphic conventions.[2]

---

Limiting Naval Armament, Feb. 6, 1922, U. S. Treaty Vol. III, 3114; Art. XXIX of Commercial Aviation Convention concluded by the American Republics, Feb. 20, 1928, U. S. Treaty Vol. IV, 4735.

See Art. II of Convention as to Cape Spartel Light-House, concluded between the United States, Austria, Belgium, France, Great Britain, Italy, The Netherlands, Portugal, Spain, Sweden and Norway, and Morocco, May 31, 1865, Malloy's Treaties, I, 1219.

§ 551. [1] Art. 282.

[2] Art. 283. See also, Art. 284 with reference to conditions on which the International Radio-Telegraphic Convention of July 5, 1912, was to be applied.

By Art. 285 it was agreed by the contracting parties to "apply" in so far as concerned them, and under conditions previously stipulated, the conventions of May 6, 1882, and Feb. 1, 1889, regulating the fisheries in the North Sea outside of territorial waters, and the conventions and protocols of Nov. 16, 1887, Feb. 14, 1893, and April 11, 1894, regarding the North Sea liquor traffic.

Numerous rights and privileges acquired by Germany through previous agreements, both bi-partite and multi-partite, were declared to have been terminated on specified dates; [3] and in most instances the treaties productive of such privileges were themselves declared to have been terminated.[4]

Each of the Allied or Associated Powers, "being guided by the general principles or special provisions" of the treaty, was to notify to Germany the bilateral treaties or conventions which the former might wish to revive with Germany, the date of revival to be that of the notification. A period of six months from the coming into force of the Treaty of Versailles was allowed within which to make the notification. This right of the Allied and Associated Powers was subject to the undertaking on their part not to revive any conventions or treaties at variance with the terms of the treaty of peace. In case of a difference of opinion, the League of Nations was to be called upon to decide. Only those bi-lateral treaties and conventions which should become the subject of a notification were to be "revived." It was declared that "all the others are and shall remain abrogated." [5]

It may be observed that the Department of State declared on March 21, 1923, that the Government of the United States did not give notice within the

---

See Art. 286, with reference to the renewal or coming into force again of the international convention of Paris of March 20, 1883, for the protection of industrial property, revised at Washington, June 2, 1911, and the international convention of Berne, of Sept. 9, 1886, for the protection of literary and artistic works, revised at Berlin, Nov. 13, 1908, and completed by the additional protocol signed at Berne, March 20, 1914.

See, also, Art. 287 concerning the Convention of The Hague of July 17, 1905, relating to Civil Procedure.

[3] These dates coincided with the outbreak of war between Germany and the particular contracting countries concerned.

[4] See, for example, Art. 288, respecting special rights granted to Germany by Art. 3 of the convention of Dec. 2, 1899, relating to Samoa. See, also, Art. 135, concerning Siam; Art. 139, concerning Liberia; Art. 141, concerning Morocco; Art. 148, with respect to Egypt. See Art. 128, respecting German renunciation in favor of China, of privileges resulting from the final Protocol of Sept. 7, 1901. See Art. 31, embracing German consent to the abrogation of the treaties of April 19, 1839, fixing the status of Belgium.

[5] Art. 289. It was here also stated that "the above regulations apply to all bilateral treaties or conventions existing between all the Allied and Associated Powers signatories to the present treaty and Germany, even if the said Allied and Associated Powers have not been in a state of war with Germany."

According to Art. 290, Germany recognized that all its contractual arrangements concluded with Austria, Hungary, Bulgaria or Turkey, subsequent to Aug. 1, 1914, until the coming into force of the treaty of Versailles, were and remained abrogated by it. By Art. 292, Germany recognized that all agreements which it had concluded with Russia, or with any State or Government of which the territory had previously formed a part of Russia, or with Roumania, before Aug. 1, 1914, or after that date until the coming into force of the treaty of Versailles, were and remained abrogated. See, also, Art. 116 in which Germany accepted definitely the abrogation of the Brest-Litovsk treaties and all other agreements entered into with the Maximalist Government in Russia.

It will be found that the essential plan of the Treaty of Versailles concerning the relation of Germany to previous agreements of various kinds to which she had been a party was reflected also in corresponding provisions of the Treaty of Peace concluded with Austria at St. Germain-en-Laye, Sept. 10, 1919, in that concluded with Bulgaria at Neuilly-sur-Seine, Nov. 27, 1919, and in that concluded with Hungary at Trianon, June 4, 1920. See, also, corresponding provisions in the Treaty of Peace with Turkey concluded at Lausanne July 24, 1923, in which no provision was made for a revival of earlier bi-partite agreements between Turkey and the Allied and Associated Powers.

See, in this connection, Harold J. Tobin, The Termination of Multipartite Treaties, 139–144.

Also McNair, Law of Treaties, British Practice, 548–551.

period referred to in Article 289 of the Treaty of Versailles, as extended by paragraph 5 of Article 2 of the treaty between the United States and Germany of August 25, 1921, of an intention to revive the treaty of 1828 between the United States and Prussia, and that that treaty, therefore, was not regarded by the Department as then being in force.[6]

[6] See Goos *v.* Brocks, 117 Neb. 750, 755–756. See Art. II (5) of Treaty Restoring Friendly Relations with Germany, Aug. 25, 1921, U. S. Treaty Vol. III, 2598.

"The treaties of peace between the United States and Germany (3 Treaties, etc. [Redmond, 1923] 2596), Austria (*ibid.* 2493), and Hungary (*ibid.* 2693) provided that the United States should have the benefits of the Treaties of Versailles, Saint-Germain, and Trianon as to the revival of bilateral treaties with the former enemy nations. The United States made use of these provisions 'to revive' only the patent agreement of 1909 with Germany (1 Treaties, etc. [Malloy, 1910] 578), the extradition convention of 1856 with Austria-Hungary (*ibid.* 36) as to both Austria and Hungary, and the copyright convention of 1912 (3 Treaties, etc. [Redmond, 1923] 2692) with Hungary." (Statement in Hackworth, Dig., V, § 513.)

# *PART VI*

# Differences between States. Modes of Redress Other Than War

## TITLE A

## AMICABLE MODES

### 1

### NON-JUDICIAL MEANS

#### a

§ 552. **Negotiation.** It is not here sought to discuss the various types of differences that arise between States, or the reasons which impel States, under certain circumstances, to have recourse to particular modes of adjustment, or the adaptability of certain agencies for the solution of controversies that fall within a special category. It is desired simply to point to the fact that such differences, howsoever defined or classified, may be, and oftentimes are, amicably adjusted by direct negotiation.[1] "In the international sphere and in the sense of international law, negotiation is the legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences." [2] The potency of such procedure stands out in the life of the international society. By virtue of it the United States has succeeded in bringing to an end some controversies of grave aspect such as those pertaining to the Northeastern Boundary in 1842,[3] and to Oregon in 1846.[4]

The fate of negotiations may depend upon considerations beyond the control of plenipotentiaries, and possibly remote from the merits of a particular claim. The sheer power of a strong State may serve to compel a weaker adversary to yield to whatever solution is demanded, and to smother its indignation in the provisions of a sacrificial treaty. When, however, foreign offices of supposedly equal and independent States are given free rein, the efficacy of diplomacy is

§ 552. [1] See Moore, Dig., VII, 2.

[2] Dissenting opinion by Judge Moore, in case of the Mavrommatis Palestine Concessions, Publications, Permanent Court of International Justice, Series A, No. 2, 62–63.

[3] Moore, Arbitrations, I, 85–161, and documents there cited, and particularly the Webster-Ashburton treaty with Great Britain of Aug. 9, 1842, Malloy's Treaties, I, 650.

[4] Moore, Arbitrations, I, 196–213, and documents there cited, and particularly treaty with Great Britain of June 15, 1846, Malloy's Treaties, I, 656.

believed to depend in large degree upon the friendliness of tone, the accuracy of statement and the regard for international law with which the representatives of the powers at variance advocate their respective claims.[5]

Negotiations between States may have a variety of settings, such as written diplomatic correspondence, or personal conferences between representatives of the States at variance. High official station and personal influence always lend weight to the efforts of negotiators who are possessed of them, and may confer a unique power to bring about accord.[6] At a time when rigidity of purpose is frequently tempered by breadth of outlook, and when a spirit of conciliation is likely to complement zeal for achievement, direct negotiation becomes an instrument of amicable adjustment of international controversies which should not lightly be exchanged for any other. On occasions, however, when the price of such adjustment is a substantial concession by one party (as may be apparent in a boundary dispute), fear lest the requisite sacrifice prove to be highly objectionable to his own country and even lead to his own political downfall, may paralyze the efforts of a negotiator (or of his government) who endeavors to bring about agreement. Under such circumstances negotiation between representatives of parties to the dispute must be unavailing and necessarily give rise to other instrumentalities.[7]

Negotiations in behalf of a group of States looking to the adjustment of differences which concern the several members thereof, as in the case of the applicability of the provisions of a multi-partite treaty, may be had through a conference of representatives of the contracting parties. Moreover, as a means of effecting accord when controversy arises as to the requirements of such an agreement, there may be incorporated in the instrument itself arrangement for the full and frank communication of views by the parties one to another.[8]

Treaties frequently provide that if a controversy between the contracting parties "cannot be settled by negotiation," [9] or if it has not been possible to settle it "through diplomatic channels" [10] recourse shall be had to a specified procedure such as conciliation or arbitration as a means of adjustment. It is an unfortunate feature of such agreements that they fail to prescribe tests of determining when the endeavors of the parties to adjust their controversy by

[5] Despagnet, 3 ed., § 470.

[6] The author has known particular individuals who exemplified the truth of this statement. It is unnecessary to name them.

See Diplomatic Intercourse of States, Agents of a State, The President of the United States, *supra*, § 408; The Secretary of State as an Organ of Correspondence, *supra*, § 410; Direct Negotiations between Heads of Governments, *supra*, § 410A.

[7] An arbitral award reflecting sacrificial obligations to be met by a party to a dispute may be an indispensable means of enabling and inspiring the representatives of such party to agree to satisfy those obligations.

[8] See, for example, Art. VII, Treaty between the United States of America, Belgium, The British Empire, China, France, Italy, Japan, The Netherlands, and Portugal, of Feb. 6, 1922, Relating to the Principles and Policies to be Followed in Matters Concerning China, U. S. Treaty Vol. III, 3123.

[9] Art. 26 of the Mandate for Palestine referred to in the Second Judgment of the Permanent Court of International Justice in the case of the Mavrommatis Palestine Concessions, Publications, Permanent Court of International Justice, Series A, No. 2, 11.

[10] Art. 1, convention between the United States and other American Republics concerning Inter-American Conciliation, of Jan. 5, 1929, U. S. Treaty Vol. IV, 4765.

negotiation or through the diplomatic channel shall have been exhausted. The Second Judgment of the Permanent Court of International Justice, in the case of the Mavrommatis Palestine Concessions [11] was illustrative of the freedom deemed to be possessed by an aggrieved contracting State to determine for itself under what conditions a controversy with another could not be settled by negotiation.[12]

## b

## Good Offices and Mediation

### (1)

**§ 553. Significance of the Term "Good Offices."** The term "good offices" is somewhat ambiguous. According to Secretary Hay, its use should be confined to the two contingencies in respect to which, he declared, the Department of State was careful to limit its employment. In its first sense, he said that it corresponds to the French term *officieux,* or the Spanish *oficioso,* and "means the unofficial advocacy of interests which the agent may properly represent, but which it may not be convenient to present and discuss on a full diplomatic footing." [1] A typical case arose in 1905, when, in compliance with the request of Great Britain, the American Minister at Montevideo was instructed to use his "unofficial friendly offices" in support of the British Minister's request for the release from prison of the captain of the Canadian schooner, *Agnes G. Donahoe.*[2]

In its second sense the term "good offices" refers broadly to the act of a State or of an officer thereof in endeavoring by friendly suggestion to facilitate adjustment of a controversy between others. Thus, in June, 1905, the good offices of President Roosevelt were exercised when he suggested that both Japan and Russia, then at war, open direct negotiations for peace, and that there be a meeting of Russian and Japanese plenipotentiaries without any intermediary.[3]

[11] Publications, Permanent Court of International Justice, Series A, No. 2.

[12] *Id.,* 13–15. *Cf.* dissenting opinion of Judge Moore, *id.,* 61–68.

§ 553. [1] Communication to Mr. McNally, No. 235, March 16, 1900, MS. Inst. Cent. Am., XXI, 645, Moore, Dig., VII, 3.

Concerning Good Offices and Mediation, see documents in Moore, Dig., VII, 2–24; also Despagnet, 3 ed., §§ 472–476; bibliography on Hershey, Essentials, revised ed., 488–489; J. P. Higgins, The Hague Peace Conferences, 167; Frederick W. Holls, The Peace Conference at the Hague, 176–203; E. J. Mélik, *La Médiation et les Bons Offices,* Paris, 1900; Lauterpacht's 5 ed. of Oppenheim, II, §§ 7–11; N. Politis, *"L'Avenir de Médiation," Rev. Gén.,* XVII, 136; J. B. Scott, The Hague Peace Conferences, I, 256–265; Jean Zamfiresco, *De la Médiation,* Paris, 1911.

[2] Telegram of Mr. Adee, Acting Secy. of State, to Mr. O'Brien, Minister to Uruguay, Aug. 15, 1905, For. Rel. 1905, 916; Same to the British Ambassador at Washington, Aug. 15, 1905, *id.*

In a similar sense the good offices of the United States were requested by Colombia in 1905, in advocating the adoption by Venezuela of the principle of the free navigation of rivers common to neighboring countries. The request was complied with. For. Rel. 1905, 248–252, 1030–1036. Also *id.,* 1906, II, 1438–1440.

[3] Telegram of Mr. Loomis, Acting Secy. of State, to Mr. Meyer, American Ambassador to Russia, June 8, 1905, For. Rel. 1905, 807; Same to Mr. Griscom, Minister to Japan, June 8, 1905, *id.,* 808. The suggestions of the President were followed, and direct negotiations were held at Portsmouth, N. H., where a treaty of peace was concluded Aug. 23, 1905. For. Rel. 1905, 807–828.

On August 21, 1918, Secretary Lansing informed the American Chargé d'Affaires in

Again, a State tenders its good offices when it offers its services for the purpose of devising a mode of adjusting a foreign controversy, or of furnishing through its own agencies a means of negotiation appropriate to that end. In the latter case, if the offer is accepted by the parties at variance, the offeror becomes a mediator.

In 1917, the United States tendered its good offices to Guatemala and Honduras in order that as mediator it might facilitate an adjustment of the boundary dispute between those countries.[4] The mediation was unsuccessful. On June 5, 1928, Secretary Kellogg stated that since 1918, the Department of State, at the request of the Governments of those countries had been "serving as a friendly Mediator" in the matter of the adjustment of the boundary and suggested that the States at variance submit their dispute to the International Central American Tribunal established by the convention of February 7, 1923.[5] The suggestion did not bear fruit.[6] Through the mediatory efforts, however, of the Department of State, a treaty contemplating the arbitration of the dispute was signed at Washington, July 16, 1930, and in pursuance thereof a Special Boundary Tribunal rendered its opinion and award on January 23, 1933.[7]

On October 21, 1937, the Department of State announced the acceptance by the Republics of Nicaragua and Honduras of the tender of good offices by the Government of the United States in association with the Governments of Costa Rica and Venezuela, designed to facilitate a pacific solution of the boundary controversy between those Republics.[8] Pursuant to suggestions of a so-called Mediation Commission composed of representatives of the United States, Costa Rica and Venezuela, assembled at San José, Costa Rica, the States at variance accepted a "Pact of Mutual Offers," on December 10, 1937, embracing a common undertaking to solve the existing conflict "by pacific means as established by International Law."[9]

On November 14, 1937, President Roosevelt announced that in response to a

---

Honduras that the Department of State offered its good offices to the Government of Honduras "to use its influence towards a friendly settlement of the question at issue with Nicaragua" pertaining to the existing boundary dispute between those countries, according to a specified manner, For. Rel. 1918, 32.

[4] See For. Rel. 1917, 760–801.

[5] See Guatemalan-Honduras Boundary Arbitration, Brief on Behalf of Guatemala on the Question Concerning the Competency of the International Central American Tribunal, Annex No. 5, Washington, 1931.

[6] See F. C. Fisher, "The Arbitration of the Guatemalan-Honduran Boundary Dispute," *Am. J.*, XXVII, 403, 406–407.

[7] See Guatemala-Honduras Special Boundary Tribunal, Opinion and Award, Washington, 1933.

See The Doctrine of *Uti Possidetis, supra,* § 150A.

[8] Dept. of State Press Releases, Oct. 23, 1937, 315.

In a message of Oct. 21, 1937, addressed by the Dept. of State to the Governments of the States at variance it was said: "Should the Republics of Nicaragua and Honduras be disposed to accept this tender of good offices, the three Governments will be happy to offer suggestions for the alleviation of the present tension in the relations between the Republics of Honduras and Nicaragua, and, once that result is accomplished, to make suggestions as to means, equally acceptable to both parties, which might be adopted by Honduras and Nicaragua with the object of reaching a definitive settlement of the controversy." (*Id.*)

[9] Dept. of State Press Releases, Dec. 18, 1937, 453.

The Pact of Mutual Agreement was signed also by the Members of the Mediating Commission.

request from the President of Haiti, the Governments of the United States, Cuba and Mexico were jointly tendering their good offices to those of Haiti and the Dominican Republic, in order to further a satisfactory adjustment of the "difficulty" which had unfortunately arisen between them.[10] On December 15, 1937, the Department of State announced that the representatives of the "three invited governments" after mature deliberation had come to the conclusion that the "incident in question had become a factor susceptible of disturbing the peace of the American continent," and that on December 14, the Government of Haiti had announced its invocation of the Gondra Treaty of 1923 and the Convention of Conciliation of 1929.[11]

(2)

**§ 554. The Relation of Mediation to Good Offices.** Mediation is, therefore, not only the consequence of the tender of good offices, but also the manifestation of the exercise thereof.[1] The efficacy of mediation may depend upon avoidance of direct negotiations between parties to the controversy, or upon the skill of the mediator in initiating proposals calculated to harmonize conflicting interests. To achieve success the mediator is inclined, therefore, to encourage compromise rather than advise adherence to legal principle.

A mediating State may or may not directly conduct negotiations between the opposing States. Thus, in 1906, the United States in coöperation with Mexico, in order to facilitate the termination of war between Salvador and Honduras on the one side, and Guatemala on the other, suggested direct negotiations on board the U.S.S. *Marblehead,* in the presence of diplomatic representatives of the United States and Mexico, acting "simply in a friendly advisory capacity." The treaty of peace there concluded July 20, 1906, referred to the latter States as the "mediating nations." [2]

On April 25, 1914, the diplomatic representatives at Washington of Brazil,

[10] Dept. of State Press Releases, Nov. 20, 1937, 379–380.

[11] Dept. of State Press Releases, Dec. 18, 1937, 474.

§ 554. [1] J. B. Scott, The Hague Peace Conferences, I, 260. *Compare* Lauterpacht's 5 ed. of Oppenheim, II, § 9.

[2] For. Rel. 1906, I, 834–852.

By reason of continued disturbances in Central America, the Presidents of the United States and of Mexico, in 1907, tendered their good offices to the States at variance in order to bring about peace. For. Rel. 1907, II, 636–644; *id.,* 606–635. Accordingly, on Sept. 17, 1907, representatives of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua concluded at Washington a protocol providing for a general conference to be held in that city following a formal invitation to be extended simultaneously by the Presidents of the United States and of Mexico, and for the purpose of adjusting existing differences and of concluding a treaty to determine the general relations among the Central American States. It was agreed that the Presidents of the United States and of Mexico should be invited to appoint, if they deemed proper, their respective representatives, who should "lend their good and impartial offices in a purely friendly way toward the realization of the objects of the conference." (*Id.,* II, 644.) In response to the invitations contemplated, representatives of the five Central American Republics duly met in Washington, and in the presence at all deliberations of representatives of both the United States and Mexico, concluded Dec. 20, 1907, a series of important treaties and conventions, Malloy's Treaties, II, 2392–2420, including among the latter an agreement for the establishment of a Central American Court of Justice. *Id.,* II, 2399. Respecting the Conference, see Luis Anderson (plenipotentiary of Costa Rica) "The Peace Conference of Central America," *Am. J.,* II, 144; J. B. Scott, "The Central American Peace Conference of 1907," *id.,* II, 121.

Argentina and Chile, tendered to the Government of the United States their "good offices for the peaceful and friendly settlement of the conflict between the United States and Mexico."[3] The offer was promptly accepted by the United States, and also by General Huerta, head of the *de facto* and provisional Mexican Government with which that of the United States was in conflict.[4] Representatives of the opposing Governments assembled at Niagara, Ontario, May 20, 1914, where they held negotiations under the direction of the South American plenipotentiaries. The latter joined the former in signing a protocol of agreement June 24, 1914, according to the third Article of which it was declared that "the three mediating Governments" agreed on their part to recognize a provisional Mexican Government organized according to a specified plan.[5]

In the course of the Conference on Limitation of Armament held at Washington 1921–1922, Mr. Balfour, head of the British Delegation, and Secretary Hughes, head of the American Delegation, through the exercise of their good offices persuaded the Delegations of Japan and China, respectively, to endeavor by direct negotiation to settle the serious controversy between their countries in relation to Shantung. In the presence of those gentlemen, an agreement was signed on behalf of China and Japan which permitted the announcement on February 1, 1922, that the controversy had been settled, a result which, in the opinion of the American Delegation, was of utmost value in smoothing the way for the success of the Conference.[6]

(3)

§ 555. **The Hague Conventions of 1899 and 1907.** Part II of the Hague Conventions of 1899 and of 1907, for the Pacific Settlement of International Disputes, embodied a formal plan of mediation, and also described with precision the significance of acts tending to adjust differences by that process.[1] The signatory Powers agreed to have recourse, "as far as circumstances allow," to the good offices or mediation of one or more friendly Powers.[2] It was declared that, independently of such recourse, the contracting Powers deemed it expedient *and desirable* that strangers to the dispute should, on their own initiative, and as far as circumstances might allow, offer their good offices or mediation to States at variance.[3] The right of such strangers so to act, even during hostilities, was acknowledged, while the exercise of the right could never, it was said, be regarded as an unfriendly act.[4] It was announced that the part of a mediator

[3] For the text of the offer see *Am. J.*, VIII, 583.

[4] *Id.*

[5] *Id.*, 584–585. The arrangement proved valueless. See Recognition of New Governments, *supra*, § 44.

[6] See Proceedings, Conference on the Limitation of Armament, Washington, November 12, 1921–February 6, 1922, Government Printing Office, 1922, 200.

§ 555. [1] Malloy's Treaties, II, 2020–2022, 2228–2229.

[2] Art. II.

[3] Art. III. The addition of the words "and desirable" (*et désirable*), in Art. III, and the substitution of the word "contracting" (*contractantes*) for "signatory" (*signataires*) Powers (appearing also throughout the convention), constituted the only amendments to Part II of the convention of 1899, which were made by the Conference of 1907.

[4] Art. III.

consists in reconciling opposing claims and appeasing feelings of resentment between the States at variance; [5] that the functions of a mediator cease when once it is declared by a party to the dispute, or by the mediator, that the means of reconciliation proposed are not acceptable.[6] The fact was wisely emphasized that good offices and mediation, howsoever initiated, "have exclusively the character of advice and never have binding force"; [7] and also, that in the absence of agreement, acceptance of mediation cannot have the effect of interrupting, delaying or hindering warlike preparations, or military operations, in case mediation occurs after the commencement of hostilities.[8]

The signatory powers agreed also in recommending in Article VIII the application, when circumstances might allow, of "special mediation," according to a specified form.[9]

(4)

§ 555A. **Multi-Partite American Conventions.** Provision for the use of the mediatory function is made in certain multi-partite conventions concluded by the American Republics, embracing the United States, such as the General Convention of Inter-American Conciliation, of January 5, 1929,[1] the Treaty of Non-Aggression and Conciliation (known as the Saavedra-Lamas Treaty) of October 10, 1933,[2] and the Convention "to Coördinate, Extend and Assure the Fulfillment to the Existing Treaties Between the American States," of December 23, 1936.[3] In the last of these arrangements, it is agreed that in all matters which affect peace "on the Continent," there shall be exerted a consultative and coöperative effort having as its object "to assist, through the tender of friendly good offices and of mediation, the fulfillment by the American Republics of existing obligations for pacific settlement, and to take counsel together, with full recognition of their juridical equality, as sovereign and independent States, and of their general right to individual liberty of action, when an emergency arises which affects their common interest in the maintenance of peace." [4] The influ-

[5] Art. IV. [6] Art. V. [7] Art. VI. [8] Art. VII.

[9] The form specified was as follows:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

Respecting the authorship and design of this Article, see Holls, 188–203.

§ 555A. [1] U. S. Treaty Vol. IV, 4763, with additional protocol of Dec. 26, 1933, *id.*, 4798.
[2] U. S. Treaty Vol. IV, 4793. [3] U. S. Treaty Vol. IV, 4831.
[4] Art. II.

On Dec. 23, 1936, there was also concluded the Inter-American Treaty on Good Offices and Mediation, U. S. Treaty Vol. IV, 4827, whereby it was agreed that "when a controversy arises between them, that cannot be settled by the usual diplomatic means, the High Contracting Parties may have recourse to the good offices or mediation of an eminent citizen of any of the other American countries," preferably chosen from a general list to be made up in accordance with a specified plan. Recourse to the procedure contemplated does not seem to have been made obligatory.

ence of the tender of good offices for a mediatory service is obviously enhanced when it is the expression of a united endeavor of coöperating powers. Under such circumstances the State whose action is thereby sought to be checked may, however, in fact regard the collective effort as interference with its freedom unless its full right to reject the services offered be clearly acknowledged by the States which make the tender, and the exercise of that right be not stigmatized by them.

(5)

§ 556. **The Practice of the United States.** The amicable relations of a mediating power with the States at variance, its friendly purposes implied by the tender of good offices, and the purely advisory function which is sought to be exercised, combine, under certain circumstances, to render mediation an efficacious means of adjusting international differences after direct negotiations between the parties concerned have proved unavailing.[1]

The United States, when itself a party to an international dispute, has rarely accepted offers of mediation.[2] Nor has it pursued a uniform policy in tendering its own good offices to other States. In earlier days of the Republic, the fear lest mediation might be construed as intervention, and as subversive of the political independence of foreign States, served to check the offering of American mediatory proposals.[3] Apparently the disposition to remain aloof from European entanglements increased the national reluctance to suggest mediation to States across the Atlantic.[4] Less hesitation appears to have been manifested with respect to differences between or relating to States of Central or South America.[5]

§ 556. [1] Explanatory Note respecting Art. V of a project relating to good offices and mediation proposed by the Russian Delegation to the first Hague Peace Conference, *La Conférence Internationale de la Paix,* 1899, I, 121–124; J. B. Scott, The Hague Peace Conferences, I, 782–787.

See Art. VIII, Treaty of Paris of March 30, 1856, respecting recourse to mediation in the event of any misunderstanding which might endanger the maintenance of the relations between the Sublime Porte and one or more of the other contracting parties, *Nouv. Rec. Gén.,* XV, 770, 774; J. B. Scott, The Hague Peace Conferences, I, 261; also Art. I of treaty between the United States and Korea, May 22, 1882, Malloy's Treaties, I, 334, and documents relative to its operation in Moore, Dig., VII, 7–8; Art. XII, General Act of the Berlin Conference, Feb. 26, 1885, with respect to the Congo, *Nouv. Rec. Gén.,* 2 ser., X, 414, 420.

[2] The United States did, however, accept the offer of Russia to act as mediator in the War of 1812. Am. State Pap., For. Rel. III, 623–627; also Lawrence's Wheaton, 495, quoted in Moore, Dig., VII, 2. It accepted also the tender of good offices of the plenipotentiaries of Brazil, Argentina and Chile, April 25, 1914, to pave the way for the adjustment of the controversy with General Huerta's Government in Mexico. See, also, Reprisals, The Tampico Incident, *infra,* § 591, concerning the acceptance of an offer of mediation by Great Britain in 1836, to facilitate the adjustment of the issue with France concerning payment by the latter of the spoliation claims.

[3] See, for example, Mr. Webster, Secy. of State, to the President, Aug. 12, 1852, MS. Report Book, VI, 447, Moore, Dig., VII, 4; Mr. Seward, Secy. of State, to Mr. Hassaurek, Minister to Ecuador, No. 6, Nov. 20, 1861, MS. Inst. Ecuador, I, 100, Moore, Dig., VII, 6.

See, also, Mr. Phillips, Acting Secy. of State, to the Uruguayan Minister at Washington, Aug. 20, 1936, Dept. of State Press Releases, Aug. 22, 1936, 176.

[4] See documents in Moore, Dig., VII, 11–13, respecting the refusal of the United States in 1870, to use its good offices in conjunction with European powers for the restoration of peace between France and Germany.

[5] Moore, Dig., VII, 9–11, and documents there cited, concerning the mediation of the United States, 1866–1872, between Spain on the one side and Peru, Chile, Bolivia and Ecuador on the other.

Declared Mr. Gresham, Secy. of State, in a communication to Mr. Baker, Minister to

As has been noted elsewhere, the United States has in recent years become a party to a series of multi-partite conventions concluded by the American Republics, and which contemplate the exercise of the mediatory function.[6]

As the nature of mediation and the function of the mediator have become better understood, and as the interest of the United States in averting the outbreak of hostilities and in the termination of wars has become apparent, it has perceived that the advancement of that interest may without impropriety be effected by the exercise of the mediatory function with respect to any contest between any States, unless there is reason to believe that such action will prove unwelcome.[7] Thus, on December 18, 1916, President Wilson addressed to the several belligerent and neutral powers, through the Department of State, suggestions to the effect that all the nations then at war make "avowal of their respective views as to the terms upon which the war might be concluded and the arrangements which would be deemed satisfactory as a guaranty against its renewal or the kindling of any similar conflict in the future as would make it possible frankly to compare them." [8] It was announced that the President was not proposing peace, nor "even offering mediation," but that he was merely proposing that soundings be taken in order that it might be learned how near the haven of peace might be. As is known, these suggestions, although eliciting courteous responses, proved valueless. Notwithstanding the disclaimer as to the character of his proposals, it is believed that they were essentially mediatory in kind, and made with a view to obtaining declarations indicative of a basis on which the opposing belligerents might reach an accord.[9]

---

Nicaragua, No. 27, July 14, 1893: "You appear to have rightfully understood the policy of this Government, which is at all times disposed to lend its impartial good offices, or those of its diplomatic agents, to the honorable adjustment of issues of peace or war in neighboring communities, whenever acceptable to both parties; and it would seem that the tender of your mediation was not made without previous knowledge that it would be equally welcomed by the titular Government and the revolutionists." (For. Rel. 1893, 201, Moore, Dig., VII, 16.)

See, also, Mr. Gresham, Secy. of State, to Mr. Denby, Minister to China, Nov. 24, 1894, respecting the circumstances leading to the tendering of the good offices of the United States with a view to the restoration of peace between China and Japan in 1894, For. Rel. 1894, App. I, 81, Moore, Dig., VII, 16.

[6] See Multi-Partite American Conventions, *supra*, § 555A.

As has also been noted elsewhere (*supra*, § 553), through the mediatory efforts of the Department of State, there was facilitated the conclusion on July 16, 1930, of the treaty between Guatemala and Honduras for the arbitration of the boundary dispute between those countries.

[7] Thus on February 20, 1915, in view of correspondence with Great Britain and Germany, respectively, relative to the declaration of a war zone by the German Admiralty, and the use of neutral flags by British merchant vessels, the United States expressed the hope that the two belligerent Governments might, through reciprocal concessions, find a basis for agreement which would relieve neutral vessels engaged in peaceful commerce from certain dangers encountered by them. To that end the United States suggested the terms of an agreement. Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram, Feb. 20, 1915, For. Rel. 1915, Supp., 119. The proposal proved, however, to be unacceptable to both belligerents. See the German Minister for Foreign Affairs, to Mr. Gerard, American Ambassador at Berlin, May 28, 1915, *id.*, 419; also Mr. Lansing, Secy. of State *ad interim*, to Mr. Gerard, telegram, June 9, 1915, *id.*, 436.

[8] Mr. Lansing, Secy. of State, to the Ambassadors and Ministers in Belligerent Countries, telegram, Dec. 18, 1916, For. Rel. 1916, Supp., 97, 98. For the several responses elicited, see *id.*, 117–139; For. Rel. 1917, Supp. 1, 3–23.

[9] *Compare* proposals of the *de facto* Government of Mexico, communicated Feb. 12, 1917,

On August 20, 1936, the Acting Secretary of State informed the Government of Uruguay that that of the United States found itself unable to accept the suggestion that it participate in any offer of mediation in the Spanish conflict.[10] On December 10, 1936, the Acting Secretary of State, adverting to the announcement by the Governments of Great Britain and France that they had invited the Governments of Germany, Italy, Russia and Portugal to join them "in a mediation offer to end the Spanish Civil War," declared it to be the very earnest hope of the Government of the United States that the six nations mentioned might find a peaceful method of accomplishing the great purpose in view. He added that this expression represented "no deviation from our well-known policy of non-interference in the affairs of other countries." [11]

c

## International Commissions of Inquiry

(1)

§ 557. **The Hague Conventions of 1899 and 1907.** Controversies between States arising from questions of fact may baffle diplomacy and lead to war. The truth is usually, however, within the reach of those who seek it, and notably if recourse be had to an impartial investigation; and when brought home to the States at variance, it may point to a sound basis of adjustment which they are willing to accept. As a means of ascertaining the truth, recourse may be had to a commission of inquiry empowered to investigate and report. As a fact-finding body, a commission of inquiry, especially when composed chiefly of nationals of States other than those at variance, should be competent to make a report that is entitled to respect. Hence its conclusions on any of the factual aspects of a dispute concerning, for example, the causes of events, or the authorship of acts, or the consequences of what may have taken place, may be of first importance as a means of enabling the parties to a controversy to reach accord. In view of such considerations, Title III of the Hague Convention of 1899, for the Pacific Settlement of International Disputes (Arts. IX–XIV), established a brief plan for the use of so-called International Commissions of Inquiry.[1] The signatory powers recommended that in differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the States at variance should, as far as circumstances might allow,

---

For. Rel. 1917, Supp. 1, 44; also response of the United States thereto, March 16, 1917, *id.*, 67.

[10] Mr. Phillips, Acting Secy. of State, to the Uruguayan Minister at Washington, Aug. 20, 1936, Dept. of State Press Releases, Aug. 22, 1936, 176, where he adverted to the substance of an instruction to the Diplomatic and Consular Officers of the United States, of Aug. 7, 1936, to the effect that "in conformity with its policy of non-interference in the internal affairs of other countries, this Government will scrupulously refrain from interference in the unfortunate situation which now exists in Spain."

[11] Statement by Mr. Moore, Acting Secy. of State, Dec. 10, 1936, Dept. of State Press Releases, Dec. 12, 1936, 496.

§ 557. [1] Malloy's Treaties, II, 2022. Also Holls, 203–220; Maurice Bokanowski, *Les commissions internationales d'enquête*, Paris, 1908; André Le Ray, *Les commissions internationales d'enquête au xx^me^ siècle*, Saumur, 1910.

institute an International Commission of Inquiry to "facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation." [2] Such a commission was to be established by special agreement between the parties in conflict.[3] Its function was to make a report limited to a statement of facts, and which, it was declared, should in no way have the character of an arbitral award.[4]

The attack during the night of October 21–22, 1904, in the course of the Russo-Japanese War, upon vessels of the English fishing fleet off the Dogger Bank in the North Sea, by the Russian naval fleet bound for the Orient, gave rise to a grave issue between Great Britain and Russia. It concerned the question whether Japanese torpedo boats had been among the fishing vessels fired upon, so as to justify the Russian action which caused the destruction of British lives and property. The States at variance agreed to entrust to an International Commission of Inquiry, assembled in accordance with the provisions of the Hague Convention of 1899, the care of elucidating the question of fact involved. The Commission was also empowered to make inquiry into and draw up a report upon all the circumstances of the case, with particular reference to the place where responsibility lay, and the degree of blame attaching to the subjects of the contracting parties or of other countries, in case their responsibility should be established. The Commission, composed of five admirals, representative of the American, Austrian, French, British, and Russian navies, reported that no Japanese vessels had been among the fishing fleet, that the firing upon the latter was unjustifiable, and that responsibility lay with Admiral Rojdestvensky, the Commander of the Russian fleet.[5] Russia duly paid to Great Britain a substantial indemnity.[6]

The success of the North Sea Commission assured the maintenance of provisions for International Commissions of Inquiry in the Hague Convention of 1907, for the Pacific Settlement of International Disputes.[7] Part III thereof devoted twenty-eight Articles to the subject, embodying a carefully devised code of procedure the use of which was recommended.[8] The Conference of 1907 did not, however, broaden the scope of questions of fact deemed expedient "and

[2] Art. IX. [3] Art. X. [4] Art. XIV.

[5] The Commission took pains to declare that its findings were "not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky, or of the personnel of his squadron." (*Am. J.*, II, 936.)

[6] For the text of the Russo-British Protocol of Agreement of July 29, 1899, and the Report of the Commission of Inquiry of Nov. 12 (25), 1904, see *Am. J.*, II, 929–936, *Nouv. Rec. Gén., 2 sér.*, XXXIII, 641, 710, 712.

Concerning the case generally, see Sir T. Barclay, Problems, 35–42; Hershey, revised ed., 461–464, and commentaries there cited; A. P. Higgins, The Hague Peace Conferences, 167–169, and documents there cited; R. de La Penha, *La Commission internationale d'enquête sur l'incident anglo-russe de la mer du Nord*, Paris, 1906; A. Mandelstam, "*La Commission internationale d'enquête sur l'incident de la mer du Nord*," *Rev. Gén.*, XII, 161 and 351; J. B. Moore, *Proceedings of Eleventh Lake Mohonk Arbitration Conference*, 1905, p. 143; Lauterpacht's 5 ed. of Oppenheim, II, 13–14.

[7] Malloy's Treaties, II, 2230–2234.

[8] Concerning the work of the Second Hague Peace Conference relative to Commissions of Inquiry, see *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 402–416, 564–568, II, 219–226, 379–402, 625, 859–872; also J. B. Scott, The Hague Peace Conferences, I, 269–273.

desirable"[9] for submission to the Commission of Inquiry, or amplify the functions of the latter, or render obligatory the use of such a body.[10]

It may be noted that the Governments of France and Italy agreed on May 20, 1912, to confide to an international commission of inquiry in pursuance of The Hague Convention of October 18, 1907, "the task of clearing up the actual circumstances" under which the capture and detention, and also the firing upon certain French vessels on January 25, 1912, by Italian vessels of war had taken place.[11] In accordance with the same provisions of the same Hague Convention of 1907, the Governments of Germany and of the Netherlands agreed on March 30, 1921, to submit to an international commission of inquiry the question concerning the loss of the Dutch Steamer *Tubantia* on March 16, 1916.[12]

(2)

§ 558. **Treaties of the United States. The Bryan Peace Plan.** On September 20, 1913, the United States concluded with Guatemala one of a notable group of treaties with numerous States, whereby a broader use of commissions of inquiry was contemplated.[1] The purpose of the series was to advance the cause of peace by establishing a deterrent of war. The contracting parties took cognizance, therefore, of the following facts: first, that failure to adjust amicably questions of grave concern to the parties at variance naturally leads to war; secondly, that oftentimes States, including the United States, are unwilling to agree generally to have recourse to arbitration for the adjustment of differences of such a kind; thirdly, that the outraged sensibilities of the people of an aggrieved State, however provocative of war, become immeasurably soothed by the mere lapse of time if unaccompanied by the outbreak of hostilities; fourthly, that States are not unwilling to consent to the reasonable investigation of future and unknown differences of whatsoever magnitude, provided the right is reserved to disregard the report of those who make the investigation; fifthly, that the report of impartial investigators of highest moral reputation and known competency must serve to produce a profound impression upon the public opinion of the States at variance and so pave the way for the solution of their controversy; sixthly, that the organization and establishment of a permanent international commission of inquiry empowered also to suggest to the States concerned the

[9] These words incorporated in Art. IX of the Convention of 1907, constituted an amendment to Art. IX of the convention of 1899.

[10] See Arts. X–XXXVI, Malloy's Treaties, II, 2230–2234.

[11] See Convention of Inquiry in the "Tavignano," "Camouna" and "Gaulois" Cases, May 20, 1912, J. B. Scott, Hague Court Reports, 417.

[12] For the Report of the Commission, Feb. 27, 1922, see J. B. Scott, Hague Court Reports (second series), 135.

§ 558. [1] U. S. Treaty Vol. III, 2666.

These treaties embodied what has been known as Secretary Bryan's Peace Plan. See editorial comment, *Am. J.*, VIII, 565 and 876; *id.*, IX, 175. See Treaties for the Advancement of Peace, between the United States and Other Powers Negotiated by the Honorable William J. Bryan, Secretary of State of the United States, with an introduction by James Brown Scott, Carnegie Endowment of International Peace, New York, 1920; also, "The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes," by this author, *Proceedings,* Am. Soc. Int. Law, 1929, 144, and published also in *Brit. Y.B.* 1929, 96.

invocation of its services would tend to facilitate the use of such a body when the exercise of its functions was most needed.

Thus, for example, the treaty with Norway of June 24, 1914, provides that all disputes between the parties "of every nature whatsoever" shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a "Permanent International Commission"; provided, however, that treaties in force between the two parties do not prescribe settlement by arbitration of such dispute.[2] It is agreed, moreover, that war shall not be declared, nor hostilities begun, during such investigation and before the report is submitted. The international commission is to be composed of five members, one chosen from each country by the government thereof, one chosen by each government from some third country; and the fifth chosen by common agreement between the two governments from among persons who are not "citizens" of either contracting State. The Commission is to be appointed within four months after the exchange of ratifications of the treaty.

Reference of a dispute to the Commission is to take place immediately upon the failure of the contracting parties to adjust it by diplomacy. The Commission may, however, spontaneously offer its services to that effect, and in such case is to notify both governments, requesting their coöperation in the investigation. The Commission is to be furnished with all the means and facilities required for its investigation and report. The report is to be completed within one year after the date on which the Commission declares its investigation to have begun, unless there is agreement between the parties to limit or extend the time. The report is to be prepared in triplicate, of which one copy is to be presented to each government, and the third retained by the Commission for its files. The contracting parties reserve the right to act independently on the subject matter of the dispute after the report shall have been submitted.

The efficacy of treaties such as the foregoing obviously depends upon the power and disposition of the governments of the contracting parties, in the face of a popular demand for war, to respect the terms agreed upon.[3] If, however, those terms are observed, the plan devised promises much; for the report of the Commission, even if itself unacceptable, may, nevertheless, furnish or suggest a basis for adjustment by direct negotiation or by arbitration.[4] The plan is

[2] U. S. Treaty Vol. III, 2745.
It may be observed that the form expressive of the conditions when recourse shall be had to the International Commission is not identical in the several treaties.

[3] J. B. Moore, *Proceedings*, Twentieth Lake Mohonk Arbitration Conference, 1914, 17–18.
Declared Mr. Elihu Root, while Secretary of State in 1907: "It is hard for democracy to learn the responsibilities of its power; but the people now, not governments, make friendship or dislike, sympathy or discord, peace or war, between nations. In this modern day, through the columns of the myriad press and messages flashing over countless wires, multitude calls to multitude across boundaries and oceans in courtesy or insult, in amity or in defiance. Foreign offices and ambassadors and ministers no longer keep or break the peace, but the conduct of each people toward every other. The people who permit themselves to treat the people of other countries with discourtesy and insult are surely sowing the wind to reap the whirlwind, for a world of sullen and revengeful hatred can never be a world of peace. Against such a feeling treaties are waste paper and diplomacy the empty routine of idle form." (*Am. J.*, I, 285–286.)

[4] A Russian delegate at the Second Hague Conference made the following interesting proposal as to the treatment to be accorded the report of the Commission of Inquiry (in the

practical because the author of it took shrewd cognizance of the susceptibilities of opposing States in seasons of conflict, and sought to open a welcome door to direct negotiation under fresh conditions which might inspire accord. It minimizes dangers to either of the opposing States from a report adverse to its interests, not only because of the absence of an obligation to accept the report, but also for the reason that neither contestant finds itself opposed by an affirmative endeavor which it may prove embarrassing to disregard. The Bryan plan, therefore, still offers a sound means of facilitating the amicable adjustment of international differences. It should be observed, however, that no controversy has been seen for the solution of which the aid of a Commission established in pursuance of a relevant treaty has been invoked.[5]

d

§ 558A. **International Commissions of Conciliation.** It has been perceived that a commission, authorized to make impartial investigation of the facts productive of controversy, may be competent also to exercise an additional function — namely, to endeavor by recommendation or other affirmative effort to effect agreement between the opposing States. It seems to be widely acknowledged that such an endeavor, if made under reasonable conditions by an appropriate body, may be highly desirable, provided the opposing States retain freedom to disregard the effort to bring about accord.[1] Arrangement for the exercise of such a function by a permanent body was effected by the treaty between the United States and Great Britain of January 11, 1909, concerning the boundary waters between the United States and Canada. By the terms of Article IX, provision was made for the International Joint Commission (established pursuant to the treaty) not only "to examine into and report upon the facts and circum-

---

Convention for the Pacific Settlement of International Disputes): "The Powers at variance, having obtained knowledge of the facts and responsibilities declared by the International Commission of Inquiry, are free either to conclude a friendly arrangement, or to have recourse to the Permanent Court of Arbitration at the Hague." (A. P. Higgins, The Hague Peace Conferences, 169; *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 415.)

[5] Among the more recent treaties exemplifying the Bryan plan may be noted that with Finland of June 7, 1928, U. S. Treaty Vol. IV, 4137, and that with Latvia of Jan. 14, 1930, *id.*, 4413. The same plan has at times been embraced in treaties making provision also for arbitration, such as that with Switzerland of Feb. 16, 1931, *id.*, 4659.

Some treaties, for example those with Costa Rica (signed Feb. 13, 1914), with Guatemala (signed Sept. 20, 1913), and with Honduras (signed Nov. 3, 1913), were superseded by the Convention for the Establishment of International Commissions of Inquiry between the United States and the Central American Republics, of Feb. 7, 1923, *id.*, 4677. Art. XIII of that convention clothed the Commission of Inquiry with the right, at the request of any of the parties to the dispute, to fix the status in which the parties should remain, in order that the conditions might not be aggravated, and that matters might remain in the same state pending the rendering of the report by the Commission.

§ 558A. [1] Declared Dr. Van Hamel, Director of the Legal Section of the League of Nations, on February 1, 1926: "In principle, a treaty of conciliation establishes, as between the parties, an obligation to submit disputes which may arise between them to a Conciliation Commission or Commissioner. The essential difference between treaties of conciliation and arbitration treaties is that under the former the parties are obliged, in the first instance, to have recourse to the procedure for conciliation, but they are not necessarily obliged to abide by its result. The proposals of a conciliation commission must be, from their nature, optional; whereas the decisions of arbiters are binding." (Arbitration and Security Publications, League of Nations, Legal. 1926. V. 14, p. 7.)

stances of the particular questions and matters referred" to it, but also to accompany its report with "such conclusions and recommendations as may be appropriate." [2] The reports were not to partake of the character of arbitral awards.[3] The same idea found expression in identical language in the proposed arbitration treaties between the United States and France, and the United States and Great Britain, signed during the Taft Administration, August 3, 1911, but which failed to be consummated.[4]

Numerous treaties have since manifested the readiness of States to confide such powers to international commissions. Those yielded to the Council and Assembly of the League of Nations under Article XV of the Covenant are well known and present a distinctive feature of the polity of that organization.[5] The efforts of Norway and of Sweden in 1920 to secure the annexation to the Covenant of a draft designed to establish commissions of conciliation and arbitration have been widely scrutinized; [6] also the Resolution of the Third Assembly of the League, of September 22, 1922, encouraging the use of commissions of conciliation in harmony with the provisions of Articles XV and XVII of the Covenant.[7]

The several treaties confer upon commissions authority to do much more than to investigate and report, without, however, yielding the power to decide or adjudicate. They contemplate an affirmative effort on the part of commissioners to bring the opposing States together. Thus, for example, by the convention between the United States and the Central American Republics, for the "Establishment of International Commissions of Inquiry," concluded February 7, 1923, the commission is given the "right to recommend any solutions or adjustments which in its opinion, may be pertinent, just and advisable." [8] In the treaty of conciliation and judicial settlement between Italy and Switzerland of September 20, 1924, the task of the Permanent Conciliation Commission is "to further the settlement of disputes by an impartial and conscientious

[2] U. S. Treaty Vol. III, 2607, 2612.

[3] *Ibid.* See in this connection, "The International Joint Commission between the United States and Canada," by R. A. MacKay, *Am. J.*, XXII, 292, 308.

[4] See Charles' Treaties, 380 and 385, respectively.

[5] U. S. Treaty Vol. III, 3340.

[6] See proposals of the Norwegian and Swedish Governments concerning commissions of arbitration and conciliation, League of Nations, First Assembly, First Committee Minutes, 75, and 83 respectively. See also Swedish explanatory statement, *id.*, 82.

[7] League of Nations, Records of the Third Assembly, Plenary Meetings, 1922, 199–200. See also report of M. Adatci, *Rapporteur* of the First Committee, *id.*, 196.

See in this connection Lauterpacht's 5 ed. of Oppenheim, II, §§ 11d and e; also "*La Procédure de Conciliation devant la Société des Nations*," by C. de Visscher, *Rev. Droit Int.*, 3 *sér.*, IV, 21; Toynbee's Survey of International Affairs, 1924, 64–73.

See also historical statement by Dr. Arroyo Parejo, of Venezuela, on Dec. 17, 1928, before the Commission of Conciliation of the International Conference of American States on Conciliation and Arbitration. Dr. Parejo declares that "the original idea of the conciliatory method had its origin in America." He adverts to Article III of the treaty between Greater Colombia and Peru, of July 6, 1822 (William R. Manning, Arbitration Treaties among the American States, 1924, 1), and also to Article XVI of the Treaty of Perpetual Union, Alliance and Confederation signed at the Panama Conference on July 15, 1826 (International American Conference, Reports of Committees and Discussions thereon, Historical Appendix IV, Washington, 1890, 187). It is believed, however, that the idea of conciliation found expression in the treaty or truce between Denmark and Sweden, of April 23, 1512 (Rydberg, *Sverges Traktater*, III, 570, referred to in C. E. Hill's "Danish Sound Dues," 1926, p. 44.)

[8] Art. V, U. S. Treaty Vol. IV, 4677, 4679.

examination of the facts and by formulating proposals with a view to settling the case." [9]

By the terms of the Locarno conventions of 1925,[10] and also by those of the model bilateral conciliation conventions submitted by Mr. Politis to the Assembly of the League of Nations in September, 1928,[11] the task embraces the duty "to endeavour to bring the parties to an agreement." According to the General Convention of Inter-American Conciliation of January 5, 1929, the function of the Commission is "to procure the conciliation of the differences subject to its examination by endeavouring to effect a settlement between the parties." [12]

The commission is oftentimes allowed to offer its services spontaneously on its own initiative; [13] and it may even be authorized to restrict the conduct of the States at variance during the period of reference, as by devising provisional measures applicable to them,[14] or by fixing their status.[15]

A commission of conciliation is ordinarily composed of an uneven number of persons, embracing not only nationals of the States at variance, but also nationals of third States, so that the control of recommendations or proposals is lodged in a person or persons who are neutral to the controversy.[16] A joint commission composed of an equal number of representatives or nationals of the

[9] Art. V, treaty of conciliation and judicial settlement between Italy and Switzerland, September 20, 1924, League of Nations Treaty Series, No. 834; Art. XIV, conciliation convention between Norway and Sweden, June 27, 1924, *id.*, No. 717.

[10] Art. VIII, arbitration convention between Germany and Belgium (initialed), October 16, 1925, being Annex B of Final Protocol of the Locarno Conference, 1925, *Am. J.*, XX, *Official Documents*, 25, 27.

[11] Art. XVIII of Bilateral Conciliation Convention (Convention c), Annex 2, to Report of the Third Committee to the Assembly (*Rapporteur:* N. Politis), on Pacific Settlement of International Disputes, Non-aggression and Mutual Assistance, Publications of League of Nations, Disarmament. 1928. IX. 12., p. 24.

[12] Art. VI, General Convention of Inter-American Conciliation, U. S. Treaty Vol. IV, 4765.

[13] Art. VI, conciliation convention between Chile and Sweden, March 26, 1920, League of Nations Treaty Series, No. 111; Art. III, treaty for the establishment of a peace commission between Great Britain and Chile, March 28, 1919, Brit. and For. St. Pap., CXII, 717, 718. See also Art. III, General Convention of Inter-American Conciliation, January 5, 1929.

[14] Art. XVIII, Treaty of Arbitration and Conciliation between the Swiss Confederation and the German Reich, December 3, 1921, League of Nations Treaty Series, No. 320; also Art. XIX, Arbitration Convention between Germany and Belgium, initialled at Locarno, October 16, 1925, being Annex B, to Final Protocol of the Locarno Conference, 1925, *Am. J.*, XX, *Official Documents*, 21, 30.

[15] Art. XIII, Convention between the United States and the Central American Republics for the Establishment of International Commissions of Inquiry, February 7, 1923, U. S. Treaty Vol. IV, 4680.

[16] Thus, it is provided in Art. III of the Convention between Norway and Sweden Concerning the Establishment of a Conciliation Commission, June 27, 1924: "The Commission shall be composed of five members. Each Party shall appoint two members, one of which may be a national of the appointing State. The fifth member, who shall act as chairman of the Commission, shall be a national of a State not otherwise represented on the Commission. He shall be appointed jointly by the Parties. Should the Parties be unable to agree, the chairman shall, at the request of one of the Parties, be appointed by the President of the Permanent Court of International Justice, or, should the latter be a national of one of the Contracting States, by the Vice-President of the Court.

"The Commission shall be appointed within six months after the ratifications of the present Convention have been exchanged." (League of Nations Treaty Series, No. 717.)

See also Art. IV of Treaty to Avoid or Prevent Conflicts between the American States, of May 3, 1923, U. S. Treaty Vol. IV, 4692; also Art. VII of League of Nations Model Bilateral Conciliation Convention of 1928.

opposing States may, however, be utilized for a like purpose.[17] Again, the work of conciliation may be entrusted to a single commissioner possessed of a nationality other than that of either of the opposing States, as is the case in the treaty of conciliation and arbitration between Hungary and Switzerland, of June 18, 1924.[18]

The treaties prior to 1929 present a distinctive feature which is reflected in provisions varying in fullness of detail. It is seemingly contemplated that the task of endeavoring to bring about accord, through appropriate recommendation or otherwise, shall be the consequence of investigation. In numerous conventions care is taken that the commissioners shall not lapse into the easy ways of mediators. According to some, provision is made for a procedure designed to give the opposing States the right to be heard, and to apprise the commission fully as to their respective pretensions before it shall essay to make recommendations. Thus, according to the language of the Locarno conventions of 1925, duplicated in the text of the model bilateral conventions submitted to the Assembly of the League of Nations in 1928:

> The task of the Permanent Conciliation Commission shall be to elucidate questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the Parties to an agreement. It may, after the case has been examined, inform the Parties of the terms of settlement which seem suitable to it, and lay down a period within which they are to make their decision.[19]

It is also provided that:

> The Parties shall be represented before the Permanent Conciliation Commission by agents, whose duty it shall be to act as intermediary between them and the Commission; they may, moreover, be assisted by counsel and experts appointed by them for that purpose, and request that all persons whose evidence appears to them useful should be heard.
>
> The Commission, on its side, shall be entitled to request oral explanations from the agents, counsel and experts of the two Parties, as well as from all persons it may think useful to summon with the consent of their Government.[20]

The Treaty to Avoid or Prevent Conflicts between the American States, signed at Santiago de Chile, May 3, 1923,[21] together with the supplementary and amen-

[17] As has been noted, such was the case in the convention between the United States and Great Britain concerning the Boundary Waters between the United States and Canada, of Jan. 11, 1909. Art. IX, U. S. Treaty Vol. III, 2612.

[18] Art. III, League of Nations Treaty Series, No. 887. It was also provided that the Commissioner should not be domiciled within the territory, or employed in the service of either contracting party.

[19] Art. VIII of arbitration convention between Germany and Belgium, initialled October 16, 1925, *Am. J.*, XX, *Official Documents*, 27.

[20] Art. XII, *id.*, 28. According to Art. IX: "Failing any special provision to the contrary, the Permanent Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries the commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Chapter III (International Commissions of Enquiry) of the Hague Convention of the 18th October, 1907, for the Pacific Settlement of International Disputes."

[21] U. S. Treaty Vol. IV, 4691.

datory provisions of the General Convention of Inter-American Conciliation signed at Washington, January 5, 1929,[22] deserve attention. They reflect in part a different theory. The former of these conventions known as the Gondra Treaty, in honor of the memory of its author, the distinguished Paraguayan statesman, Dr. Manuel Gondra, was a multi-partite arrangement for the use of commissions of inquiry. Moreover there were reserved from its operation "questions affecting constitutional provisions." The Gondra Treaty, having rather slowly won the approval of a large number of American Republics, was deemed to offer a solid foundation for the new and broader plan set forth in the Convention of 1929. The latter provides that "to the procedure of conciliation" are to be submitted all controversies of any kind without reservation, which have arisen or may arise between the contracting parties and which it may not have been possible to settle through diplomatic channels.[23] This "procedure" once under way may be interrupted — and "interrupted only" by a direct settlement between the parties, or by their agreement to accept absolutely the decision *ex aequo et bono* of an American Chief of State or to submit the controversy to arbitration or to an international Court.[24] The commission of inquiry provided for by the Gondra Treaty is transformed into one of conciliation.[25] It is composed of five members all nationals of American States. Each government appoints two members at the time of convocation "only one of whom may be a national of its country." The fifth is chosen by common accord by those already appointed and performs the duties of President.[26]

The function of the Commission is to examine, to report with recommendations, and to effect a settlement. At any stage of its labors the endeavor to bring the parties together is made appropriate. The Commission may begin its work with an effort to conciliate,[27] or it may do so at any time which it regards as favorable therefor in the course of the investigation,[28] or within a specified period after it has made its report and recommendations to the States at variance.[29] Thus throughout its life the Commission is burdened with this special task. Unless its labors to effect accord have been successful, and under conditions that are specified, the Commission is obliged to undertake a conscientious and impartial investigation of the questions which are the subject of the controversy, to set forth in a report the results of its proceedings, and to propose to the

[22] U. S. Treaty Vol. IV, 4763.
[23] Art. I. See also Art. XV.
[24] Art. XIII.
[25] Art. II.
[26] *Cf.* Art. IV of Convention of May 3, 1923, U. S. Treaty Vol. IV, 4692. According to that Article: "The fifth shall be chosen by common accord by those already appointed and shall perform the duties of President. However, a citizen of a nation already represented on the Commission may not be elected. Any of the Governments may refuse to accept the elected member, for reasons which it may reserve to itself, and in such event a substitute shall be appointed, with the mutual consent of the Parties, within thirty days following the notification of this refusal. In the failure of such agreement, the designation shall be made by the President of an American Republic not interested in the dispute, who shall be selected by lot by the Commissioners already appointed, from a list of not more than six American Presidents to be formed as follows: each Government party to the controversy, or if there are more than two Governments directly interested in the dispute, the Government or Governments on each side of the controversy, shall designate three Presidents of American States which maintain the same friendly relations with all the Parties to the dispute."
[27] Art. IV of General Convention of Inter-American Conciliation, January 5, 1929, U. S. Treaty Vol. IV, 4765.
[28] *Id.*
[29] *Id.*

parties the bases of a settlement for the equitable solution of the controversy.[30] "Once the period of time fixed by the Commission for the parties to make their decisions has expired," that body is to set forth in a final act the decision of the parties, and, if conciliation has been effected, the terms of the settlement.[31] The report and recommendations of the Commission, in so far as it acts as an organ of conciliation, do not have the character of a decision or of an arbitral award, and are not binding on the parties "either as regards the exposition or interpretation of the facts or as regards questions of law." [32]

Accordingly, either party, by rejecting the efforts of the commission to bring about accord prior to investigation, may decline to consider any conciliatory endeavors until they prove to be in fact the product of fullest investigation. Nevertheless, neither party can ward off, or prevent itself from being subjected to proposals for settlement recommended by the Commission at any stage of its work.

Another feature of the convention deserves attention. Under the Gondra Treaty, two commissions, to be designated as permanent, were to be established at Washington and at Montevideo, and were to be composed of the three American diplomatic agents longest accredited in those capitals. Their functions were to be "limited to receiving from the interested Parties the request for a convocation of the Commission of Inquiry" (for which provision was made in an earlier article) and "to notifying the other Party thereof immediately." By the convention of January 5, 1929, these permanent commissions are clothed with new and important powers. By the terms of Article III, "they shall be bound to exercise conciliatory functions, either on their own motion when it appears that there is a prospect of disturbance of peaceful relations, or at the request of a party to the dispute, until the Commission referred to in the preceding article is organized." [33] The American States, parties to the convention of Janu-

[30] Art. VI.

[31] Art. XI.

[32] Art. IX. It is provided in Art. VIII that the Commission of Conciliation shall "establish its rules of procedure," and that "in the absence of agreement to the contrary, the procedure indicated in Article IV of the Treaty of Santiago de Chile on May 3, 1923, shall be followed." That Article declares that the Commission "shall itself establish its rules of procedure." There is recommended for incorporation therein the provisions contained in Articles IX, X, XI, XII and XIII of the convention between the United States and the Central American Republics of Feb. 7, 1923 (U. S. Treaty Vol. IV, 4677). Art. X provides that "during the investigation the Parties shall be heard and may have the right to be represented by one or more agents and counsel." Art. XII provides in part that "the inquiry shall be conducted so that both Parties must be heard," and that "consequently, the Commission shall notify each Party of the statements of fact submitted by the other, and shall fix periods of time in which to receive evidence."

[33] U. S. Treaty Vol. IV, 4765.

See Proceedings of the International Conference of American States on Conciliation and Arbitration, Washington, December 10, 1923–January 5, 1929, 332–334, 360.

See Report of Brig. Gen. Frank R. McCoy, U.S.A., Sept. 21, 1929, as Chairman of the Commission of Inquiry and Conciliation under protocol entered into by Bolivia and Paraguay, Jan. 3, 1929, accepting the good offices of the International Conference of American States on Conciliation, Publications, Dept. of State, Latin American Series, No. 1.

An additional protocol to the convention of Jan. 5, 1929, signed at Montevideo on Dec. 26, 1933, made provision that each country signatory to the treaty signed at Santiago, Chile, on May 3, 1923 (the Gondra Treaty), should name, as soon as possible, by means of a bilateral agreement, to be recorded in a simple exchange of notes with each one of the other signatories thereto, those members of the various commissions provided for in Art. 4 of that

ary 5, 1929, thus appear to contemplate under the contingencies there specified, the exercise of good offices by a diplomatic body on which the States at variance are not necessarily represented as the normal preliminary to the use of a commission of conciliation. In fact it is only when one of the diplomatic commissions fails to bring about accord within the brief period before the commission of conciliation is organized, that the latter shall have an opportunity to function. The brevity of that period may, however, serve to give to the permanent diplomatic commissions small opportunity for service.[34]

(1)

§ 558B. **The Same.** Within recent years the United States has expressed renewal of its faith in the efficacy of conciliation as a mode of adjusting international differences. It is a party to the Treaty of Non-Aggression and Conciliation signed at Rio de Janeiro, October 10, 1933 (known as the Saavedra-Lamas Treaty).[1] According to the terms thereof, the parties "obligate themselves to submit to the conciliation procedure established by this treaty the disputes specially mentioned and any others that may arise in their reciprocal relations . . . which it has not been possible to settle by diplomatic means, within a reasonable period of time," without further limitations than those enumerated in agreement.[2] The United States is party also to the Convention to Coördinate,

---

treaty, and that the commissions so named should have a permanent character and should be called "Commissions of Investigation and Conciliation." It was also provided that the commissions organized in fulfillment of Art. 3 of the treaty of Santiago, should be called "Permanent Diplomatic Commissions of Investigation and Conciliation." It was added that in view of the character which the protocol had as an addition to the convention of Jan. 5, 1929, the provision of Art. 16 of that convention should be applied thereto. U. S. Treaty Vol. IV, 4798.

[34] This section of the text was embodied in an article by the author entitled "The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes," read before the American Society of International Law, April 26, 1929 (*Proceedings*, Am. Soc. Int. Law, 1929, 144), and printed also in *Brit. Y.B.*, 1929, 96.

See Manley O. Hudson, "The Friendly Settlement of Economic Disputes between States," *Am. J.*, XXVI, 353, concerning the resolution of the Council of the League of Nations of Jan. 28, 1932, adopting rules of procedure for the optional friendly settlement of economic disputes between States.

§ 558B. [1] U. S. Treaty Vol. IV, 4793. See address of Mr. Hull, Secy. of State, as Chairman of the American Delegation to the Inter-American Conference for the Maintenance of Peace, at Buenos Aires, Dec. 5, 1936, in which he urged other American Republics which had not accepted the Saavadra-Lamas Treaty, (and other treaties to which he referred), to do so. Dept. of State Press Releases, Dec. 5, 1936, 432.

[2] Art. IV.

In Art. V, the limitations are enumerated as follows:

"(*a*) Differences for the solution of which treaties, conventions, pacts, or pacific agreements of any kind whatever may have been concluded, which in no case shall be considered as annulled by this agreement, but supplemented thereby insofar as they tend to assure peace; as well as the questions or matters settled by previous treaties;

"(*b*) Disputes which the parties prefer to solve by direct settlement or submit by common agreement to an arbitral or judicial solution;

"(*c*) Questions which international law leaves to the exclusive competence of each State, under its constitutional system, for which reason the parties may object to their being submitted to the conciliation procedure before the national or local jurisdiction has decided definitively; except in the case of manifest denial or delay of justice, in which case the conciliation procedure shall be initiated within a year at the latest;

"(*d*) Matters which affect constitutional precepts of the parties to the controversy. In case of doubt, each party shall obtain the reasoned opinion of its respective tribunal or supreme court of justice, if the latter should be invested with such powers."

Extend and Assure the Fulfillment of the Existing Treaties between the American States, signed at Buenos Aires December 23, 1936, by the terms of which the signatories agree that in the event of a dispute between two or more of them they will seek to settle it in a spirit of mutual regard for their respective rights, having recourse for that purpose "to direct diplomatic negotiation or to the alternative procedures of mediation, commissions of inquiry, commissions of conciliation, tribunals of arbitration, and courts of justice," as provided in the treaties to which they may be parties.[8]

It may be premature to attempt to appraise the value of conciliation as a mode of the adjustment of differences between States. Nevertheless, certain relative disadvantages in having recourse to conciliation are believed to be more than theoretical. A State may find itself embarrassed by a strong recommendation participated in by all of the commissioners who are foreign to itself, and which is adverse to its policy and interests, and yet not necessarily based upon the law or the requirements thereof; and it may resent the effort on the part of a non-judicial body to encourage it to relinquish legal rights or to pursue a course that may entail a sacrifice of them. For that reason, it is not impossible that the narrower and more modest efforts of a commission of inquiry that is not endowed with authority to conciliate may prove, at least under certain circumstances, to be more acceptable to States that fail to adjust their controversy by direct negotiation.

## 2

## JUDICIAL MEANS

### a

### Arbitration

#### (1)

§ 559. **Definition. Character.** In a broad sense, the term arbitration[1] refers, in relation to the matter of the adjustment of controversies between States, to the reference of a dispute to an individual known as an arbitrator, or to an uneven number of persons so described, for a decision or award, and regardless of whether their conclusions are based upon compromise expressive of a diplo-

[8] Art. IV, U. S. Treaty Vol. IV, 4831, 4833.

The terms of the proclamation of a treaty between the United States and Greece, of June 19, 1930, U. S. Treaty Vol. IV, 4288, providing for recourse to an international commission for investigation and report, refer to the agreement as a treaty of "conciliation." In numerous other instances like reference has been made to similar agreements which fail to clothe the commission with the functions of conciliation, and where the texts are in substance similar to those providing for commissions of inquiry under the Bryan Peace Plan.

§ 559. [1] See, especially, J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Washington, 1898; The United States and International Arbitration, Boston, 1896; Digest of International Law, VII, 24–103; International Adjudications Ancient and Modern, New York, 1929–1936. Also H. La Fontaine, *Pasicrisie internationale; Histoire documentaire des arbitrages internationaux,* 1794–1900, Berne, 1902; A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux,* Paris, 1905. Attention should be called to A. Mérignhac, *Traité théorique et pratique de l'arbitrage*

matic achievement, and of whether any of those individuals look upon themselves or act as representatives of either party to the dispute.[2] In the light, however, of the practice of States which have had recourse to arbitral tribunals, it is not unreasonable to assert that the term arbitration is commonly employed by statesmen in a narrower, more precise and more technical sense. It appears to refer to an impartial adjudication according to law, and that before a tribunal of which at least a single member who is commonly a national of a State neutral to the contest acts as umpire.[3] Recourse to arbitration thus implies that

---

*international,* Paris, 1895, a translation of a portion of which respecting arbitration in the East and in Greece, under the Roman Empire, and in the Middle Ages, is contained in Moore, Arbitrations, V, 4821–4831; J. H. Ralston, The Law and Procedure of International Tribunals, revised ed., Stanford University, 1926; Supplement to 1926 Revised Edition of The Law and Procedure of International Tribunals, Stanford University, 1936; International Arbitration from Athens to Locarno, Stanford University, 1929. H. M. Cory, Compulsory Arbitration of International Disputes, New York, 1932; W. R. Manning, Arbitration Treaties among the American Nations to the close of the year 1910, New York, 1924; M. Habicht, Post-War Treaties for the Pacific Settlement of International Disputes, Cambridge, Mass., 1931; Arbitration and Security: Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations (revised to Dec. 15, 1927), Publications, League of Nations, Legal, 1927.V.29; Memorandum relating to the Pacific Settlement of International Disputes concerning Economic Questions in General and Commercial and Customs Questions in Particular, Publications, League of Nations, Economic and Financial Questions, 1931.II.B.1; P. C. Jessup, "The United States and Treaties for the Avoidance of War," *International Conciliation,* Documents, 1928, No. 239; F. C. de Wolf, General Synopsis of Treaties of Arbitration, Conciliation, Judicial Settlement, Security and Disarmament, Actually in Force between Countries invited to the Disarmament Conference, Washington, 1933; Carnegie Endowment for International Peace, Reading List No. 30, March 9, 1931, on The Permanent Court of Arbitration; Preliminary Select Bibliography of International Law by E. H. Ketcham, Syracuse University, pp. 47–49; Fenwick, 2 ed., 408–418; C. M. Bishop, International Arbitral Procedure, Baltimore, 1930; A. M. Stuyt, Survey of International Arbitrations, 1794–1938, The Hague, 1939; Lauterpacht's 6 ed. of Oppenheim, II, 19–41, with bibliography.

[2] In his instructions to the American delegates to the Second Hague Peace Conference of 1907, May 31, 1907, Mr. Root, Secy. of State, declared: "It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlement of the questions brought before them in accordance with traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process." (For. Rel. 1907, II, 1128, 1135; Stockton, Outlines, 280.)

[3] In the Mixed Claims Commission, United States and Germany, under convention of August 10, 1922, the Umpire was an American citizen, in the person of Judge Edwin B. Parker.

"Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. . . . Mediation is merely a diplomatic function and offers nothing new. Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts." (J. B. Moore, in Dig., VII. 25.)

Declared the same writer in an address May 29, 1917, on International Arbitration before the Academy of Political Science: "It is said that heretofore we have had arbitration, but that arbitration has failed, and that now we are to have 'judicial settlement' of international disputes. Such statements illustrate the propensity to accept phrases rather than to search for facts — I venture to assert that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the author-

the issue is regarded as susceptible to reasonable adjustment by reference to accepted principles of international law,[4] that the arbitrators are acquainted with those principles and will apply them, and that the parties to the controversy will respect the award.[5]

As a mode of amicable adjustment of international differences, arbitration reveals itself, in so far as it has been utilized by States at variance, as a process where the individuals to whom the arbitral task is confided necessarily exercise a judicial function in reaching their decisions.[6] For that reason, one encounters difficulty in regarding arbitration as a method which differs essentially from any other where, as a means of adjusting controversies, judges are employed to act in a judicial capacity. Nevertheless, the nomenclature of numerous relevant documents, embracing instruments expressive of agreement, reveals a growing disposition to distinguish in terms judicial settlement, as, for example, by the Permanent Court of International Justice, from arbitration.[7]

Recourse to arbitration reflects the aspirations of the States at variance to realize what may be described as a right to international law itself.[8] It marks a sense of the reasonableness of the assertion that membership in an international society professing to be governed by that law signifies that the individual member may fairly invoke it as the basis of the solution of its controversies with any other, and that such member may also fairly demand that the applicability of international law to its pretensions be tested by agencies that are competent to apply it and obligated to do so, rather than by any others. While such aspira-

---

ity of tribunals that preceded it, as you will find in the proceedings of our ordinary judicial tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the 'judicial settlement' of international disputes we are presenting some new device or new method." (*Proceedings*, Academy of Political Science, VII, No. 2, Part 1, 21–22.)

Declares Westlake: "The essential point is that the arbitrators are required to decide the difference — that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of a mediator." (Int. Law, 2 ed., I, 354.)

[4] Westlake, 2 ed., I, 358; Legal Problems Capable of Settlement by Arbitration, *Bulletin No. 11*, American Society for Judicial Settlement of International Disputes, February, 1913.

[5] Art. XXXVII, Hague Convention of 1907, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2234. Also Mr. Gresham, Secy. of State, to Mr. Baker, Minister to Costa Rica, July 14, 1893, For. Rel. 1893, 202, Moore, Dig., VII, 28.

[6] See Judge Moore's invaluable "Notes on the Historical and Legal Phases of the Adjudication of International Disputes" in Moore, Adjudications, I, xv–xci, especially lxxxix–xci.

*Cf.* Observations by Judge Kellogg in Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase), Publications, Permanent Court of International Justice, Series A, No. 24, 29–43.

[7] See, for example, General Act for Pacific Settlement of International Disputes, reported by Dr. N. Politis to the Assembly of the League of Nations in 1928 (and ultimately approved by that body), Publications, League of Nations, Disarmament, 1928.IX.12.p.7; also, Art. 13, Treaty of Conciliation, Arbitration and Compulsory Adjudication concluded by Colombia and Switzerland, Aug. 20, 1927, League of Nations, Treaty Series, CXI, 230; Art. 13, Inter-American Treaty of Conciliation, of Jan. 5, 1929, U. S. Treaty Vol. IV, 4766.

[8] See Charles E. Hughes, "The Shrine of the Common Law," address at Westminister Hall, July 21, 1924, in which he declared: "The fundamental conception which we especially cherish as our heritage is the right to law itself, not as the edict of arbitrary power, but as the law of a free people, springing from custom, responsive to their sense of justice, modified and enlarged by their free will to meet conscious needs, and sustained by authority which is itself subject to the law — the law of the land." (The Pathway of Peace, Representative Addresses by Charles E. Hughes, New York, 1925, 203, 208.)

tions of a State are not acknowledged in practice to be the equivalent of a legal right to hale its adversary before a particular tribunal, or to deprive the latter of freedom to decline to adjust the controversy by a particular procedure,[9] they point to the insufficiency of the law in so far as it fails to enable a State to have the conduct of any other of which it makes complaint tested by the requirements of that law through judicial means, rather than by processes that may be contemptuous of it. Yet the tendency of States in seasons of peace to have recourse to arbitration and other modes of judicial settlement, as well as to agree also generally to have recourse to them for the solution of subsequent differences, is as impressive as the acknowledgment of the freedom of a State, in the absence of agreement, not to adjudicate or to agree to adjudicate its disputes with another in any specified forum. That tendency may be prophetic of the time when assertions of a right not to adjust international controversies by amicable means, whether judicial or otherwise, shall have been largely relinquished. In the meantime, however, the continuous endeavor of aggrieved States to realize their aspirations for a right to international law itself through appropriate judicial agencies are shining tokens of appreciation not only of the applicability of its precepts as a solvent of controversy, but also of the efficacy of those agencies to apply them for the common good.[10]

(2)

§ 560. **Arbitrable Differences.** It is believed to be unnecessary to seek a term that shall isolate in a descriptive sense those disputes between States which are susceptible to adjustment by arbitration when other modes of amicable settlement are unavailing or unsought.[1] Whether an international controversy lends itself to adjustment by such process is believed to depend upon whether the principles of international law are sufficiently broad and flexible in their scope and application, and sufficiently well understood to mark clearly the lawfulness or unlawfulness of the conduct or contentions giving rise to complaint. One encounters difficulty in visualizing a situation where those principles are lacking in this regard, or where they are not comprehensible by those who seek their guidance.[2] Moreover, the controversies which harass opposing States and baffle diplomacy, commonly embrace contentions assertive of a breach of legal duty, contractual or otherwise, by one of the States at variance.[3]

[9] See Fifth Advisory Opinion of the Permanent Court of International Justice in the Case concerning Eastern Carelia, Publications, Permanent Court of International Justice, Series B, No. 5, 27.

[10] Concerning the General Act for the Pacific Settlement of International Disputes, adopted at Geneva, Sept. 26, 1928, League of Nations Treaty Series, XCIII, 343, Hudson, Int. Legislation, IV, No. 207, p. 2529, see Lauterpacht's 6 ed. of Oppenheim, II, 79–83. The United States is not a party to the convention.

§ 560. [1] See illuminating comment by Dr. Lauterpacht in footnote 1, p. 4, Vol. II, of his sixth edition of Oppenheim.

[2] "The history of international arbitration shows no instances of the arbitrators refusing to give a decision on the ground of the absence of applicable rules of International Law." (Lauterpacht's 6 ed. of Oppenheim, II, p. 24, footnote 4.)

[3] Thus when States agree "to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of

Doubt exists, however, in the minds of statesmen whether the condition of the law of nations and the measure of human understanding of it suffice to make it applicable to the adjustment of differences of every type. Again, it is constantly assumed by those who are responsible for the form of treaties that there is a broad class of disputes between States which do not grow out of breaches of legal duty and which are, therefore, to be described as non-legal or non-justiciable; and that for the solution of such differences recourse to arbitration is not desirable.[4] These considerations which have affected the practices of States as reflected in the character and form of their agreements, have not been productive of clearness of thought.[5]

The susceptibility of a dispute to adjustment by arbitration is obviously not dependent upon the magnitude of the questions at issue, or upon the attachment of one of the States at variance to the policy that is decisive of its conduct. Nor does the circumstance that the controversy affects the so-called "vital interests," or "honor" or "independence" of a State, or partakes of a "political nature," indicate that it is not arbitrable. The presence of considerations that may be so described has, however, oftentimes been utilized to segregate types of differences which there was an unwillingness to agree to arbitrate.[6] Uninfluenced by the theoretical comprehensiveness or sufficiency of arbitration as an agency of adjustment, States have persistently sought to establish checks upon their mutual undertakings to have recourse thereto, even when agreeing generally to utilize it; and these checks, notwithstanding the unscientific form which they have assumed, have served to restrict appreciably the size of commitments. Although the scope of reservations to be found in general arrangements has been diminished within recent years, States that are disposed to have recourse to arbitration for the adjustment of controversies of grave import, frequently still remain unwilling to agree that some future and unknown differences

---

decision by the application of the principles of law" (Art. I of Inter-American Arbitration Treaty, Jan. 5, 1929, U. S. Treaty Vol. IV, 4756), their undertakings are of vast scope and cover a field of which the limits, unless specifically defined (as they were in the treaty quoted, especially under reservations contained in Art. 2), are difficult to discern.

[4] Such an idea is in part responsible for arrangements contemplating the use of international commissions of conciliation. See Art. 3, Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, initialed Oct. 16, 1925, Annex A to Final Protocol of the Locarno Conference, 1925, *Am. J.*, XX, *Official Documents*, 23.

[5] Such considerations have, moreover, been responsible for the attempt to segregate certain categories of disputes which were to be deemed to be arbitrable, by labelling them as justiciable, and for the supplementary attempt to explain the character of those differences to which the label could be fairly applied as a means of bringing them within the category of disputes which might be regarded as arbitrable. This indirect process has not been helpful in the quest for a solution of the broad question whether a particular controversy is fairly susceptible to adjustment by arbitration.

[6] See Art. I of arbitration convention between the United States and Great Britain, of April 4, 1908, Malloy's Treaties, I, 814.

See, also, Mr. Hay, Secy. of State, to General Reyes, Representative of Colombia on Special Mission, Jan. 5, 1904, For. Rel. 1903, 294, 306.

Declared Mr. Hughes, Secy. of State, in a communication to the Panaman Minister at Washington, Oct. 13, 1923: "This Government is generally not indisposed to refer to arbitration legal questions arising from divergent interpretations of a treaty to which it is a party. In the present case, however, the question which you propose to arbitrate is one attacking the exercise of sovereign rights by the United States explicitly granted under Article III of the Treaty of 1903 with Panama. It would be quite impossible for the United States to consent to arbitrate a question of that sort." (For. Rel. 1923, II, 707, 710.)

of war-producing calibre, however susceptible to adjustment by arbitration, shall be settled by that procedure rather than by any other.[7]

Fear lest a State be subjected to the obligation to arbitrate a question arising out of a contention that is defiant of its exercise of a privilege commonly acknowledged by international law to be its own, has led to the incorporation in certain instruments of a reservation that is designed to meet the situation. Thus, it is declared in certain treaties to which the United States is a party that the provisions thereof shall not be invoked in respect of any dispute the subject matter of which "is within the domestic jurisdiction of either of the high contracting parties." [8] This is a rough, yet perhaps effective mode of indicating that as against a frivolous or preposterous claim preferred against it a State is not to be obliged to defend itself in an arbitral forum. Nevertheless, the applicability of such a reservation to the particular issue that is raised may be questioned and controversy may arise whether the subject matter of the dispute is within the "domestic jurisdiction." While the parties to an arbitration treaty are obliged to interpret the same as a means of determining whether a particular controversy is to be adjusted according to its terms, provisions which complicate the performance of that task as by opening the door to divergent constructions of what has been agreed upon must always be regretted.

Oftentimes a decision or award by an arbitral tribunal is not desired by one of the States at variance or is not deemed by it to be preferable to a recommendation which there is no legal obligation to heed.[9] The reluctance of a State

[7] See, for example, Art. III of arbitration treaty between the United States and France, of Feb. 6, 1928, U. S. Treaty Series, No. 785. See, also, Art. II of Inter-American Arbitration Treaty, Jan. 5, 1929, U. S. Treaty Series, No. 886.

[8] See, for example, Art. III of arbitration treaty with France of Feb. 6, 1928, U. S. Treaty Vol. IV, 4180.

It will be recalled that according to paragraph 8 of Art. 15 of the Covenant of the League of Nations: "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." (U. S. Treaty Vol. III, 3340.)

Declared Secy. Hughes, in the course of an address at Cincinnati, Oct. 4, 1924: "The people of this country would never tolerate the submission to any Power or group of Powers of the determination of any of our domestic questions. If we are to coöperate, we must be permitted to coöperate without the sacrifice of our right to determine our own policies."

"Disputes legal in their nature may arise between two States with regard to matters falling exclusively within the domestic jurisdiction of one of them. No State can agree to the submission to an international tribunal of matters falling exclusively within the range of its national sovereignty. Similarly, there are some political questions even of a justiciable nature as to which a country feels that for the reasons indicated in paragraph 4 the stage has not yet been reached when it can agree unreservedly in advance to submit them to an arbitration tribunal." (Observations of His Majesty's Government in Great Britain on the Programme of Work of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference, Publications, League of Nations, Disarmament, 1928, IX.3.p.51.)

[9] It must be obvious that estimates of the desirability of recourse to arbitration will in the particular case be dependent upon the alternatives which confront the States at variance in case that mode of settlement be rejected. Such States as are members of the League of Nations find themselves confronted with an ultimate reference to the Council of that body when other modes of amicable adjustment have proved to be unsuccessful. (See *infra*, § 585.) This was acknowledged in the Locarno pacts which provided for recourse to the Permanent Court of International Justice and to arbitration as well as to conciliation. (See arbitration convention between Germany and Belgium initialed Oct. 16, 1925, Annex B to the final protocol of the Locarno Conference of 1925, *Am. J.*, XX, *Official Documents*, 25.) The United States

to agree to arbitrate differences within certain categories may be attributable to a variety of causes, such as lack of confidence in its ability to convince foreign judges as to the soundness of national pretensions, or fear of prejudice against itself, or distrust of the competence or impartiality of judges to be clothed with the arbitral function, or dangers to itself to be anticipated from an award that may be denunciatory of its claims. Like reasons may inspire reluctance also to entrust to any entity composed chiefly of alien members, authority to decide upon the merits of a contention of grave national significance. The United States has frequently been unwilling to agree generally to confer such authority for the solution of cases involving contentions of such a kind upon any body or tribunal of which the majority was to be composed of persons alien to itself; [10] and it has exhibited a preference for another type of forum when a decision was sought in a controversy to be regarded as of such a type.[11]

It is not unreasonable for States to agree that questions concerning the scope or character of their general undertakings to arbitrate be referred, in case of disagreement, to an appropriate arbitral or other body for solution.[12] Moreover, it is feasible for the contracting parties to yield to such a body authority to fix the terms of a preliminary agreement or *compromis* designed to give effect to an existing obligation to arbitrate, under circumstances when the parties are unable of themselves to fix the terms of such an agreement.[13] A broader commitment is made when it is agreed that failing the conclusion of a special agreement within a defined period, either party to a treaty may bring its controversy with

---

does not find itself in such a situation. It is not obliged to face ultimate recourse to the Council of the League as an alternative for the failure to accept arbitration or any other mode of settlement. Again, it finds itself, in respect to many countries, under no legal obligation to have recourse to any specified mode of amicable adjustment. According to the terms of the Convention for the Renunciation of War as an Instrument of National Policy of Aug. 27, 1928, the burdens imposed through Article II involve merely an obligation to seek a solution by pacific means. (U. S. Treaty Vol. IV, 5130.) Even under that convention the United States acknowledges no duty to abstain from recourse to war on grounds of self-defense. (See note of the American Government to the Governments of Certain States, June 23, 1928, as contained in Department of State, Treaty for the Renunciation of War, Text of the Treaty, Notes Exchanged, Instruments of Ratification and of Adherence and Other Papers, Washington, 1933, 56.) By the terms of certain arbitration treaties, such as that with France of Feb. 6, 1928, the duty to arbitrate does not appear to arise until adjustment by diplomacy and by conciliation shall have failed. (Art. II, U. S. Treaty Vol. IV, 4180, 4181.) According to the Inter-American Arbitration Treaty of Jan. 5, 1929, the duty to arbitrate does not preclude any of the parties, before resorting to arbitration, "from having recourse to procedures of investigation and conciliation established in conventions then in force between them." (Art. 1, U. S. Treaty Vol. IV, 4756, 4757.) The treaty does not, however, declare that the duty to arbitrate does not come into being until recourse to conciliation shall have failed. (Art. 1.)

[10] See The United States as a Party to Treaties for Obligatory Arbitration, *infra*, §§ 566–567.

[11] This was true in the case of the adjustment of the Alaskan Boundary Dispute. See Joint Commissions, *infra*, § 584.

[12] See Art. III of a proposed arbitration convention, signed in behalf of the United States and Great Britain, Aug. 3, 1911, where such authority was confided to a Joint High Commission of Inquiry. Charles' Treaties, 387.

[13] See Art. 4 of Inter-American Arbitration Treaty of Jan. 5, 1929, U. S. Treaty Vol. IV, 4758. See, also, Art. LIII of Hague Convention of Oct. 18, 1907, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2238; Art. VIII of Convention for the Establishment of an International Central American Tribunal, of Feb. 7, 1923, Conference on Central American Affairs, Washington, Dec. 4, 1922–Feb. 7, 1923, U. S. Government Printing Office, 1923, p. 303.

the other before a specified arbitral tribunal.[14] When States are at variance with respect to the law that should be applied for the solution of their controversy, preliminary agreement as to the principles which should, nevertheless, guide a tribunal to be called upon to adjust it, may serve to produce a mutual acquiescence that is productive of recourse to arbitration.[15]

(*a*)

§ 561. **The Same.** Recourse to arbitration is likely to be constantly recurrent. Yet the disposition of States to refrain from agreeing to settle by such process numerous types of differences that are susceptible to adjustment by such means must be expected to depend in large degree upon the growth of confidence in the competence and resolution of arbitral tribunals to apply and be guided by the principles of international law rather than by any others in adjudications that are had before them.

If in the struggle to maintain peace arbitration is to be employed as an instrument for the solution of differences that are gravely provocative of war, its employment in so far as it concerns the United States, may prove to be the consequence of voluntary arrangements to arbitrate, rather than of general undertakings causing recourse to arbitration to be obligatory. The increasing readiness of States, including the United States, to commit themselves to such general undertakings is of course a happy augury, despite the terms of reservations that in varying degree oftentimes accentuate the freedom of the contracting parties to shun an arbitral forum. For the amicable solution of controversies such as may be calculated to jeopardize the continuance of peace, it is not yet apparent that the United States is generally disposed to embark upon arbitration until at least it has explored in vain the uses of some other possible methods of adjustment.[1]

(3)

RECOURSE TO ARBITRATION BY THE UNITED STATES

(*a*)

§ 562. **In General.** Ever since its birth as a State, the United States has been beset with international controversies for the solution of which diplomacy proved to be inadequate. Differences growing out of pecuniary claims in consequence of the treatment accorded private individuals alleged to have been vic-

[14] According to Art. 27 of the so-called General Act for the Pacific Settlement of International Disputes reported to the Third Committee of the Assembly of the League of Nations by Dr. N. Politis in 1928: "Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by one or other party." (Publications, League of Nations, Disarmament. 1928. IX. 13, p. 13.)

[15] See, for example, the so-called Neutrality Rules contained in Art. VI of the treaty between the United States and Great Britain of May 8, 1871, for the guidance of the tribunal in the Geneva Arbitration, Malloy's Treaties, I, 703.

§ 561. [1] See The United States as a Party to Treaties for Obligatory Arbitration, *infra*, §§ 566–567; Joint Commissions, *infra*, § 584; International Organization for Peace, *infra*, § 923.

tims of internationally illegal conduct have frequently been referred to arbitral tribunals. Arrangement has been made for the adjustment before such bodies both of individual claims,[1] and of groups of claims within a specified category,[2] and in cases where the United States was a respondent [3] as well as a complainant.[4]

For the adjustment of controversies of grave general importance, affecting its national rights, the United States has frequently also had recourse to arbitration. By such process it has secured the adjustment of differences relating, for example, to rights of property and control, such as those concerning boundary disputes and fisheries, to rights of jurisdiction, to rights of political independence, to the duties of both neutrals and belligerents, and to the interpretation of treaties.

(*b*)

§ 563. **Territorial Differences.** The controversy respecting the boundary between the northeastern portion of the territory of the United States and the adjacent possessions of Great Britain was a legacy from the treaty of peace of 1782–1783.[1] As early as April 21, 1785, John Jay, as Secretary for Foreign Affairs, submitted to the Congress a report embracing an elaborate plan for the adjustment of the dispute by a joint commission composed of an equal number of commissioners to be appointed by the United States and by the King. A majority of the commissioners was to be empowered to render an "absolute, final and conclusive" judgment.[2] In 1790, this report was submitted by President Washington to the Senate.[3] No agreement was, however, made in pursuance of its suggestions. By Article V of the Jay Treaty of November 19, 1794, the question as to "what river was truly intended under the name of the river St. Croix," mentioned in the treaty of peace, and forming part of the boundary therein described, was referred to the final decision of three commissioners.[4] The arbitra-

§ 562. [1] See, for example, protocol of agreement with Haiti, Oct. 18, 1899, for the arbitration of the question of the liability and amount of damages to be awarded John D. Metzger and Company, Malloy's Treaties, I, 936.

[2] See, for example, claims convention with Mexico of July 4, 1868, Malloy's Treaties, I, 1128. This agreement provided for a typical mixed commission, composed of an appointee of each contracting party, and also an umpire. The two commissioners were to proceed conjointly to the investigation and decision of claims. In case of their disagreement, they were to call to their assistance the umpire, who after examination of the evidence, the hearing of arguments and consultation with the Commissioners was to render a decision. Concerning the work of the Commission, see Moore, Arbitrations, II, 1287–1358. See also protocol with Venezuela, Feb. 17, 1903, for the arbitration of American claims against that State, Malloy's Treaties, II, 1870.

[3] See Claims Convention with Mexico of July 4, 1868, Malloy's Treaties, I, 1128; General Claims conventions with Mexico of Sept. 8, 1923, U. S. Treaty Vol. IV, 4441.

See, also, special agreement with Sweden of Dec. 17, 1930, for the arbitration of claims growing out of the alleged detention of the motorships "Kronprins Gustaf Adolf" and "Pacific," U. S. Treaty Vol. IV, 4653.

[4] See Special Claims convention with Mexico of Sept. 10, 1923, U. S. Treaty Vol. IV, 4445.

§ 563. [1] Malloy's Treaties, I, 581 and 587.

[2] Am. State Pap., For. Rel., I, 94.

[3] *Id.*

[4] Malloy's Treaties, I, 593. It was therein provided that: "One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third; or if they cannot so agree, they shall each propose one person, and of the

tion was successful, the commission duly making its declaration October 25, 1798.[5] According to Article V of the Treaty of Ghent of December 24, 1814, the boundary extending from the source of the St. Croix River to the river Iroquois or Cataraquy, which remained in dispute, was to be referred to a joint commission of two.[6] The commission having disagreed, the controversy was referred to the decision of the King of the Netherlands, pursuant to a convention concluded September 29, 1827.[7] His award, rendered January 10, 1831, was not accepted by either Government, inasmuch as the royal arbitrator had given up the attempt to fix the boundary as described in the treaty of 1782–1783, substituting therefor his own recommendation as to the line of demarcation.[8] The controversy was finally adjusted by diplomacy, and the boundary established by virtue of Article I of the Webster-Ashburton Treaty of August 9, 1842.[9]

A dispute as to the ownership of certain islands in Passamaquoddy Bay, and of the Island of Grand Manan in the Bay of Fundy, was settled by means of a joint commission of two, pursuant to Article IV of the Treaty of Ghent.[10] A similar commission, by virtue of Article VI of the same treaty, was able to adjust the dispute respecting the water boundary extending from the intersection of the 45th degree of north latitude with the river Iroquois or Cataraquy, to Lake Superior, as well as the ownership of certain islands within the water communications between the points named.[11]

By Article VII of the Treaty of Ghent, it was agreed that the same commission should fix and determine the boundary extending from the water communication between Lake Huron and Lake Superior, to the most northwestern point of the Lake of the Woods, and should decide upon the ownership of islands lying in the lakes, water communications and rivers forming the boundary.[12] The commission failed to agree as to a portion of the line, and the boundary was ultimately fixed by Article II of the Webster-Ashburton Treaty of August 9, 1842.[13]

The difference respecting the boundary west of the Rocky Mountains and extending to the Pacific Coast was settled by direct negotiation, and the boundary fixed by the Buchanan-Pakenham Treaty of June 15, 1846.[14]

---

two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners."

[5] For the text of the declaration, see Moore, Adjudications, II, 373.

[6] Malloy's Treaties, I, 615.

[7] *Id.*, I, 646. Art. V of the Treaty of Ghent had provided for arbitration before a "friendly sovereign or State," in case the commissioners should be unable to agree.

[8] Moore, Dig., VII, 59–60, and documents there cited.

[9] Malloy's Treaties, I, 651. Concerning the Northeastern Boundary dispute generally, see Moore, Arbitrations, I, 65–161, and documents there cited.

[10] Malloy's Treaties, I, 614. For the decision of the Commission, *id.*, I, 619. See, also, Moore, Adjudications, VI, and documents there cited.

[11] Malloy's Treaties, I, 616. For the decision of the Commission, *id.*, I, 620. Also, Moore, Arbitrations, I, 162–170, and documents there cited.

[12] Malloy's Treaties, I, 617. The commissioners were also to designate the most northwestern point of the Lake of the Woods.

[13] Malloy's Treaties, I, 652. That Article "adopts the line of the commissioners under Article VII of the treaty of Ghent, so far as they agreed upon it." Moore, Arbitrations, I, 193. See, generally, Moore, Arbitrations, I, 171–195, and documents there cited. The boundary from the Lake of the Woods to the Rocky Mountains (described as the "Stony Mountains") was fixed by Art. II of the convention of Oct. 20, 1818, Malloy's Treaties, I, 632.

[14] Malloy's Treaties, I, 656. "In January 1845, no agreement seeming to be possible, Mr.

By Articles XXXIV to XLII of the Treaty of Washington of May 8, 1871, the contracting parties agreed to refer their dispute as to the San Juan water boundary to the German Emperor.[15] His award, October 21, 1872, served to give the island of San Juan to the United States.[16]

By a convention concluded January 24, 1903, the United States and Great Britain agreed to an adjudication before a joint tribunal comprising "six impartial jurists of repute" (three to be appointed by the President and three by the King), respecting the Alaskan boundary dispute, arising from divergent interpretations of the convention between Great Britain and Russia of February 28/16, 1825.[17] A decision was duly rendered by a majority of the tribunal.[18]

On April 11, 1908, the United States concluded with Great Britain an elaborate convention providing for the more complete definition and demarcation of the Canadian international boundary by a joint commission of two expert geographers or surveyors.[19] In view, however, of certain known differences respecting a portion of the boundary through Passamaquoddy Bay, agreement was made in Article I for the submission by each contracting party to the other, of a full printed statement of the evidence, with certified copies of original documents referred to therein, which were in its possession, and the arguments upon which it based its contentions, with a view to arriving at an adjustment in accordance with the true intent and meaning of the treaties of 1783 and 1814. Recourse to arbitration was to follow only in case direct negotiations should fail to accomplish their end. Such recourse was avoided by means of a treaty concluded May 21, 1910, whereby the contracting parties agreed to the definition of the line.[20]

According to Article II of the treaty of April 11, 1908, it was agreed that where the national character of any island in the St. Croix River was in dispute, the question of its nationality should be referred by the commissioners to their respective Governments, and that in all such cases the location of the boundary with respect to each island in dispute should be determined in accordance with certain specified rules and pursuant to a general plan. Recourse to arbitration was to follow if direct negotiations should fail to effect adjustment. Articles I and II indicated an earnest desire on the part of both Governments (emphasized also by the language of Article I of the treaty of May 21, 1910) to adjust the differences contemplated by direct negotiation rather than by arbitration, and that by means of the fullest reciprocal presentation of documentary and other evidence and arguments in support of opposing claims. The two Governments agreed, in brief, to place themselves in the position of a joint commission and to exercise the functions of one.[21]

---

Pakenham proposed to submit the dispute to arbitration. This proposition Mr. Calhoun declined, saying that it was the opinion of the President that it would be inadvisable to consider any other mode than negotiation, so long as there was a hope of arriving at a satisfactory settlement in that way." (Moore, Arbitrations, I, 209–210.)

[15] Malloy's Treaties, I, 714–716.

[16] *Id.*, 716. Also Moore, Arbitrations, I, 196–236, and documents there cited.

[17] Malloy's Treaties, I, 787.

[18] *Id.*, I, 792. The majority who rendered the decision were Baron Alverstone, the President, and Messrs. Root, Lodge and Turner. See, also, generally, *Proceedings of the Alaskan Boundary Tribunal*, 58 Cong., 2 Sess., Senate Doc. No. 162.

[19] Malloy's Treaties, I, 815.

[20] U. S. Treaty Vol. III, 2616.

[21] Declared Lord Salisbury, May 18, 1896, with respect to provisions of a proposed gen-

On February 24, 1925, there was concluded at Washington a treaty to define more accurately at certain points and to complete the international boundary between the United States and Canada and to maintain the demarcation of that boundary.[22] To that end, provision was made, among other things, for the defining and monumenting of a point to be taken and deemed to be the terminus of the international boundary from the mouth of Pigeon River at the western shore of Lake Superior to the northwesternmost point of Lake of the Woods, and the initial point of the international boundary from the northwesternmost point of Lake of the Woods to the summit of the Rocky Mountains; [23] also for the definition of the boundary between the northwesternmost point of Lake of the Woods to the summit of the Rocky Mountains (which was the parallel of 49° north latitude) as consisting of "a series of right or straight lines joining adjacent monuments;" [24] for the extension of the boundary in the Grand Manan Channel from the terminus defined by the treaty of May 21, 1910, for a distance of 2383 meters through the middle of Grand Manan Channel to the high seas; [25] and for the inspection, repairing and rebuilding of monuments and buoys, for the keeping of boundary vistas open, and the general maintenance at all times of an effective boundary line between the United States and the Dominion of Canada, and between Alaska and the Dominion of Canada as defined by the treaty, and treaties previously concluded or thereafter to be concluded.[26]

Territorial differences with Mexico have arisen chiefly from changes in the bed and channel of the Rio Grande and of the Rio Colorado where they form the international boundary.[27] Adjustment has been effected mainly by direct negotiation,[28] and through the medium of a Joint International Boundary Com-

---

eral arbitration treaty between the United States and Great Britain: "The enforcement of arbitration in respect to territorial rights is also an untried project in regard to the provisions of the international law by which they are to be ascertained. This is in a most rudimentary condition, and its unformed and uncertain character will aggravate the other dangers on which I have dwelt in a previous despatch — the danger arising from the doubts which may attach to the impartiality and the competence of the arbitrators. . . . It appears to me that under these circumstances it will be wiser, until our experience of international arbitration is greater, for nations to retain in their own hands some control over the ultimate result of any claim that may be advanced against their territorial rights." (Communication to Sir Julian Pauncefote, British Ambassador at Washington, For. Rel. 1896, 230, 231.) In response, Mr. Olney, Secy. of State, said in part, June 22, 1896, that "the condition of international law fails to furnish any imperative reasons for excluding boundary controversies from the scope of general treaties of arbitration. If that be true of civilized States generally, *a fortiori* must it be true of the two great English-speaking nations." (Communication to Sir Julian Pauncefote, British Ambassador, *id.*, 236.)

[22] U. S. Treaty Vol. IV, 3988. [23] Art. I.

[24] Art. II. See Various Territorial Limits or Boundaries, Artificial Lines, *supra*, § 135.

[25] Art. III.

[26] Art. IV. The parties were agreed generally to carry out the terms of the treaty through the Commissioners appointed under the provisions of the treaty of April 11, 1908.

[27] Difficulties arising from the destruction or displacement of monuments marking the boundary from the Pacific Ocean to the Rio Grande have been settled by agreement providing for the restoration to their proper places of existing monuments, and the erection of new ones, through the instrumentality of a joint international boundary commission composed of engineers and astronomers. See Boundary Convention of July 29, 1882, Malloy's Treaties, I, 1141, and agreements for the extension of the time for the completion of the work of the Commission, *id.*, 1163.

[28] See Boundary Convention of Nov. 12, 1884, Malloy's Treaties, I, 1159. See, also, Convention of Mar. 20, 1905, for the elimination of the Bancos in the Rio Grande from the effects of Art. II of the Convention of Nov. 12, 1884, *id.*, I, 1199

mission.[29] Pursuant to a convention of June 24, 1910, a controversy respecting "the international title" to the so-called "Chamizal tract" within the Rio Grande, and concerning which the International Boundary Commission had failed to agree, was submitted to arbitration before the Commission, specially enlarged by the addition of a Canadian jurist.[30] The award, from which the American Commissioner dissented, was made June 15, 1911.[31] For the reasons set forth by the American commissioner, and by the American agent in his suggestion of protest, the United States announced that it did not accept the award "as valid or binding." The Government accordingly suggested the negotiation of a new boundary convention upon a specified basis. Owing to disturbed conditions existing in Mexico definite action for the settlement of the Chamizal dispute was necessarily suspended, the case remaining in *status quo*.[32]

A convention for the rectification of the Rio Grande in the El Paso-Juarez Valley was concluded by the United States and Mexico, February 1, 1933 (accompanied by exchanges of notes on that date and on September 8, 1933).[33] According to Article I, the Parties agreed to carry out the Rio Grande rectification works provided for in Minute No. 129 of the International Boundary Commission and annexes thereto, approved by both Governments, within a specified part of the river.[34]

[29] See Boundary Convention of March 1, 1889, *id.*, I, 1167, and extensions thereof, *id.*, 1175, 1179, 1181, 1182, 1191, and 1192.

"The first meeting of the Commission took place on January 8, 1894, at El Paso, Texas, in the office of the Mexican Consul. The Commission has had a continued existence since that date, although interruptions were experienced at certain periods during the Mexican Revolution (1911–1923) due to the withholding of recognition from Mexico by the United States. The Commission's jurisdiction is extended to the land boundary for specific purposes, usually following an exchange of notes between the two Governments, agreeing on such procedure. In the winter of 1933–1934 the two sections of the Commission reset and repainted all the land boundary monuments between El Paso, Texas, and the Pacific Ocean. Various problems of an international nature and requiring an engineering solution have been submitted by the Goverments to the Commission for investigation and report." (G. Frederick Reinhardt, in *Am. J.*, XXXI [1937], 44, footnote 3, p. 45.)

See, also, Boundary Convention with the Republic of Texas, April 25, 1838, Malloy's Treaties, II, 1779.

[30] U. S. Treaty Vol. III, 2729. See, also, supplemental protocol for the arbitration of the case, Dec. 5, 1910, *id.*, 2732.

[31] For the text of the award, see For. Rel. 1911, 573; also *Am. J.*, V, 785; editorial comment, *id.*, 709.

[32] Memorandum of Dept. of State, to the Mexican Embassy, Aug. 24, 1911, For. Rel. 1911, 598; also Same to Same, Oct. 6, 1911, *id.*, 604.

Concerning subsequent negotiations see Mr. Knox, Secy. of State, to the American Ambassador to Mexico, Jan. 14, 1913, For. Rel. 1913, 969; also *id.*, 957–977.

[33] U. S. Treaty Vol. IV, 4462.

[34] See G. Frederick Reinhardt (of the International Boundary Commission), "Rectification of the Rio Grande in the El Paso-Juarez Valley," *Am. J.*, XXXI, 44, who declares: "The rectification feature of the project will provide a straightened river and flood water channel for a distance of 88 miles through the El Paso-Juarez Valley, the old river distance over this terrain being 155 miles as a result of the meanders of the river. This rectified channel will be formed by the construction of parallel levees, generally 590 feet apart, and where possible in reasonably straight stretches the existing river will form the low water channel. . . . The Commission is charged with surveying the right of way to be occupied by the rectified channel as well as the areas to be segregated from either country in the process of straightening the river. . . . The commencement of work on the Rio Grande Rectification Project represented the undertaking of a plan which had been dismissed by many as far too complex ever to be realized. It is believed that for the first time in history, two sovereign States have entered into coöperative action to change peacefully their common boundary through an extensive area for the benefit of their citizens dwelling along that frontier." (*Id.*, 50 and 54.)

In pursuance of an agreement of January 23, 1925, there was submitted to the Permanent Court of Arbitration at The Hague, the tribunal consisting of one arbitrator in the person of Judge Max Huber, the question whether the Island of Palmas (or Miangas) in its entirety formed a part of territory belonging to the United States of America or of Netherlands territory.[35] In his award of April 4, 1928, the Arbitrator decided that the island formed in its entirety a part of Netherlands territory.[36]

(*c*)

**§ 564. Certain Differences, Other than Territorial, of Great International Significance.** The controversy growing out of the acts of the *Alabama* and certain other Confederate vessels, during the Civil War, and giving rise to the so-called "Alabama Claims," raised the issue whether the failure of Great Britain to prevent the fitting out in, and the departure from, British ports of those vessels, and their use of such ports as bases of operations, rendered that State responsible to the United States for depredations committed on American commerce. The question was, briefly and generally, whether Great Britain had failed to perform its duties as a neutral.[1] Earl Russell, British Foreign Secretary, declined, in 1865, to accede to the proposal of the United States for the adjustment of the controversy by recourse to arbitration, on the ground that the questions involved could not "be put to a foreign government with any regard to the dignity and character of the British Crown and the British nation." "Her Majesty's Government are," he declared, "the sole guardians of their own honor." [2] In 1871, when a joint high commission assembled at Washington, to negotiate a treaty providing for the adjustment of the Alabama claims and other pending differences, Great Britain was unwilling to admit that its conduct had disregarded international law, and dissented from what the United States asserted the existing law to be.[3] Nevertheless, Her Majesty's Government were willing to agree, by the Treaty of Washington of May 8, 1871,[4] first, to an expression of regret for the escape of the *Alabama* and other vessels from British ports, and for the depredations committed by them; secondly, to the reference of the controversy to a tribunal composed of five arbitrators; and thirdly, that the arbitrators should be governed by three definite rules respecting the duties of neutral States, and by principles of international law not inconsistent therewith. It was expressly declared that while Her Majesty's Government could not

[35] U. S. Treaty Vol. IV, 4512.

[36] The text of the award is contained in *Am. J.*, XXII, 867. See P. C. Jessup, "The Palmas Island Arbitration," *id.*, 735.

§ 564. [1] Moore, Arbitrations, I, 495–682; also Papers Relating to the Treaty of Washington, Vols. I–IV, Washington, Government Printing Office, 1872.

[2] Dip. Cor. 1865, I, 545, Moore, Arbitrations, I, 496. According to Earl Russell, the two questions by which the claim of the United States to compensation could be tested were these: "Have the British Government acted with due diligence, or, in other words, in good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is: Have the law officers of the Crown properly understood the foreign enlistment act, when they declined, in June, 1862, to advise the detention and seizure of the *Alabama*, and on other occasions when they were asked to detain other ships, building or fitting in British ports?"

[3] Moore, Arbitrations, I, 543.

[4] Arts. I–XI, Malloy's Treaties, I, 701–705.

agree that the rules were declaratory of international law, the arbitrators might assume that that Government had undertaken to act upon the principles therein set forth.[5] The tribunal on September 14, 1872, awarded to the United States the sum of $15,500,000, which was duly paid.[6] In view of the nature of the question involved, the sensitiveness of the British Government to foreign criticism of its conduct, and the conflict of opinion as to the exact requirements of international law, the case still serves to illustrate the efficacy of arbitration as a means of adjusting international differences of first moment.[7]

The controversy with Great Britain respecting the right asserted by the United States to exercise jurisdiction in Bering Sea, and also to protect and claim property in fur-seals frequenting the islands of the United States in that sea, when such seals were found outside of the ordinary three-mile limit, was submitted to arbitration by the convention of Feb. 29, 1892.[8] The tribunal comprising five members, three of which were neutral, duly made an award, August 15, 1893, unfavorable to the claims of the United States.[9] The arbitrators, in accordance with the treaty, determined also what regulations were deemed necessary for the proper protection and preservation of seal life in waters "outside the jurisdictional limits of the respective Governments," and over what waters they should extend.[10]

(i)

§ 565. **The Same.** In certain instances, for the solution of questions of great international concern, the United States has, by virtue of special agreements, been able to invoke the aid of tribunals organized pursuant to the Hague Conventions of 1899 or of 1907, for the Pacific Settlement of International Disputes. In the first of these, known as the Pious Fund Case, against Mexico, and decided in 1902, the chief and preliminary issue was whether the claim of the United States for indemnity in behalf of the Roman Catholic Archbishop of San Francisco, and the Bishop of Monterey, was governed by the principle of *res judicata,* by virtue of the arbitral sentence of Sir Edward Thornton of November 11, 1875, and amended by him October 24, 1876, in a case between the same parties, and respecting the same subject matter. The contention of the United

[5] Art. VI.

[6] For the text of the award, see Moore, Arbitrations, I, 653.

[7] The employment of a joint high commission of eight members under the leadership, on the American side, of Mr. Fish, Secy. of State, and on the British, of Earl de Grey and Ripon, greatly facilitated the task of concluding the treaty of Washington, and may have been indispensable to bring about the arbitration of the Alabama Claims.

[8] Malloy's Treaties, I, 746.

[9] Malloy's Treaties, I, 751.

[10] See, generally, The Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration,* Washington: Government Printing Office, 1895. Also convention for the settlement of claims presented by Great Britain against the United States in virtue of the convention of Feb. 29, 1892, Malloy's Treaties, I, 766; Convention concluded by the United States, Great Britain, Russia and Japan, for the preservation and protection of fur seals (superseding the treaty of Feb. 7, 1911), July 7, 1911, U. S. Treaty Vol. III, 2966.

See Geneva Convention for the Regulation of Whaling, of Sept. 24, 1931, U. S. Treaty Vol. IV, 5372.

See The Exploitation of Riches of the Sea, *supra,* 227A; The Alaska Salmon Fisheries, *supra,* 227D.

States that the claim should be so governed was sustained by a unanimous court.[1]

By virtue of a series of protocols of May 7, 1903, there was submitted to the Permanent Court of Arbitration at The Hague the question whether or not Germany, Great Britain and Italy were entitled to payment of their respective claims against Venezuela out of thirty per cent of the customs revenues of that State agreed to be set aside for that purpose, in preference to the United States, France, Spain, Belgium, the Netherlands, Sweden and Norway, and Mexico.[2] The claim of preference was based upon the action of Germany, Great Britain and Italy in blockading certain Venezuelan ports. The court decided that by such conduct those powers acquired the right to preferential treatment.[3]

In the Orinoco Steamship Company Case there was referred to the Permanent Court of Arbitration at The Hague, by virtue of an agreement with Venezuela, of February 13, 1909,[4] a preliminary question of great significance, "as to whether the former decision of Dr. Barge, umpire of the United States and Venezuelan Commission of 1903, was invalid as claimed by the United States, and liable to be set aside on the grounds that the umpire had disregarded the terms of the submission, and committed essential error. The tribunal declared the Barge award void on a number of points, but held the award severable, and on some points not open to the objections advanced by the United States." [5]

The North Atlantic Coast Fisheries Arbitration submitted to the tribunal at the Hague, pursuant to a special agreement with Great Britain of January 27, 1909, was the means of adjusting a controversy of grave magnitude and long duration.[6] The several questions involved arose from divergent interpretations of the provisions of Article I of the treaty of October 20, 1818. These concerned first the issue "to what extent, if at all, the British or Colonial Governments were entitled, without the consent of the United States, to limit or restrain the time, methods, or implements of fishing by American fishermen exercising their treaty liberties in British territorial waters." [7] They called for a decision also

§ 565. [1] See Protocol of agreement, May 22, 1902, Malloy's Treaties, I, 1194; award of the Court, Oct. 14, 1902, *Am. J.*, II, 898. See, also, concerning the case, Rule of *Res judicata, infra*, § 581; For. Rel. 1902, Appendix II.

[2] Malloy's Treaties, II, 1872–1878; *Am. J.*, II, 905.

[3] For the text of the award, of Feb. 22, 1904, see Malloy's Treaties, II, 1878, *Am. J.*, II, 907. See, also, Report of William L. Penfield, Agent of the United States, For. Rel. 1904, 509.

[4] Malloy's Treaties, II, 1881.

[5] W. C. Dennis, Agent for the United States, in *Am. J.*, V, 36. For the text of the award of Oct. 25, 1910, see For. Rel. 1911, 749; also *Am. J.*, V, 230.

See Award Outside of Limits of Submission, *infra*, § 582.

[6] Malloy's Treaties, I, 835. According to Mr. Chandler P. Anderson, Agent of the United States, "This arbitration was in some respects the most notable of the many international arbitrations in which the United States has participated. The fisheries dispute, the settlement of which was its purpose, had been a constant source of irritation and friction between the United States and Great Britain for nearly a century, and on several occasions had seriously strained the friendly relations between the two countries. Throughout the course of this dispute both countries exhausted every resource of diplomacy, short of arbitration, in attempting to bring about a satisfactory adjustment of the questions at issue, but without success. It was, therefore, a surprising and encouraging triumph for the cause of arbitration in the settlement of international disputes, that, when at last arbitration was resorted to in this case, a result was secured which has been accepted on both sides as an eminently fair and satisfactory settlement of the controversy." (*Am. J.*, VII, 1–2.)

[7] Statement of Mr. Anderson, *id.*, 8.

respecting the right of the latter to employ as members of fishing crews persons not inhabitants of the United States; concerning also the British right to subject the exercise by the inhabitants of the United States of "the liberties" yielded by the treaty, without the consent of the United States, "to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction"; concerning the question whether the enjoyment by American fishermen of the treaty privilege of admission to certain bays or harbours "for shelter, repairs, wood, or water, and for no other purpose whatever," could be conditioned upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions; concerning the territorial extent of the area wherein the fishery privileges had been yielded; concerning the meaning of the term "bays" as employed in the treaty, and finally touching the right of American fishermen to enjoy commercial privileges on the treaty coasts.[8] That such questions were not only deemed to be susceptible of solution by arbitration, but were also solved by recourse to that instrumentality, served to renew confidence in the value of adjudications before international courts of law, such as might be expected to assemble at The Hague.[9]

In pursuance of an agreement concluded June 30, 1921, between the United States and Norway, there was submitted to an arbitral tribunal constituted in accordance with Article 87 (Chapter IV) and Article 59 (Chapter III) of the Hague Convention of October 18, 1907, for the Pacific Settlement of International Disputes, the claims of certain Norwegian subjects against the United States, arising, according to contentions of the Government of Norway, out of certain requisitions by the United States Shipping Board Emergency Fleet Corporation.[10] It was agreed that the tribunal should examine and decide the claims "in accordance with the principles of law and equity" and determine what sum if any should be paid in settlement of each claim.[11] On October 13, 1922, the Tribunal made its award in favor of the several claimants.[12] The payment thereof,

[8] Concerning the case generally, see *Proceedings,* North Atlantic Coast Fisheries Arbitration, 12 vols., 61 Cong., 3 Sess., Senate Doc. No. 870; Argument of Hon. Elihu Root, on behalf of the United States, edited with introduction and appendix by James Brown Scott, of counsel for the United States, 1912; also "The North Atlantic Coast Fisheries Arbitration," by Robert Lansing, of counsel for the United States, *Am. J.,* V, 1; "*La question des pêcheries de l'Atlantique,*" by Thomas Willing Balch, *Rev. Droit Int., 2 sér.,* XI, 415.

See, also, Bays, The North Atlantic Coast Fisheries Arbitration, *supra,* § 147; The Interpretation of Treaties, The North Atlantic Coast Fisheries Arbitration, *supra,* § 533.

[9] In commenting upon the case, the Agent of the United States said: "It is quite probable that if before this arbitration both parties had been in full possession of all the facts as they have been developed and presented upon this arbitration, an agreement could have been reached without recourse to arbitration. The importance of reaching a common basis of fact in the discussion of international disputes, before submitting such disputes to arbitration, is not always appreciated, and resort might be had more frequently with advantage to the hitherto somewhat neglected expedient of employing an impartial commission of inquiry for the purpose of securing an agreed statement of facts as a basis for reaching, if possible, an adjustment by direct negotiation between the parties, rather than by arbitration." (Chandler P. Anderson, in *Am. J.,* VII, 16.)

[10] U. S. Treaty Vol. III, 2749.

[11] Art. I.

[12] For the text of the award, see J. B. Scott, Hague Court Reports (Second Series), 1932, 32.

on February 26, 1923, with interest at the rate of six per centum per annum from the date of the rendition to the date of payment, amounting to $12,239,-852.47,[13] was accompanied by a communication from the Secretary of State to the Norwegian Minister at Washington, in which complaint was made of the terms of the decision.[14]

The complaint of the Government of the United States that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, had caused damage in the State of Washington, served to produce a reference of the matter to the International Joint Commission (pursuant to the terms of Article IX of the convention of January 11, 1909, between the United States and Great Britain). In a report of February 28, 1931, that body made a finding in respect to the extent to which property in the State of Washington had been damaged, concluding that the amount of indemnity that would compensate the American interests in that State for damages up to and including January 1, 1932, was $350,000. "The Commission recommended, *inter alia,* that the smelting company proceed as expeditiously as might be reasonably possible with works already erected for the purpose of reducing fumes from the smelter and also erect such further works as might be necessary until the fumes drifting into the United States were reduced to a point where no damage would be done therein. The United States was unwilling to accept the Commission's report." [15] Through a convention concluded on April 15, 1935, the United States and Canada agreed to arbitrate certain specified questions; [16]

[13] The sum mentioned did not include the sum of $22,800 retained by the United States under the terms of the award for payment to Page Brothers, American citizens. See Art. I of agreement of June 30, 1921, in relation to the matter.

See also Mr. Hughes, Secy. of State, to the President, Jan. 11, 1923, *id.,* 617.

[14] For. Rel. 1923, Vol. II, 626.

See Neutral Persons and Property within Belligerent Territory, The Requisition of Property, *infra,* § 632.

Concerning recourse by the United States to arbitration for the adjustment of claims, under agreements contemplating the settlement, reciprocally or otherwise, of groups of cases, see, The Scope of Claims Conventions to Which the United States Has Been a Party, *supra,* § 306; also, Substitutes for International Adjudication, *supra,* § 309A.

Among recent cases of lesser importance in which the United States has had recourse to arbitration there may be noted the claim on behalf of P. W. Shufeldt against the Republic of Guatemala under an exchange of notes of Nov. 2, 1929, and productive of a decision by the arbitrator, July 24, 1930, awarding the sum of $225,468.38 for the benefit of the claimant, which with interest amounting to $40,935.21, was paid by the respondent State, June 11, 1931 (Dept. of State, Arbitration Series, No. 3, Washington, 1932); the claim on behalf of George J. Salem against the Royal Government of Egypt under protocol of Jan. 20, 1931, based upon the treatment experienced by the claimant from the Egyptian local and mixed authorities, regarded by the United States as a denial of his rights, and upon the alleged violation of treaty rights of the United States, and resulting in an award favorable to the respondent, June 8, 1932, from which the American member of the tribunal, Hon. Fred K. Nielsen, dissented (Salem Claim, Dept. of State, Arbitration Series, No. 4 [6], Washington, 1933); the claims of Sweden on behalf of a Swedish corporation for losses said to have been incurred from the alleged detention in ports of the United States, in contravention of its treaty obligations toward Sweden, of the motorships *Kronprins Gustaf Adolf* and *Pacific,* and resulting in an award, July 18, 1932, by Professor Eugène Borel as sole Arbitrator, as a member of the Permanent Court of Arbitration at The Hague, that was favorable to the respondent (Dept. of State, Arbitration Series, No. 5 [6], Washington, 1932). See Anna A. O'Neill, "United States-Sweden Arbitration," *Am. J.,* XXVI, 720.

[15] Hackworth, Dig., II, 344.

[16] U. S. Treaty Vol. IV, 4009.

The questions for decision as set forth in Art. III, were as follows: "(1) Whether damage

and through the same instrument they agreed, moreover, to the payment to the Government of the United States of $350,000 to cover all damage which had occurred in the United States, prior to January 1, 1932, as a result of the operation of the Trail Smelter.[17] "On April 16, 1938, the arbitral tribunal established under the convention of 1935 rendered an interim decision in which it reported its final decision on question 1, awarding to the United States as damages up to October 1, 1937, an indemnity of $78,000 with interest at the rate of 6 per cent from the date of the filing of the report and decision until the date of payment. The question of the existence of damage occurring after October 1, 1937, and the indemnity to be paid therefor was left for later determination by the tribunal in its final decision. The tribunal rendered a temporary decision on questions 2 and 3 and provided for a temporary régime thereunder and for a final decision on these questions and on question 4 within three months from October 1, 1940. With respect to question 2 the tribunal decided that until the date of the final decision the Trail Smelter should refrain from causing damage in Washington to the extent set forth under the temporary régime until October 1, 1940, and thereafter to such extent as the tribunal should require in the final decision." [18] The tribunal found it "unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention." Adverting to the fact that the Government of the United States in its "Statement (page 59)" itemized under the claim of "violation of sovereignty" only money expended "for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail," the tribunal announced its opinion that it was not the design of the parties, as expressed in the words of Article 3 of the convention, "to include such moneys expended." [19] The tribunal added that "neither as a separable item of damage nor as an incident to other damages should any award be made for that which the United States terms 'violation of sovereignty.' " [20]

In its final decision reported on March 11, 1941, the tribunal declined to reconsider its decision of 1938, with respect to expenditures incurred by the United States during the period from January 1, 1932, to October 1, 1937, de-

caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

"(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and, if so, to what extent?

"(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

"(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?" (*Id.*, 4010–4011.)

[17] See statement in Hackworth, Dig., II, 344.

[18] Statement in Hackworth, Dig., II, 345.

For the text of the decision see *Am. J.*, XXXIII, 182.

[19] *Id.*, 207, where the tribunal added: "This interpretation is confirmed by a consideration of the proceedings and of the diplomatic correspondence leading up to the making of the Convention."

[20] *Id.*, 208.

claring that while it did not deny its power to grant a revision, no sufficient legal grounds for such action were apparent, and that, moreover, even if the tribunal had the power to reopen the case as to the expenditures during the period mentioned, it would have reached the same conclusion, and would have felt obliged to affirm its earlier decision of April 16, 1938.[21]

The tribunal proceeded to enunciate the law as to the responsibility of a State for the operation of a plant causing the pollution of the air within foreign neighboring territory; [22] and it concluded that the Dominion of Canada was responsible in international law for the conduct of the Trail Smelter and that it was its duty to see to it that that conduct should be in conformity with its obligations under international law, and that the Trail Smelter should be required to refrain from causing any damage through fumes in the State of Washington. Moreover, the tribunal (in pursuance of provisions of the Convention of April 15, 1935) decided that a régime or measure of control should be applied to the operations of the Smelter, and should remain in full force unless and until modified in accordance with certain provisions of the decision.

(*d*)

§ 566. **The United States as a Party to Treaties for Obligatory Arbitration.** The United States has thus far frequently been reluctant to enter into treaties rendering obligatory recourse to arbitration for the adjustment of future differences, save under conditions restricting the contractual undertaking to one of relatively narrow scope.[1] The United States did, however, in 1905, accept the convention concluded by the Second International American Conference, January 30, 1902,[2] and again, in 1911, that concluded by the Fourth International

[21] The tribunal, moreover, denied the request of the United States to be indemnified in a particular sum with interest for certain amounts expended by it in the investigation, preparation and proof of its case after the convention providing for the arbitration had entered into force, and during the period from July 1, 1936, to Sept. 1, 1940.

[22] See *supra*, § 217C.

§ 566. [1] On Jan. 11, 1897, Mr. Olney, Secy. of State, and Sir Julian Pauncefote, British Ambassador at Washington, signed a remarkable treaty which failed, however, to receive the requisite approval of the Senate. For the adjustment of territorial claims, or questions of grave general importance affecting the national rights of either party, as distinquished from the private rights of which it was merely the international representative, provision was made for submission to a joint tribunal of six members, composed of an equal number of judges from specified tribunals of each country, whose award if concurred in by five members was to be final; or if rendered by a smaller majority was also to be final, unless protested against within three months. In case of protest no hostile measures were to be undertaken until the mediation of one or more friendly powers was sought. For pecuniary claims or groups thereof not exceeding altogether £100,000, and not involving the determination of territorial claims, arbitration was contemplated before a tribunal to consist of three members, the mode of whose choice was specified. All pecuniary claims or groups thereof exceeding £100,000 in amount, and all other differences other than territorial claims, were to be similarly arbitrated. If the award was not unanimous, however, either party was to have the right within six months from the date of the award, to demand a review. In such case the matter in controversy was to be submitted to a new arbitral tribunal consisting of "five jurists of repute" to be chosen according to a designated plan. For the text of the treaty see For. Rel. 1896, 238; also correspondence prior to its signature, *id.*, 222–237.

[2] Malloy's Treaties, II, 2062. With respect to the Second International American Conference, see Senate Doc. No. 330, 57 Cong., 1 Sess.

See, also, Moore, Dig., VII, 70–74, and documents there cited, with reference to the failure of the broad and important arbitration treaty proposed by the First International American Conference of 1889–1890, and with respect also to previous efforts to promote international

American Conference, August 11, 1910, providing for the arbitration of all private claims for pecuniary loss or damage, if found incapable of adjustment by diplomacy, and when of sufficient importance to warrant the expense of arbitration.[3] In 1909 the United States became a party to the Hague Convention of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, an agreement which made the tender of arbitration by a State seeking payment in behalf of its nationals, and the refusal thereof by a debtor State, a condition precedent to the use of armed force by the former.[4]

(i)

§ 567. **The Same.** In 1908 and 1909, the United States became a party to the first of a series of conventions concluded with numerous important countries, and contemplating the reference of differences of a "legal nature," or relating to the interpretation of treaties, and which it should not be possible to settle by diplomacy, to the Permanent Court of Arbitration established by the Hague Convention of 1899, provided, nevertheless, that they did "not affect the vital interests, the independence, or the honor of the two Contracting States," and did "not concern the interests of third Parties."[1] It was also declared that in each case, before appealing to the Court, "a special agreement defining clearly

---

arbitration on the American continents. Also International American Conference, Reports of Committees and Discussions thereon, 4 vols., Washington, Government Printing Office: 1890; Resolution on Arbitration of the Third International American Conference, Aug. 7, 1906, Report of Delegates of the United States, 97 (59 Cong., 2 Sess., Senate Doc. No. 365), *Am. J.*, I, Supp., 307.

[3] U. S. Treaty Vol. III, 2922. See, generally, Fourth International Conference of American States, Senate Doc. No. 744, 61 Cong., 3 Sess., especially Report of the Delegates of the United States, pp. 21–25.

[4] Malloy's Treaties, II, 2248; also *supra*, § 309.

The United States has rarely inserted the arbitral clause in treaties of amity and commerce. It is seen, however, in Art. XII of the treaty with Tripoli of Nov. 4, 1796, Malloy's Treaties, II, 1787, and in loose form in Art. XXI of the Treaty of Guadalupe Hidalgo, of Feb. 2, 1848, *id.*, I, 1117, and renewed in Art. VII of the Gadsden Treaty of Dec. 30, 1853, *id.*, I, 1124.

See, in general, Miss Helen May Cory's illuminating study on Compulsory Arbitration of International Disputes, New York, 1932.

§ 567. [1] See, for example, convention with France of Feb. 10, 1908, Malloy's Treaties, I, 549.

By the convention concluded at the Central American Peace Conference at Washington, Dec. 20, 1907, by representatives of Costa Rica, Guatemala, Honduras, Nicaragua and Salvador, and in the presence of representatives of the United States and Mexico, for the establishment of a Central American Court of Justice (Malloy's Treaties, II, 2399), the contracting parties bound themselves to submit to the tribunal of their own creation "all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be," if found incapable of adjustment by diplomacy. The Court was also given cognizance of claims of an international character of the nationals of one Central American State against any of the other contracting governments and that without the interposition of the claimant's government. The treaty thus contemplated in international cases the invocation of the aid of the Court by an aggrieved Central American State or individual by filing a complaint therein, without any preliminary agreement such as a *compromis*. It was agreed also that the Court should have jurisdiction over cases arising between any of the contracting governments and individuals, if by common consent they were submitted to it, and likewise, in case of special agreement, over international questions between Central American and foreign governments. See J. B. Scott, "The Central American Peace Conference of 1907," *Am. J.*, I, 121, 140–143.

See, also, Convention for the Establishment of an International Central American Tribunal, Conference on Central American Affairs, Washington, Dec. 4, 1922–Feb. 7, 1923, U. S. Government Printing Office, 1923, p. 296.

the matter in dispute, the scope of the powers of the arbitrators and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure," should be concluded and submitted, in behalf of the United States, to the approval of the Senate.

The limitations of these treaties deserve attention. The term "vital interests," however current in diplomacy, has no special signification in law. Doubtless its use in arbitration conventions is for the purpose of excluding generally from their operation controversies involving matters of grave national concern.[2] Those of seemingly political aspect, regardless of whether they are really susceptible to adjustment by arbitration by reason of their inherent character, are likely to be regarded as of such a kind.[3] In the absence of evidence of design to attach to the phrase a special or narrow signification, its presence in a convention affords a contracting party convenient opportunity to refuse to arbitrate whatever important differences it is indisposed to adjust by such process. The terms "independence" and "honor" are employed for the same purpose and fulfill a like function. In view of their position and association in the texts of conventions to which the United States is a party, they appear to bear a tautological rather than a supplementary relation to "vital interests."[4]

It may be doubted whether the conclusion of conventions such as those to which the United States became a party in 1908 and 1909, serves a highly useful purpose. As a deterrent of war they are of little value. They impose no legal obligation to employ arbitration for the adjustment of differences of grave aspect.[5] The nature and extent of the reservations excuse recourse to arbitration in a vast field where it may be unwelcome.[6] Nevertheless, the

[2] J. B. Moore, American Diplomacy, 221–222, quoted in J. B. Scott, The Hague Peace Conferences, I, 248; also Lauterpacht's 5 ed. of Oppenheim, II, § 17; Westlake, 2 ed., I, 356–361; Dr. Hans Wehberg, "Restrictive Clauses in International Arbitration Treaties," *Am. J.*, VII, 301; Amaro Cavalcanti, "Restrictive Clauses in International Arbitration Treaties," *id.*, VIII, 723.

[3] At the close of 1903, the Colombian Government presented to the Department of State a statement of grievances based upon the conduct of the United States in relation to Panama, contending that they constituted a violation of the treaty with New Granada of 1846, and requesting that the questions at issue be submitted to arbitration before the Permanent Court at the Hague. The differences related to the propriety of the intervention of the United States. The acts of intervention forming the basis of complaint consisted of the prevention by the United States of the landing of Colombian armed forces on the Isthmus, the prevention of the bombardment of the town of Panama and the recognition of the State of Panama as a new nation. In response, Mr. Hay, Secy. of State, declared on Jan. 5, 1904, that the grievances of Colombia were of a "political nature, such as nations of even the most advanced ideas as to international arbitration have not proposed to deal with by that process. Questions of foreign policy and of the recognition or non-recognition of foreign States are of a purely political nature, and do not fall within the domain of judicial decision; and upon these questions this Government has in the present paper defined its position." (For. Rel. 1903, 294, 306.)

[4] See Arbitrable Differences, *supra*, § 560.

[5] J. B. Moore, "International Arbitration — A Survey of the Present Situation," *Proceedings*, Twentieth Lake Mohonk Arbitration Conference (1914), 12, 17; also same author, International Law and Some Current Illusions, New York, 1924, 86.

[6] It must be acknowledged, however, that the special agreement of Jan. 27, 1909, submitting to arbitration the controversy with Great Britain concerning the North Atlantic Coast Fisheries, is described (in the caption) as being "under the general treaty of arbitration concluded between the United States and Great Britain on the 4th day of April, 1908." It is understood that the existence of that treaty facilitated the conclusion of the later agreement. Doubtless the reference in the special agreement of 1909 to the general treaty was

United States did not hesitate for some years to agree to extend the duration of such conventions upon the expiry thereof, for the reason that a declination to do so might be construed as a token of disinclination to have recourse generally to arbitration in situations where it was peculiarly applicable for the adjustment of an international controversy.[7] It was not until well after the conclusion of World War I that any treaties perfected in behalf of the United States revealed a step forward.[8]

(ii)

§ 567A. **The Same.** A treaty concluded with France, on February 6, 1928,[1] was the first of a new series of arrangements for obligatory arbitration which

---

helpful to the cause of arbitration as an indication of the readiness of the States at variance to refer to an arbitral tribunal a grave controversy of long standing. It is believed, however, that the nature of the issue was such as to have justified either party in refusing to agree to arbitrate, on the ground that the questions involved concerned directly its vital interests.

[7] See, for example, agreement between the United States and Great Britain, of June 23, 1923, further extending the duration of the arbitration convention of April 4, 1908, U. S. Treaty Vol. IV, 4223.

[8] By the proposed arbitration conventions with France and with Great Britain, of Aug. 3, 1911 (Charles' Treaties, 380 and 385), provision was made for the arbitration before the Permanent Court of Arbitration at the Hague, of all differences "relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." The special agreement providing for the terms of each case was to be submitted (in behalf of the United States) to the approval of the Senate.

Elaborate arrangement was made for the employment also of a joint high commission of inquiry of six persons. To the commission was to be referred for investigation any controversy made arbitrable by the terms of the treaty, prior to its submission to arbitration, as well as any other controversy, even if there were disagreement as to its arbitrable character. It was provided that such a reference might be postponed until the expiration of one year after the date of a formal request therefor, in order to give an opportunity for adjustment by direct negotiation. The Commission was to be authorized "to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate." Such reports, either on the facts or law, were not to be regarded as decisions, or to have the character of an arbitral award.

The Commission was to exercise another function of great significance. In case of disagreement as to whether a difference was subject to arbitration within the meaning of the treaty, the question was to be referred to that body, whose affirmative decision by a vote of at least five to one would render compulsory the arbitration of the controversy. By way of amendment the Senate struck out this provision, and also declared that it advised and consented to ratification with the understanding that "the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe doctrine, or other purely governmental policy." (*Id.*, 384.) The conventions as amended were not ratified by the President.

See Report of Senate Committee on Foreign Relations, respecting the treaties, together with the views of the minority, and the proposed committee amendments, Senate Doc. No. 98, 62 Cong., 1 Sess. See, also, William C. Dennis, "The Pending Arbitration Treaty with Great Britain," *Univ. Penn. L. Rev.*, LX, 1; C. C. Hyde, "The General Arbitration Treaties," *North Am. Rev.*, XCVII, 1 (Jan. 1912).

§ 567A. [1] U. S. Treaty Vol. IV, 4180.

Among the more recent treaties, see that with China, of June 27, 1930, U. S. Treaty Vol. IV, 4021.

extended the scope of differences to be adjusted by such process. It was provided that all differences relating to international matters in which the parties were concerned "by virtue of a claim of right made by one against the other under treaty or otherwise," which it had not been possible to adjust by diplomacy, and which had not been adjusted as a result of reference to the Permanent International Commission (of Inquiry, for which provision had been made in a previous article), and which were "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity" should be submitted to the Permanent Court of Arbitration at The Hague, or to some other competent tribunal, as should be decided in each case by special agreement, which special agreement should provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference.[2] There were reserved, however, from the operation of the treaty differences the subject matter of which

(*a*) is within the domestic jurisdiction of either of the High Contracting Parties;

(*b*) involves the interests of third Parties;

(*c*) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine;

(*d*) depends upon or involves the observance of the obligations of France in accordance with the Covenant of the League of Nations.[3]

It was agreed, moreover, that the special agreement in each case should be made on the part of the United States of America, by the President thereof by and with the advice and consent of the Senate, and on the part of France, in accordance with the constitutional laws of France.[4]

In 1935, the United States became a party to the Inter-American Arbitration Treaty signed at Washington, January 5, 1929.[5] It was provided that all differences of an international character which had arisen or might arise between the parties "by virtue of a claim of right made by one against the other under treaty or otherwise" which it had not been possible to adjust by diplomacy and which were "juridical in their nature by reason of being susceptible of decision by the application of the principles of law" should be submitted to arbitration.[6] It was declared that there should be considered among the questions of a juridical character:

(*a*) The interpretation of a treaty;

(*b*) Any question of international law;

[2] Art. II.

See, in this connection, P. C. Jessup, "The United States and Treaties for the Avoidance of War," *International Conciliation*, April, 1928, No. 239; J. W. Garner, "The New Arbitration Treaties of the United States," *Am. J.*, XXIII, 595; H. M. Cory, Compulsory Arbitration of International Disputes, 153; Lauterpacht's 6 ed. of Oppenheim, II, 30–31.

[3] Art. III.

[4] Art. II. According to Art. IV, the treaty was to take effect on the date of the exchange of ratifications and to remain in force continuously unless and until terminated by one year's written notice given by either party to the other.

[5] U. S. Treaty. Vol. IV, 4756.

[6] Art. I.

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature and extent of the reparation to be made for the breach of an international obligation.[7]

There were excepted from the stipulations of the treaty controversies which were "within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law," and also those which affected the interest or referred to the action of a State not a party to the treaty.[8] It was agreed that the parties to a dispute should formulate by common accord, in each case, a special agreement which should clearly define the particular subject-matter of the controversy, the seat of the court, the rules which would be observed in the proceedings, and the other conditions to which the parties might agree. It was also agreed that if an accord had not been reached with regard to such agreement within three months reckoned from the date of the installation of the court, the agreement should be formulated by the court.[9] It should be observed that the treaty was ratified on the part of the United States, with the understanding, made a part of such ratification, "that the special agreement in each case shall be made only by the President, and then only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur." [10]

The continued unwillingness of the United States to accept arrangements for obligatory arbitration that do not contemplate the conclusion of a special agreement preliminary to a prospective adjudication which shall have such approval on the part of the Senate as is requisite in the case of any treaty concluded in behalf of the Republic, is of course in contrast to the provisions of numerous treaties through which European contracting parties have not conditioned the obligation to arbitrate upon the success of further treaty-making.[11] Nevertheless, there is a contractual obligation imposed in the treaties to which the United States is a party that demands reasonable effort to comply with the terms agreed upon through the instrumentality of an appropriate *compromis*. Thus, when conditions demanding arbitration arise and are properly invoked, the State which seeks to evade an adjudication by declining to acquiesce in the terms of a reasonable *compromis* is seemingly guilty of a breach of contract. In the case of the United States, the circumstance that the Senate together with the President

[7] *Id.* [8] Art. 2.

[9] Art. 4.

According to Art. 3, the arbitrator or tribunal which should decide the controversy was to be designated by agreement of the parties. In the absence of an agreement the following procedure was adopted. Each party was to nominate two arbitrators, of whom one only was to be its national or an individual selected from the persons whom it had designated as members of the Permanent Court of Arbitration at The Hague. The other member might be of any other American nationality. These arbitrators were in turn to select a fifth arbitrator who should be the president of the Court. Should the arbitrators be unable to reach an agreement among themselves for the selection of a fifth American arbitrator, or in lieu thereof, of another who was not, each party was to designate a non-American member of the Permanent Court of Arbitration at The Hague, and the two persons so designated were to select a fifth arbitrator, who might be of any nationality other than that of a party to the dispute.

[10] See proclamation of the President of the United States, U. S. Treaty Vol. IV, 4756, 4759.

[11] See, for example, Art. 2 of treaty between Portugal and Switzerland respecting Conciliation, Arbitration and Compulsory Adjudication, of Oct. 17, 1928, M. Habicht, Post-war Treaties For the Pacific Settlement of International Disputes, No. 124. See analysis of systems of pacific settlements introduced by Post-war Treaties in Part II, *id.*

are to unite as instrumentalities through which it is to acquiesce in the terms of a *compromis* does not indicate that the nation will, or is to be expected, to lack good faith in satisfying any obligations which the initial undertaking to arbitrate actually entails.[12]

The character and scope of the reservations under which the United States has accepted both bi-partite and multi-partite treaties serve, however, to encourage differences of opinion concerning whether a particular dispute is one for the solution of which recourse should be had to arbitration. Perhaps any line of demarcation which is designed to distinguish arbitrable from non-arbitrable controversies may, under some circumstances, be productive of such a result. Accordingly, a radical change in the form of arrangements contemplating the obligatory use of arbitration is believed to be desirable. It is suggested that agreements to be concluded by the United States for the amicable adjustment of international differences refer to arbitration as one of the instrumentalities to be availed of by the contracting parties, and without specifying categories of disputes deemed to be arbitrable, merely prescribe recourse to arbitration under conditions such that if it be not employed, the use of another mode of adjustment becomes obligatory. By such process, the contracting States when at variance may oftentimes be expected to prefer arbitration to the available alternative.[13] Moreover, such a form of agreement minimizes the danger of divergent constructions, and at the same time diminishes the significance of a preliminary agreement, causing it to become an aid rather than an obstacle to final settlement.

It is highly desirable that arrangements for obligatory arbitration should if possible eliminate, or minimize the necessity of agreement-making as a condition precedent to the adjudication of international differences.[14] The United States has, at least on one occasion, within the present century, accepted an arrangement that was free from a compromissary clause.[15] If, however, it be deemed

[12] According, however, to Professor Garner: "Each treaty therefore is merely an agreement to arbitrate when the Senate, two-thirds of its members concurring, is willing to consent to arbitration in a particular case and when the disputing parties are able to agree upon the particular tribunal to which the dispute shall be submitted. The decision whether a particular dispute falls within the terms of Article I of the treaty, or is excluded by the reservations of Article II, lies in the last analysis with the Senate, which means that one-third plus one of the senators may, if they are opposed, prevent recourse to arbitration." (*Am. J.*, XXIII, 595, 597.)

[13] Thus, if a treaty provided that if it proved to be impossible to adjust by diplomacy a controversy between the signatory parties, endeavor should be made to effect settlement by conciliation, or by arbitration or by means of a joint commission, regardless of the character of what was involved, so that there was a definite alternative to accept a final procedure, such as the use of a joint commission if the other procedures were unwanted or untried or proved to be ineffectual, there would be a flexible mode of encouraging the States at variance to elect, at least under some circumstances, an adjudication before an arbitral forum.

See Joint Commissions, *infra*, § 584.

[14] As Professor Jessup has tersely said: "This function [of an arbitration treaty] is to provide in advance when relations are cordial, a machinery which can almost automatically start to function when a dispute arises and passions are aroused." (The United States and Treaties for the Avoidance of War, *International Conciliation*, 1928, No. 239, p. 202.)

[15] See Treaty between the United States and Certain Powers for the Arbitration of Pecuniary Claims, concluded Jan. 30, 1902, Malloy's Treaties, II, 2062.

The Olney-Pauncefote Treaty of Jan. 11, 1897 (For. Rel. 1896, 238), which failed to be consummated, made no provision for the use of a preliminary agreement.

expedient to incorporate such a clause in treaties yet to be consummated, the clause may cease to be a barrier to adjudication if in consequence of the succinct as well as comprehensive character of the initial undertaking to adjudicate, the function of the preliminary agreement be reduced to one of minor and routine administration concerning which differences of opinion may be expected to be trivial.

(4)

THE HAGUE CONVENTIONS OF 1899 AND 1907, FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

(*a*)

§ 568. **Declarations Respecting the System of Arbitral Justice.** The Hague Conventions of 1899 and 1907, for the Pacific Settlement of International Disputes,[1] dealt with four distinct phases of arbitration[2]: first, the general system of arbitral justice; secondly, the establishment of a permanent court; thirdly, arbitral procedure; and fourthly, arbitration by summary procedure.

With respect to the first of these, brief but significant declarations were made. The object and basis of international arbitration were clearly set forth. The obligation implied from recourse thereto, to submit loyally to the arbitral award, was emphasized.[3]

In the convention of 1899, the efficacy of arbitration as a mode of adjusting questions of a legal nature and arising especially from the interpretation or application of international conventions was acknowledged, and that without the addition of any restriction.[4] In 1907, this acknowledgment was supplemented

§ 568. [1] For the texts of these conventions, in so far as they concern arbitration, see Malloy's Treaties, II, 2023–2029, and 2234–2243. Respecting the proceedings at the First Hague Conference, see *La Conférence Internationale de la Paix*, The Hague, 1899; A. H. Fried, *Die Haager Konferenz*, Berlin, 1900; also F. W. Holls, The Peace Conference at the Hague, New York, 1900. Respecting the Proceedings at the Second Hague Conference, see *La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents*, 3 vols., The Hague, 1909; The First and Second International Peace Conferences held at the Hague, Washington, 1914, 63 Cong., 2 Sess., House Doc., 1151.

See, also, C. M. Bishop, International Arbitral Procedure, Baltimore, 1930, Chaps. III and IV; A. H. Fried, *Die Zweite Haager Konferenz*, Leipzig, 1907; bibliography in Hershey, revised ed., 489–491; A. P. Higgins, The Hague Peace Conferences, 164, with bibliography, 179; M. O. Hudson, "The Permanent Court of Arbitration," *Am. J.*, XXVII, 440; W. I. Hull, The Two Hague Peace Conferences, Boston, 1908; A. de Lapradelle and N. Politis, "*La Deuxième Conférence de la Paix*," *Rev. Gén.*, XVI, 385; T. J. Lawrence, International Problems and Hague Conferences, London, 1908; E. Lémonon, *La Seconde Conférence de la Paix*, Paris, 1908; O. Nippold, *Die Zweite Haager Friedenskonferenz*, Leipzig, 1908; Lauterpacht's 6 ed. of Oppenheim, II, §§ 19–25aa; Antoine Pillet, *La cause de la paix et les deux conférences de La Haye*, Paris, 1908; J. H. Ralston, International Arbitration from Athens to Locarno, Stanford University, 1929, 253–286; L. Renault, *Les deux conférences de la paix*, Paris, 1908; J. B. Scott, The Hague Peace Conferences, I, 274–312; Reports to Hague Conferences, 1917; Hague Court Reports, New York, 1916, and Second Series, New York, 1932; P. Zorn, *Die Fortschritte des Seekriegsrechtes durch die zweite Haager Friedenskonferenz*, Tübingen, 1908.

[2] As has been observed, both conventions made provisions also concerning Good Offices and Mediation, *supra*, § 555, and with respect also to International Commissions of Inquiry, *supra*, § 557.

[3] Art. XXXVII.

[4] Art. XVI (1899). "The Hague Convention, although it does not in terms make arbitration obligatory in any case, excepts nothing from the scope of arbitration, thus leaving the parties free to apply the process to any and every question for the solution of which they

by the statement that "it would be desirable" for the contracting parties to have recourse to arbitration for the adjustment of such questions "in so far as circumstances permit." [5]

(*b*)

§ 569. **The Permanent Court of Arbitration.** For the purpose of facilitating recourse to arbitration, the signatory powers undertook, in 1899,[1] to organize a Permanent Court of Arbitration, and in 1907 it was agreed to maintain the Court which the earlier Conference had established.[2]

The seat of the Court is at the Hague.[3] It is declared to be "competent for all arbitration cases," unless the parties agree to institute a special tribunal.[4] For service as a registry for the Court, and for the channel of communications relative to its meetings, as well as for the custody of its archives and the conduct of its administrative business, there is established a so-called International Bureau.[5] To the Bureau the contracting powers undertake to communicate, "as soon as possible," certified copies of the texts of special arbitration agreements, arbitral awards of special tribunals, and also local laws, regulations and documents showing execution of the awards given by the Court.[6]

The Court consists of a panel of judges, four of whom, at the most, are selected by each contracting power,[7] a list of those chosen being notified to each by the Bureau.[8] The arbitrators in a particular case must be chosen from the general list. In case of failure to agree as to the composition of the Court, each party appoints two arbitrators, "of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court." [9] These arbitrators together choose an umpire. In case of their disagreement, his choice is entrusted to a third Power selected by agreement between the parties. If the parties cannot agree on this subject, each selects a different Power and the choice of an umpire is made by them in concert. If these two Powers within two months' time fail to agree, each of them presents two candidates from the list of members of the Permanent Court, exclusive of the members selected by the parties, and who are not nationals of either of them. From these candidates the umpire is determined by lot.[10]

As soon as the Tribunal has been constituted, the parties inform the Bureau

---

may see fit to employ it, without discouraging in advance its application to any class of questions or furnishing a ready means of avoiding the resort to it." (J. B. Moore, *Proceedings*, Twentieth Lake Mohonk Conference, 1914, p. 14.)

[5] Art. XXXVIII. In Art. XL the contracting powers reserved to themselves "the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it."

§ 569. [1] Art. XX (1899). [2] Art. XLI. [3] Art. XLIII. [4] Art. XLII. [5] Art. XLIII. [6] *Id.*

[7] Art. XLIV. The persons so selected are to be "of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator."

[8] According to Art. XLIV the selection by two or more powers of the same person, whether by agreement or otherwise, is permitted. The term of appointment, capable of renewal, is six years.

[9] Art. XLV. The limitation expressed by the words quoted in the text was an amendment made in 1907. See A. P. Higgins, The Hague Peace Conferences, 171–172.

[10] Art. XLV.

of their determination to have recourse to the Court, the text of their *compromis* (or special agreement to arbitrate), and the names of the arbitrators. The Bureau communicates without delay to each arbitrator the *compromis,* and the names of the other members of the Tribunal. Thereupon the Tribunal assembles at the date fixed by the parties, the Bureau making necessary arrangements for its meeting.[11]

While recourse to the court is not made compulsory, it is declared to be the duty of the contracting powers, "if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them"; and it is said that "the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions." [12] A party to a dispute may always inform the Bureau, by a note of declaration, of the readiness to have recourse to arbitration. Of such declaration the Bureau is obliged at once to inform the other party.[13]

Attempts, both in 1899 and 1907, to make recourse to arbitration obligatory were unsuccessful.[14] The Anglo-American project before the Second Conference, which ultimately won the approval of a great majority of the Commission to which the matter was entrusted, contemplated the arbitration of differences of a legal nature, and primarily relating to the interpretation of treaties, provided that the issues did not involve the vital interests, independence or honor of the States at variance, and did not affect the interests of other nations not con-

[11] Art. XLVI. It is here also provided that, "The members of the Tribunal, in the exercise of their duties, and out of their own country, enjoy diplomatic privileges and immunities."

In order to facilitate recourse to arbitration the Bureau is authorized to place its services at the disposal of the contracting powers for the use of any special board of arbitration. Art. XLVII.

The jurisdiction of the Permanent Court may, under specified conditions, be extended to disputes between non-contracting powers, or between such powers and contracting powers, if the parties are agreed to have recourse to the Court. *Id.*

[12] Art. XLVIII. The words "friendly actions" is the translation published in Malloy's Treaties (II, 2237) for the French expression *actes de bons offices.* "*Bons offices*" are the exact equivalent of the English "good offices," a term which in both languages has a technical signification, which the contracting parties doubtless sought to attach to the words of the present Article.

[13] Art. XLVIII. Concerning this Article, see A. P. Higgins, Hague Peace Conferences, 172–173.

According to Art. XLIX, a Permanent Administrative Council, composed of the diplomatic representatives of the contracting powers accredited to the Hague, and of the Netherland Minister for Foreign Affairs, who acts as President, is charged with the direction and control of the Bureau.

In its reply of July 25, 1914, to the demands of Austria-Hungary, the Serbian Government announced a readiness "to accept a pacific understanding, either by referring this question to the decision of the International Tribunal at the Hague, or to the Great Powers which took part in the drawing up of the declaration made by the Serbian Government on 18th (31st) March, 1909." (Collected Diplomatic Documents relating to the Outbreak of the European War, His Majesty's Stationery Office, London, 1915, 31, 37.) On July 24, 1914, in response to the request of the Serbian Minister to France for advice, the French Political Director, M. Berthelot, declared that Serbia should above all "attempt to escape from the direct grip of Austria by declaring herself ready to submit to the arbitration of Europe." (See M. Bienvenu-Martin, French Acting Minister for Foreign Affairs, to M. Thiebaut, French Minister at Stockholm, July 24, 1914, *id.*, 157, 158.)

[14] J. B. Scott, The Hague Peace Conferences, I, 321–385.

cerned in the disputes.[15] Certain specified differences of minor aspect were declared to be outside of the reservations.[16] In view of the nature and scope of these restrictions, it may be doubted whether the project was preferable to the general resolution adopted by the Conference, recognizing the principle and efficacy of obligatory arbitration, and that without reference to its limitations.[17]

(*c*)

§ 570. **Arbitral Procedure.** Articles LI to LXXXV of the Convention of 1907 are devoted to "Arbitral Procedure," and make provision generally for the steps to be taken preliminary to an adjudication, the presentation of cases before the Tribunal, and the work of that body itself.[1] Thus the function of and necessity for the *compromis* are indicated. Therein, it is said, the subject of the dispute is clearly defined, as well as, if need be, the mode of appointing arbitrators, the scope of their powers, the language to be employed by and before the Tribunal, the place of meeting and all the conditions generally on which the parties are agreed.[2] When the parties have failed so to agree, the Convention seeks to remedy the situation.[3]

Elaborate provision is made for the settlement of the *compromis* by the Tribunal when the parties are agreed to have recourse to it for that purpose, and, under certain circumstances, when the request is made by only one party.[4]

The duties of arbitrator may be conferred upon one or several persons.[5] When a sovereign or chief of State is chosen, the procedure is to be settled by him.[6] The umpire is declared to be *ex officio* president of the Tribunal. When the Tribunal does not include an umpire, it is permitted to appoint its own president.[7]

Unless the *compromis* specifies the language to be employed the question is to be decided by the Tribunal.[8] The right of the parties to appoint agents

[15] *Id.*, I, 369; also *La Deuxième Conférence internationale de la Paix, Actes et Documents*, II, 998; *id.*, II, 899 and 906.

[16] These related to (1) Reciprocal gratuitous aid to indigent sick; (2) International protection of workingmen; (3) Means of preventing collisions at sea; (4) Weights and measures; (5) Measurement of vessels; (6) Wages and estates of deceased sailors; (7) Protection of literary and artistic works; also Pecuniary claims on account of injuries when the principle of indemnity was recognized by the parties. J. B. Scott, The Hague Peace Conferences, I, 370.

[17] According to the Final Act, the Conference of 1907 was "unanimous (1) In admitting the principle of compulsory arbitration. (2) In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of International Agreements, may be submitted to compulsory arbitration without any restriction." (Malloy's Treaties, II, 2378.)

§ 570. [1] Malloy's Treaties, II, 2237–2242.

[2] Art. LII.

[3] Unfortunate results, serving to obstruct the work of obtaining justice, have oftentimes attended the action of the parties in burdening the Tribunal with the decision of numerous questions of procedure concerning which neither the Convention of 1907 nor any practice firmly established by the Permanent Court offers authoritative guidance. See William Cullen Dennis in *Am. J.*, VII, 285, 291.

[4] Arts. LIII and LIV.

[5] Art. LV.

[6] Art. LVI.

[7] Art. LVII.

[8] Art. LXI. The experience of the United States in cases before the Court has emphasized the soundness of the recommendation of the late William L. Penfield, its Agent in the Venezuelan Arbitration at the Hague in 1903, to the effect that "The protocol should prescribe the language of the proceedings and of the debates, and that the arbitrators must have sufficient knowledge of that language to be able to understand and speak it readily." (For. Rel. 1904,

to attend the Tribunal for the purpose of acting as intermediaries between themselves and the Tribunal, and to retain counsel or advocates to defend their rights before it, is acknowledged.[9]

Members of the Permanent Court are not permitted to act as agents, counsel or advocates except in behalf of the Power which appointed them members thereof.[10] It is to be regretted that the Convention did not completely prohibit appointment of any member of the Court in such a capacity. Equally desirable would have been a restriction limiting the choice of arbitrators to persons not nationals of the parties litigant and not their appointees on the panel of the Permanent Court.[11]

Tested by the experience of the United States as a party litigant, the provisions respecting the presentation of a case before the Tribunal are inadequate. They are mainly descriptive of general steps to be followed, rather than decisive of the exact rights of the parties taking them. Arbitral procedure is said to comprise two distinct phases: "written pleadings and oral discussions." The former consist of the communication by the respective agents to the members of the Tribunal and the opposite party "of cases, counter-cases, and, if necessary, of replies," to which are to be annexed all papers and documents called for in the case.[12] The "discussions" consist in the oral development of the pleas or arguments. It is not indicated whether the case and counter-case should be confined to statements of facts relied upon, or should embrace also arguments in support thereof.[13] Attention has been called to the fact that the Convention

---

509, 515.) See, also, Recommendations, Oct. 14, 1902, of the Tribunal which decided the Pious Fund Case, *Am. J.*, V, Supp., 73, 76; statement of W. C. Dennis, Agent of the United States in the Orinoco Steamship Company Case, *Am. J.*, V, 59–63.

According to Art. IX of the special agreement of Jan. 27, 1909, providing for the arbitration of the North Atlantic Coast Fisheries Case, it was provided that "the language to be used throughout the proceedings shall be English." (Malloy's Treaties, I, 840.)

[9] Art. LXII.

[10] *Id.*

[11] According to Art. IV of the claims protocol with Venezuela of Feb. 13, 1909, providing for the arbitration of the Orinoco Steamship Company Case, it was declared that "No member of said [Hague] Court who is a citizen of the United States of America or of the United States of Venezuela shall form part of said arbitral tribunal, and no member of said Court can appear as counsel for either nation before said tribunal." (Malloy's Treaties, II, 1885.) See also W. C. Dennis, in *Am. J.*, V, 63; Report of Wm. L. Penfield, Agent of the United States in the Venezuelan Case at the Hague, 1903, For. Rel. 1904, 509, 511; Jackson H. Ralston, in *Am. J.*, I, 321.

[12] Art. LXIII. In the text of the Convention of 1907, as published in Malloy's Treaties (II, 2239), the word "written" ("*écrite*") immediately preceding the word "pleadings" is unfortunately omitted. This important adjective was incorporated in the text by the Conference of 1907, as an amendment to the corresponding paragraph of Art. XXXIX of the Convention of 1899.

According to Art. LXIV, a duly certified copy of every document produced by one party must be communicated to the other party.

[13] "According to the practice of the United States, at least in recent years, the case and counter-case are to be regarded more or less as true pleadings, although expanded so as to give a complete, although succinct statement of the facts relied on to establish the various contentions of the respective parties. The case states the facts as persuasively as possible, ordinarily in narrative form, points out the conclusions which it is conceived should be drawn from these facts, and is accompanied by documentary evidence which is relied upon to support the facts therein related, by way of appendix. The counter-case performs a similar function as regards the facts relied upon in answer to the case of the other party. But when, as in perhaps the majority of instances, case and counter-case are to be followed with either written or oral argument, or perhaps by both, it has not been the American practice to argue,

makes no provision in regard to the question of determining who is plaintiff, and the order of speaking, and fails as well "to secure to agents and counsel the right to make interlocutory motions at appropriate times, to have a reasonable opportunity to be heard thereon in open court, and to have a timely ruling upon the point as raised." [14] Inasmuch as the Tribunal is expressly authorized to issue rules of procedure for the conduct of the case, to decide the forms, order and time in which each party must conclude its arguments, and to arrange all formalities required for dealing with the evidence,[15] there is imposed upon the agents and counsel the preliminary task of securing in each case a special ruling from the judges chosen to pass upon the merits of the controversy.[16]

Other broad discretionary powers are conferred upon the Tribunal. After the close of the pleadings it is entitled to exclude from discussion all new papers or documents which one of the parties may wish to submit without the consent of the other.[17] It is free, however, to take into consideration, and even require the production of new papers or documents to which its attention may be drawn by the agents and counsel.[18] The Tribunal may also require from the agents the production of all papers, and may demand all necessary explanations.[19] Members of the Tribunal are entitled to put questions to the agents and counsel, and ask for explanations on doubtful points.[20]

Of much significance is the authority given the Tribunal to determine its own competence in interpreting the *compromis,* as well as the other papers and documents which may be invoked, and in applying the principles of law.[21]

---

or even, to any considerable extent, to marshal the law or the facts in the case or counter-case.

"Continental and Latin-American practice, in which even the British occasionally join, is otherwise. The case and counter-case are made use of for argument as well as statement. The Continental method has the practical advantage when opposed to the American method, that under it the members of the tribunal take their places upon the bench fully acquainted with the strength of the side employing it, while the strength of the other side is as yet undeveloped. In other words, the Continental method secures the first favorable impression with the tribunal, which, as everyone knows, may be lasting. On the other hand, it has the practical disadvantage, at all times, that it is likely to result in the wasting of a great deal of ammunition in establishing contentions which are conceded and attacking positions which are undefended, and may result in compelling those who follow it to change their position during the course of the argument. It is submitted that the American method is more in accordance with the provisions of the protocol when these call for a case, counter-case and argument, and is more conducive to a logical and orderly presentation of the questions at issue." (William Cullen Dennis, "The Necessity for an International Code of Arbitral Procedure," *Am. J.,* VII, 285, 289–290.)

[14] *Id.,* 297, 298–299. According to Art. LXXI, the agents and counsel "are entitled to raise objections and points. The decisions of the Tribunal on these points are final and cannot form the subject of any subsequent discussion."

[15] Art. LXXIV.

[16] W. C. Dennis, in *Am. J.,* VII, 285, 292.

[17] Art. LXVII.

[18] Art. LXVIII. The Tribunal, if requiring a party to produce such new papers or documents, is obliged to make them known to the opposite party. *Id.* In several instances the Mixed Commission under agreement with Spain of Feb. 11–12, 1871, permitted the admission of new evidence after the case was closed. Moore, Arbitrations, III, 2200–2201.

[19] Art. LXIX. It is there also declared that "In case of refusal [to comply with such demand] the Tribunal takes note of it."

[20] Art. LXXII. In the same Article it is declared that "Neither the questions put, nor the remarks made by members of the Tribunal in the course of the discussions, can be regarded as an expression of opinion by the Tribunal in general or by its members in particular."

[21] Art. LXXIII. Here again the English translation published in Malloy's Treaties (II, 2241) is at fault. The words "*Actes et documents,*" substituted in the Convention of 1907,

While it is provided that the discussions are under the control of the President,[22] it is also stated that the agents and counsel are authorized to present orally to the Tribunal all of the arguments which they may consider expedient in defense of their case,[23] and that when they have submitted "all the explanations and evidence in support of their case," the President shall declare the discussion closed.[24] The Tribunal considers its decisions in private and the proceedings remain secret. All questions are decided by a majority of the members.[25]

The award is said to settle the dispute definitively and without appeal.[26]

Any dispute between the parties as to the interpretation and execution of the award is, in the absence of an agreement to the contrary, to be submitted to the Tribunal which pronounced it.[27] The right to demand a revision of the award, if reserved by the parties in the *compromis,* is recognized. In such case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the award.[28] "It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the party which de-

---

for "*Traités*" employed in the corresponding Article (XLVIII) of that of 1899, are translated as merely "Treaties," thus ignoring the important verbal change effected in 1907.

[22] Art. LXVI. In the same Article it is declared that the discussions are public only in case it be so decided by the Tribunal with the assent of the parties. The discussions are recorded in minutes drawn up by the Secretaries appointed by the President. The minutes are signed by him and by one of the Secretaries, and alone have an authentic character. *Id.*

[23] Art. LXX.

In the course of the Fur Seal Arbitration in 1893, the respective functions of agents and counsel became the subject of discussion. The right of General Foster, Agent of the United States, to present motions in behalf of his Government was recognized, but it was required that arguments in support thereof should be made solely by counsel. Moore, Arbitrations, I, 910.

[24] Art. LXXVII. According to Art. LXXVI, due respect is paid to the rights of the territorial sovereign in relation to the service of notices in the territory of a third contracting Power, and in the procuring of evidence on the spot. See, also, Art. XXIV in regard to Commissions of Inquiry.

[25] Art. LXXVIII.

[26] Art. LXXXI.

It is not believed that a State, by accepting in a *compromis* the Hague code of arbitral procedure, thereby loses the right to attack the validity of an adverse award, where it appears, for example, that the Tribunal disregarded the terms of the submission.

According to Art. LXXIX, the award must give the reasons on which it is based. It contains the names of the arbitrators, and is signed by the President and Registrar, or by the Secretary acting as such. Art. LXXX provides that the award shall be read in a public session, the agents and counsel being present or duly summoned to attend.

[27] Art. LXXXII.

[28] Art. LXXXIII. This Article is identical with Art. LV of the Convention of 1899. In the Report of the American delegates to the Conference of 1899, to the Secretary of State, July 31, 1899, it is said: "As to the revision of the decisions by the tribunal in case of the discovery of new facts, a subject on which our instructions were explicit, we were able, in the face of determined and prolonged opposition, to secure recognition in the code of procedure for the American view." (For. Rel. 1899, 513, 517, Moore, Dig., VII, 83, 84.)

Declared Count Lewenhaupt, umpire of the mixed commission under agreement with Spain of Feb. 11–12, 1871, Malloy's Treaties, II, 1661: "The umpire is of opinion that the rule generally adopted by courts of arbitration is, that the umpire has no discretionary power to set aside his own decisions; that he has a right to correct clerical errors so long as the decision has not been satisfied, but that an error of judgment cannot be corrected after due notification of the decision; except, if the case be submitted again through the authorized channel." (Moore, Arbitrations, III, 2192.)

manded the revision at the time the discussion was closed." [29] It is provided, moreover, that proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character above described, and declaring the demand admissible on that ground.[30] The award is not binding except on the parties in dispute.[31]

(*d*)

§ 571. **Arbitration by Summary Procedure.** With a view to facilitating recourse to arbitration in cases admitting of summary procedure, certain rules are agreed upon, subject, however, to the provisions, so far as applicable, of the code of arbitral procedure.[1] Accordingly, each party in dispute appoints an arbitrator, and the two thus selected choose an umpire. If they fail to agree, each arbitrator proposes two candidates taken from the general list of the Permanent Court, exclusive of the members appointed by either of the parties, and not being nationals of either of them. From these candidates the umpire is determined by lot.[2] In the absence of previous agreement, the Tribunal, as soon as it is formed, settles the time within which the respective cases must be submitted to it.[3] Each party is represented before the Tribunal by an agent.[4] The proceedings are conducted exclusively in writing.[5] Witnesses and experts may be called by either party, while the Tribunal is given the right to demand oral explanations from the agents, as well as from the experts and witnesses "whose appearance in Court it may consider useful." [6]

(5)

§ 572. **The Court of "Judicial Arbitration" Proposed by the Second Hague Peace Conference.** Numerous defects of and weaknesses in the structure of the Permanent Court of Arbitration, established in 1899 and maintained in 1907, have been acknowledged on all sides. They relate, notably, to the inadequacy of a panel of judges as compared with a really permanent tribunal, to the unwise latitude permitted in the choice of arbitrators, counsel and agents, to the insufficient restrictions respecting qualifications for the office of arbitra-

[29] Art. LXXXIII.

[30] *Id.*, where it is also declared that the *compromis* fixes the period within which the demand for the revision must be made.

[31] Art. LXXXIV. It is there also provided that when the award "concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the Award is equally binding on them."

According to Art. LXXXV, "Each party pays its own expenses and an equal share of the expenses of the Tribunal."

§ 571. [1] Art. LXXXVI.

[2] Art. LXXXVII. It is there also provided that the umpire shall preside over the Tribunal, which shall give its decisions by a majority of votes.

Art. III of the agreement with Great Britain of Aug. 18, 1910, for the arbitration of pecuniary claims, provided that the arbitral tribunal be constituted in accordance with this article of the Hague Convention. U. S. Treaty Vol. III, 2619.

[3] Art. LXXXVIII.

[4] Art. LXXXIX.

[5] Art. XC.

[6] *Id.*

tor, to the burdensome expense imposed upon parties litigant, and to the lack of an adequate code of arbitral procedure.[1]

The United States as a party litigant has, however, found it possible on each occasion to obtain arbitrators highly qualified for the exercise of the arbitral function, unfailingly conscious of the judicial nature of the task confronting them, and hence determined to expound and apply the law of nations rather than effect compromise.

The attempt was made at the Second Hague Conference of 1907, not merely to revise and enlarge the Convention of 1899 for the Pacific Settlement of International Disputes,[2] but also to establish in addition to the Permanent Court of Arbitration, a new body to be known as the Judicial Arbitration Court.[3] Accordingly a draft convention was formulated, and annexed to the first "opinion" expressed by the Conference, advising the adoption of the convention as soon as the Powers should agree as to the selection of the judges and the constitution of the court.[4]

The convention provided for a tribunal composed of "judges representing the various juridical systems of the world, and capable of insuring continuity in jurisprudence of arbitration." [5] Qualifications for fitness for the judicial office were drawn with somewhat greater rigidity than in the case of those for the Permanent Court of Arbitration, although the appointment of judges was to be made, as far as possible, from the membership of the latter.[6]

A judge was not to be permitted to exercise his judicial functions in any case in which he had previously taken any part; or to act as agent or advocate before the Judicial Arbitration Court, or the Permanent Court of Arbitration, or a Special Tribunal of Arbitration, or a Commission of Inquiry, or to act for one

§ 572. [1] Infrequency of adjudications and the resulting failure of the Court to develop a consistent or impressive body of law have also been noted. See address of Mr. Choate, head of the American delegation to the Second Hague Peace Conference, Aug. 1, 1907, *La Deuxième Conférence Internationale de la Paix, Actes et Documents,* II, 327–330, J. B. Scott, Hague Peace Conferences, I, 426–427.

See, also, in this connection, R. Floyd Clarke, "A Permanent Tribunal of International Arbitration," *Am. J.,* I, 342, 399–408; W. C. Dennis, "Compromise — The Great Defect of Arbitration," *Col. L. Rev.,* XI, 493; "The Necessity for an International Code of Arbitral Procedure," *Am. J.,* VII, 285; Jackson H. Ralston, "Some Suggestions as to the Permanent Court of Arbitration," *id.,* I, 321; J. B. Scott, An International Court of Justice, Carnegie Endowment for International Peace, Division of International Law, New York, 1916.

Concerning the International Prize Court Convention concluded at the Second Hague Peace Conference, see American Prize Courts and Procedure, Need of an International Prize Tribunal, *infra,* § 896.

[2] In his instructions to the American delegation to the Second Hague Conference, May 31, 1907, Mr. Root, Secy. of State, appears to have sought the development of the Permanent Court of Arbitration rather than the institution of a new organization. For. Rel. 1907, II, 1128, 1135.

[3] See address of Mr. Choate, Chief of the American delegation, Aug. 1, 1907, introducing the plan of the United States for a court of arbitral justice, *La Deuxième Conférence Internationale de la Paix, Actes et Documents,* II, 327–330, J. B. Scott, Hague Peace Conferences, I, 425.

[4] For the text of the draft convention, see Malloy's Treaties, II, 2380. Concerning the proposed court, see *La Deuxième Conférence Internationale de la Paix, Actes et Documents,* I, 331–335, 347–398; J. B. Scott, Hague Peace Conferences, I, 423–464; same author, The Status of the International Court of Justice, Baltimore, 1914 (Publication Nos. 15 and 16, American Society for Judicial Settlement of International Disputes); also A. P. Higgins, Hague Peace Conferences, 509–517.

[5] Art. I.

[6] Art. II.

of the parties "in any capacity whatsoever," so long as his appointment lasted.[7] He was to receive an annual salary of 6000 Netherland florins as well as 100 florins per diem when in the exercise of judicial duties, and an allowance for traveling expenses.[8]

In contrast to a mere panel of judges, the Court was to be an essentially permanent tribunal meeting in session once a year, yet carrying on much of its work through a committee of three members known as the "delegation."

The tenacity with which certain participants at the Hague Conference asserted a preference for a tribunal composed of judges chosen by the parties at variance,[9] as well as disagreement respecting any other mode suggested for the selection of a permanent bench, rendered impossible the actual establishment of the court.[10]

## (6)

## The Permanent Court of International Justice[1]

### (*a*)

§ 573. **Organization.** The Permanent Court of International Justice came into being through the ratification by a majority of the members of the League of Nations of a protocol which was opened for signature December 16, 1920,[2] in

[7] Art. VII. Also Art. X.

Such provisions would not, however, completely bar a judge from the practice of his profession in his own country during the period of his appointment, or even from holding public office. Mr. Root, Secy. of State, in his instructions to the American delegation to the Second Hague Conference, May 31, 1907, sought the "development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility." (For. Rel. 1907, II, 1128, 1135.)

According to Art. XI of the Convention for the establishment of a Central American Court of Justice, concluded at the Central American Peace Conference at Washington, Dec. 20, 1907, "The office of Justice whilst held is incompatible with the exercise of his profession, and with the holding of public office." (Malloy's Treaties, II, 2402.)

[8] Art. IX.

[9] Art. XIV which provided for a contingency when the Court was not obliged to meet.

[10] See view of M. Beernaert, Chief of the Belgian delegation to the Second Hague Conference, *La Deuxième Conférence Internationale de la Paix, Actes et Documents,* II, 331–335; J. B. Scott, Hague Peace Conferences, I, 435; A. P. Higgins, Hague Peace Conferences, 512.

§ 573. [1] For a comprehensive bibliography, see Bibliographical List of Official and Unofficial Publications concerning the Permanent Court of International Justice, Publications, Permanent Court of International Justice, Series E, No. 12, pp. 237–330.

See, also, Manley O. Hudson, The Permanent Court of International Justice, New York, 1934; same author, *La Cour permanente de Justice internationale,* containing a foreword by A. Hammarskjöld, Paris, 1936; same author, The World Court (1921–1938), Handbook, 5 ed., Boston, 1938.

Concerning the jurisprudence of the Court down to and including its advisory opinion of Dec. 4, 1935 (Series A/B, No. 65), see Hudson, World Court Reports, 4 Vols., Washington, 1934–1943.

See Manley O. Hudson's series of articles on the work of the Permanent Court of International Justice, appearing annually in the January numbers of the *Am. J.,* beginning in Vol. XVII (1923), 15.

Also Publications of the Permanent Court of International Justice, The Hague, Catalogue No. 14, February, 1939, Columbia University Press, International Documents Service, New York, 1939.

[2] In pursuance of Art. 14 of the Covenant of the League of Nations, the Council of that body invited a Committee of Jurists, which assembled at The Hague in June, 1920, to for-

which they declared their acceptance of the adjoined Statute of the Permanent Court of International Justice, that had been approved by the Assembly of the League on December 13, 1920.[3] The Court was to be "in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States" were said to be "always at liberty to submit their disputes for settlement."[4]

According to the terms of the Statute, the Court is composed of a body of independent judges elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.[5] The Court consists at the present time of fifteen members.[6] The members of the Court are elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration in accordance with specified provisions.[7] At least three months before the date of an election, the Secretary-General of the League addresses a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant (which

---

mulate a plan for a Permanent International Court. The Committee did so. The American member was Mr. Elihu Root, who was assisted by Dr. James Brown Scott. The plan reported by the Committee assumed the form of a Statute for the proposed Court defining its organization, jurisdiction and procedure. Declared Secretary Hughes, April 27, 1923: "The plan was considered and amended in the Council and Assembly of the League, but its main structure was retained. While the amended plan was adopted by the Assembly of the League, it could not be put into effect by action of the League. In view of the scope of the plan, it was necessary to have a special international agreement on the part of the States which were willing to accept it. Accordingly a special protocol or agreement, with the statute of the Court annexed, was drawn up and sent to the nations for approval. . . . The Permanent Court is thus an establishment separate from the League, having a distinct legal status created by an independent organic act." (*Proceedings*, Am. Soc. Int. Law, 1923, 80.) For the text of the protocol of Dec. 16, 1920, see Hudson, Int. Legislation, No. 37, Publications, Permanent Court of International Justice, Series D, No. 1.

See Report on The Draft Scheme for the Establishment of the Permanent Court of International Justice, presented to the Council of the League of Nations on behalf of the Advisory Committee of Jurists, by Albert de Lapradelle, The Hague, July 23, 1920; The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary, by James Brown Scott, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 35, Washington, 1920.

[3] Hudson, Int. Legislation, No. 37 *a*, Publications, Permanent Court of International Justice, Series, D. No. 1.

[4] Art. 1 of Statute. The text of the Statute as amended in accordance with a protocol of Sept. 14, 1929, and which became effective Feb. 1, 1936, is contained in League of Nations Doc. No. C.80.M.28.1936.V, and is reproduced in Publications, Permanent Court of International Justice, Series D, No. 1, Third Edition (March 1936), p. 12.

[5] Art. 2.

[6] Art. 3. According to Art. 3 of the Statute as in force Aug. 20, 1921, the Court was to consist of eleven judges and four deputy-judges, the number being subject to increase by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges. See Hudson, Int. Legislation, No. 37 *a*.

[7] Art. 4, where it is also provided that "In the case of members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes."

According to the same Article, the conditions under which a State which has accepted the Statute but is not a member of the League of Nations may participate in electing members of the Court, are, in the absence of a special agreement, to be laid down by the Assembly on the proposal of the Council.

includes the United States) or to the States which join the League subsequently (as well as to the persons appointed under paragraph 2 of article 4), inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.[8] The Assembly and the Council proceed independently of one another to elect the members of the Court.[9] Those candidates who obtain an absolute majority of votes in the Assembly and in the Council are to be considered as elected.[10] If, after the third meeting for the purpose of an election, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant to submit to the Assembly and the Council for their respective acceptance.[11] If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed are, within a period to be fixed by the Council, to proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council; and in the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.[12]

The members of the Court are not to exercise any political or administrative

[8] Art. 5. It is there provided that no group may nominate more than four persons, not more than two of whom shall be of their own nationality; and that in no case must the number of candidates nominated be more than double the number of seats to be filled. According to Art. 6, each national group is recommended, before making its nominations "to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law." According to Art. 7, the Secretary-General of the League is to prepare a list in alphabetical order of all persons thus nominated; and save as provided in Art. 12, paragraph 2, these persons shall be the only ones eligible for appointment. The Secretary-General is, moreover, charged with the duty to submit this list to the Assembly and to the Council.

[9] Art. 8. According to Art. 9 of the Statute, the electors at every election are to bear in mind that not only should all the persons appointed as members of the Court possess the requisite qualifications, but that also the whole body should represent the main forms of civilization and the principal legal systems of the world.

[10] Art. 10, where it is also provided that in the event of more than one national of the same member of the League being elected by the votes of both the Assembly and the Council, "the eldest of these only shall be considered as elected."

[11] Art. 12. According to Art. 11, three meetings are, if necessary, to be held for the purpose of an election.

According to Art. 12, if the conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

[12] Art. 12.

According to Art. 13, the members of the Court are elected for nine years and may be re-elected. They are to continue to discharge their duties until their places have been filled. Though replaced, they are to finish any cases which they may have begun.

In case of the resignation of a member of the Court, the resignation is to be addressed to the President thereof for transmission to the Secretary-General of the League of Nations. "This last notification" is said to make the place vacant. *Id.*

It is declared in Art. 14 that vacancies which occur are to be filled by the same method as that laid down for the first election, subject to the following provision: that the Secretary-General of the League of Nations shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Art. 5, and the date of the election shall be fixed by the Council at its next session.

According to Art. 15, a member of the Court elected to replace a member whose period of appointment has not expired is to hold the appointment for the remainder of his predecessor's term.

function, nor engage in any other occupation of a professional nature; and any doubt on the point is to be settled by the decision of the Court.[13] No member of the Court may act as agent, counsel or advocate in any case; nor may he participate in the decision of any case in which he has previously taken an active part as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity. Any doubt on the point is to be settled by the decision of the Court.[14] A member of the Court can not be dismissed, unless in the unanimous opinion of the other members he has ceased to fulfil the required conditions.[15] The members of the Court, when engaged on the business thereof, are to enjoy diplomatic privileges and immunities.[16] The Court elects its President and Vice-President for three years; they may be re-elected; it appoints its Registrar.[17]

For the adjudication of "Labour cases," particularly those referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other treaties of peace,[18] and for that of cases relating to transit and communications, particularly those referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles, and the corresponding portions of the other treaties of peace,[19] the following conditions are laid down. In respect

[13] Art. 16.

[14] Art. 17.

[15] Art. 18. Formal notification of dismissal is to be made to the Secretary-General of the League of Nations, by the Registrar. This notification is declared to make the place vacant. *Id.*

[16] Art. 19. Concerning the diplomatic privileges and immunities of judges and officials of the Registry, see correspondence between the President of the Court and the Netherland Minister for Foreign Affairs in 1928, embracing a statement of "General Principles" and "Regulations for Their Application" that were agreed upon, contained in Publications, Permanent Court of International Justice, Series D, No. 1, Third Edition (March 1936), pp. 69–74.

According to Art. 20, every member of the Court shall, before taking up his duties, make a solemn declaration in open court "that he will exercise his powers impartially and conscientiously."

[17] Art. 21, according to which also the duties of Registrar are not to be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

The seat of the Court is established at The Hague; and at that seat the President and Registrar are obliged to reside. Art. 22.

The Court remains permanently in session except during the judicial vacations, the dates and duration of which are fixed by the Court. Art. 23. The members of the Court whose homes are situated at more than five days' normal journey from The Hague are entitled, "apart from the judicial vacations," to six months' leave every three years, not including the time spent in traveling. *Id.* The members of the Court are bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court. *Id.*

If for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he is obliged so to inform the President. If for some special reason the President considers that one of the members of the Court should not sit in a particular case, he is obliged to notify that member. In the event of the President and a member not agreeing as to the course to be adopted in any such case, the matter is to be settled by decision of the Court. Art. 24.

According to Art. 25, the full Court is to sit except when it is expressly provided otherwise. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, it is declared in Art. 25 that the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, "to be dispensed from sitting." It is announced that a quorum of nine judges shall always suffice to constitute the Court.

[18] Art. 26.

[19] Art. 27.

to both classes of cases, the Court appoints every three years a special chamber of five judges, selected so far as possible with due regard for the provisions of Article 9. In addition, two judges are selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases are to be heard and determined by this Chamber. In the absence of such demand, the full Court sits. In the Labour cases, the judges are to be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.[20] In the cases relating to transit and communications, "when desired by the parties or decided by the Court," the judges are to be assisted by four technical assessors sitting with them but without the right to vote.[21] In both classes of cases, recourse may always be had to the summary procedure provided for in Article 29, if the parties so request.[22] The special chambers provided for in the relevant articles are permitted, with the consent of the parties to the dispute, to sit elsewhere than at The Hague.[23]

With a view to the speedy despatch of business, the Court is to form annually a chamber composed of five judges who, at the request of the contesting parties, may hear and determine cases by summary procedure. In addition, two judges are to be selected for the purpose of replacing a judge who finds it impossible to sit.[24] The Court is to frame rules for regulating its procedure; and it is enjoined, in particular, to lay down rules for summary procedure.[25]

Judges of the nationality of each of the contesting parties preserve the right to sit in the case before the Court.[26] If the Court includes upon the bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge.[27] These provisions are said to be applicable to the case of Articles 26, 27 and 29. In such cases, the President is to request one or, if necessary, two

[20] Art. 26.

[21] Art. 27. The technical assessors for this class of cases are to be chosen for each particular case in accordance with rules of procedure under Art. 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations. *Id.*

According to Art. 26, the technical assessors for the Labour cases, are to be chosen for each particular case in accordance with rules of procedure under Art. 30 from a list of "Assessors for Labour Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. That Governing Body is to nominate "as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other treaties of peace." In Labour cases, it is declared that the International Office is to be at liberty to furnish the Court with all relevant information, and that for such purpose, the Director of that Office is to receive copies of all the written proceedings. *Id.*

[22] Arts. 26 and 27.

[23] Art. 28.

[24] Art. 29.

[25] Art. 30. The Rules of Court adopted March 11, 1936, are contained in Publications, Permanent Court of International Justice, Series D, No. 1 (3rd Edition), 28. See statement in Fifteenth Annual Report of the Court, June 15, 1939, Publications, Permanent Court of International Justice, Series E, No. 15, p. 32.

See in this connection Manley O. Hudson, *La Cour permanente de Justice internationale*, Paris, 1936.

[26] Art. 31.

[27] *Id.*, where it is declared that such person is to be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned and, failing such, or if they are unable to be present, to the judges specially appointed by the parties.[28]

(*b*)

§ 574. **Competence.** Only States or Members of the League of Nations can be parties in cases before the Court.[1] The Court is open to Members of the League and also to States mentioned in the Annex to the Covenant (which embraces mention of the United States).[2] The conditions under which the Court is to be open to other States is subject to the special provisions contained in treaties in force, to be laid down by the Council, but in no case are its provisions to place the parties in a position of inequality before the Court.[3] When a State which is not a Member of the League of Nations is a party to a dispute, the Court is to fix the amount which that party is to contribute towards the expenses of the Court.[4]

The jurisdiction of the Court comprises all cases which the parties refer to it, and all matters specially provided for in treaties and conventions in force.[5] The members of the League of Nations and the States mentioned in the Annex to the Covenant, may, either when signing or ratifying the Protocol to which the Statute is adjoined, or subsequently, declare that they recognize as compulsory *ipso facto* (*de plein droit*) and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes 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 reparation to be made for the breach of an international obligation.[6]

The Declaration referred to may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain

[28] *Id.* Should there be several parties in the same interest, they are, for the purpose of the provisions of the article, to be reckoned as one party only, any doubt upon the point being settled by the decision of the Court. *Id.* It is provided that judges selected "as laid down in paragraphs 2, 3 and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20 and 24 of this Statute. They shall take part in the decision on terms of complete equality with their colleagues." *Id.*

In Article 32, provision is made for the salaries, allowances and indemnities of the officers and members of the Court, and of the Registrar.

According to Article 33, the expenses of the Court are to be borne by the League of Nations, "in such a manner as shall be decided by the Assembly upon the proposal of the Council."

§ 574. [1] Art. 34. [2] Art. 35. [3] *Id.*

[4] *Id.* This provision does not apply if such State is bearing a share of the expenses of the Court.

[5] Art. 36.

[6] Art. 36. Herein is seen the so-called "Optional Clause" in pursuance of which, through appropriate declaration, it becomes possible to accept the jurisdiction of the Court as compulsory. For the text of the declaration which has become utilized for such a purpose, see Publications, Permanent Court of International Justice, Series D, No. 1, Third Edition (March 1936), p. 9; Hudson, Int. Legislation, No. 37 *b*.

time. In the event of a dispute whether the Court has jurisdiction, the matter is to be settled by its decision.[7]

The Court is to apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice, which is accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[8]

It is declared that this provision is not to prejudice the power of the Court to decide a case "*ex aequo et bono*" if the parties agree thereto.[9]

(*c*)

§ 575. **Procedure.** Certain provisions relating to procedure deserve attention. Cases are brought before the Court, as the case may be, either by notification of the special agreement or by a written application directed to the Registrar.[1] In either case, the subject of the dispute and the contesting parties are to be indicated.[2] The Registrar is forthwith to communicate the application to all concerned.[3] He is obliged also to notify the Members of the League of Nations through the Secretary-General, and also any States entitled to appear before the Court.[4]

The Court is given the important power to indicate, if it considers that the circumstances so require, "any provisional measures which ought to be taken to reserve the respective rights of either party"; and pending the final decision, notice of such measures is to be immediately given to the Parties and to the Council.[5]

The Parties are to be represented by agents; and the latter may have the assistance of counsel or advocates before the Court.[6]

[7] *Id.* According to Art. 37, when a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

[8] Art. 38.

[9] *Id.*

§ 575. [1] Art. 40.

[2] *Id.*

[3] *Id.*

[4] *Id.*

According to Art. 39, the official languages of the Court are French and English. If the parties agree that the case shall be conducted in French, the judgment is to be delivered in that language; if they agree that it shall be conducted in English, the judgment is to be delivered in that language. In the absence of an agreement as to which language is to be employed, each party may, in the pleadings, use the language which it prefers; and the decision of the Court is to be given in both French and English. In such case, the Court is to determine at the same time which of the two texts is to be considered as authoritative. It should be noted that the Court may, at the request of any party, authorize a language other than French or English to be used.

[5] Art. 41.

[6] Art. 42.

The procedure is said to consist of two parts: written and oral.[7] The hearing in Court is to be public, unless the Court decides otherwise, or unless the parties demand that the public be not admitted.[8]

The Court is to make orders for the conduct of the case, deciding the form and time in which each party must conclude its arguments; and it makes all arrangements connected with the taking of evidence.[9] Even before the hearing begins, the Court may call upon the agents to produce any document, or to supply any explanations; and formal note is to be taken of any refusal.[10] The Court is clothed with power at any time to entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.[11] During the hearing, any relevant questions may be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.[12] After the Court has received the proofs and evidence within the time specified therefor, it may refuse to accept any further oral or written evidence that one party may desire to present, unless the other side consents.[13] Whenever one of the parties does not appear before the Court, or fails to defend its case, the other Party may call upon the Court "to decide in favour of his claim." [14] When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President is to declare the hearing closed.[15] The Court withdraws to consider the judgment; and its deliberations take place in private and remain secret.[16] All questions are to be decided by a majority of the judges present at the hearing; and in the event of an equality of votes, the President or his deputy shall have a casting vote.[17] The judgment is to state the reasons on which it is based, containing the names of the judges taking part

[7] Art. 43.

The written proceedings consist of the communication to the judges and to the parties of statements of cases, counter-cases and, if necessary, replies; also all papers and documents in support thereof. These communications are made through the Registrar, in the order and within the time fixed by the Court. Art. 43. Observe parallel provisions of Art. LXIII of the Hague Convention of 1907, Malloy's Treaties, II, 2239.

The oral proceedings consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates. Art. 43.

A certified copy of every document produced by one party is to be communicated to the other party. Art. 43.

For the service of all notices upon persons other than the agents, counsel and advocates, the Court applies direct to the Government upon whose territory the notice has to be served. The same provision is made applicable whenever steps are taken to procure evidence on the spot. Art. 44.

Appropriate provision is made for the direction of the proceedings by the President, or in his absence, by the Vice-President, or in the absence of both, by the senior judge. Art. 45.

[8] Art. 46.

According to Art. 47, minutes are to be made at each hearing and signed by the Registrar and the President; and such minutes are to be the only authentic record.

[9] Art. 48. [10] Art. 49. [11] Art. 50. [12] Art. 51. [13] Art. 52.

[14] Art. 53, where it is added that the Court, before doing so, is to satisfy itself not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and in law.

[15] Art. 54.

[16] *Id.*

[17] Art. 55. It will be recalled that in the Case of the S.S. "Lotus," constituting the Ninth Judgment of the Court, the judges were evenly divided; and the President utilized his authority to make the casting vote. See Publications, Permanent Court of International Justice, Series A, No. 10.

therein.[18] If the judgment does not represent in whole or in part the unanimous opinion of the judges, the dissenting judges are entitled to deliver separate opinions.[19] The judgment is to be signed by the President and by the Registrar; it is to be read in open Court, due notice having been given to the agents.[20] The decision has no binding force except as between the parties and in respect to the particular case.[21] The judgment is said to be final and without appeal; in the event of dispute as to its meaning or scope, the Court is to construe the judgment at the request of any party.[22]

Application for revision of a judgment can be made only when "based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence." [23] Proceedings for revision are to be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision and declaring the application admissible on such ground.[24] The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.[25] When a State considers that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party; and the Court is authorized to decide upon the request.[26] Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar is to notify all such States forthwith; and every State so notified enjoys the right to intervene in the proceedings. If it makes use thereof, the construction given by the judgment will be equally binding upon it.[27]

(*d*)

§ 575A. **Advisory Opinions.** The Statute makes elaborate provision for the rendering by the Court of Advisory Opinions. Questions upon which the advisory opinion of the Court is asked are to be laid before it by means of a written request, signed either by the President of the Assembly, or the President of the Council of the League of Nations, or by the Secretary-General of the League, under instructions from the Assembly or the Council.[1] The Registrar is forthwith to give notice of the request for such opinion to the Members of the League, through the Secretary-General thereof, and to any States entitled to

[18] Art. 56. [19] Art. 57. [20] Art. 58. [21] Art. 59. [22] Art. 60.

[23] Art. 61. *Cf.* provisions of Art. LXXXIII of the Hague Convention of 1907 for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2242.

[24] Art. 61.

[25] *Id.* It is here also provided that application for revision is to be made at the latest within six months of the discovery of the new fact; and that no such application may be made after the lapse of ten years "from the date of the sentence."

[26] Art. 62.

[27] Art. 63.

According to Art. 64, unless otherwise decided by the Court, each party is to bear its own costs.

§ 575A. [1] Art. 65. The request is to contain an exact statement of the question upon which an opinion is required, and is to be accompanied by all documents likely to throw light upon the question. *Id.*

appear before the Court.[2] The Registrar is also, by means of a special and direct communication, to "notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question." [3] Members, States and organizations having presented written or oral statements or both are permitted to comment on the statements made by other Members, States or organizations in the form, to the extent and within the time limits which the Court, or should it not be sitting, the President, may decide in each particular case.[4] The Court is to deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States, and of international organizations immediately concerned.[5]

In the exercise of its advisory functions the Court is further to be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.[6]

(*e*)

§ 576. **The Place of the Court in the International Society.** The Permanent Court of International Justice is of great significance in the life of the international society; first, as a means by which States at variance, in virtue of the Optional Clause or other appropriate arrangements making recourse thereto obligatory, may automatically be assured of an adjudication growing out of controversies within a vast field; and secondly, as an enunciator of international law and as an interpreter of treaties. Despite its failure to adhere to the protocol of December 16, 1920, even through the medium of the special protocol whereby in 1929, Mr. Elihu Root and his associates endeavored to simplify that achievement,[1] the United States is profoundly interested in the conduct of the Court

[2] Art. 66.
See Démètre Négulesco, *L'Évolution de la Procédure des Avis Consultatifs de la Cour Permanente de Justice Internationale, Recueil des Cours,* 1936, III, 1.

[3] *Id.,* where it is also provided that "should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide."

[4] Art. 66. Accordingly, the Registrar is in due time to communicate any such written statements to Members, States and organizations having submitted similar statements. *Id.*

[5] Art. 67.

[6] Art. 68.

§ 576. [1] On Feb. 17, 1923, Secretary Hughes recommended to the President that he request the Senate to advise and consent to the adhesion by the United States to the protocol of Dec. 16, 1920, accepting the adjoined Statute of the Court (but not the Optional Clause) upon four "conditions and understandings to be made a part of the instrument of adhesion" which he laid down. (*Cong. Rec.* 67 Cong., 4 Sess., Vol. LXIV, 4499, *Am. J.,* XVII, 332. See, also, Secretary Hughes' letter to the President, of March 1, 1923, *Cong. Rec.,* March 2, 1923, Vol. LXIV, 5067, *Am. J.,* XVII, 339.) On Feb. 24, 1923, the President followed the recommendation. By a resolution of Jan. 16 (calendar day, Jan. 27), 1926, the Senate advised and consented to the adherence of the United States to the protocol of Dec. 16, 1920 in the following terms that modified and expanded those recommended by Secre-

as such an enunciator and interpreter. That interest is accentuated by the conspicuous part taken by Mr. Root as a member of the Advisory Committee of Jurists of 1920, in drafting the plan for the establishment of the Court, which in

---

tary Hughes in 1923: "1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles. 2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies. 3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States. 4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States. 5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." (Senate Resolution 5, 69 Cong., 1 Sess., *Cong. Rec.*, Vol. LXVII, 2825; *Am. J.*, XX, *Official Documents*, 73.) Secretary Kellogg duly communicated "to the representative of each of the Governments of the Powers signatories of the Protocol" information concerning the action of the Senate, asking to be informed whether those Governments would accept the conditions, reservations and understandings contained in the Senate's resolutions as a part and condition of the adherence of the United States to the Protocol and Statute; and he made known these facts to the Secretary-General of the League of Nations, informing him that the signature of the United States would not be affixed to the Protocol until the Governments of the Powers signatory thereto should have signified in writing to his Government their acceptance of the Senate's requirements as a part of and condition to the adherence by the United States to the Protocol and Statute. (League of Nations, *Official Journal*, 1926, 628, 629.) In pursuance of a resolution of the Council of the League, there convened at Geneva in 1926, a Conference of States signatories of the Protocol (in which the Government of the United States felt that it could not well participate), which endeavored to study ways in which the American reservations and conditions might be satisfied. In its Final Act the Conference suggested the conclusion with the United States of a Special Protocol and presented a preliminary draft of such an instrument. (Minutes of the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, Sept. 1–23, 1926, Publications, League of Nations, Legal, 1926, V. 26, pp. 74–79.) "The recommendations of the Conference were not received with favor by the Government of the United States, and for more than two years the negotiations were not pursued." (Manley O. Hudson, The Permanent Court of International Justice, 1934, § 233.) On Feb. 19, 1929, Secretary Kellogg suggested to the Secretary-General of the League of Nations that an informal exchange of views such as had been suggested by the Governments participating in the 1926 Conference might lead to an agreement that would protect the rights and interests of the United States as an "adherent to the Court Statute." (League of Nations, Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes of the Session at Geneva, March 11–19, 1929, League of Nations Publication, Legal, 1929. V. 5, p. 96.) There resulted a conference at Geneva of a Committee of Jurists in March, 1929, of which Mr. Elihu Root was a member and at which he proposed a protocol designed to effect the desired accord, in special relation to satisfying the latter portion of the Senate's fifth reservation. "Mr. Root's plan was fully formulated before he arrived in Geneva in March, 1929, and its fundamental purpose and nature had been discussed by him with various official persons in Washington before he sailed from the United States. The plan was discussed by the committee and various changes in detail were made, although the substance of it was not altered in the slightest. The protocol received the approval of this committee of experts and was eventually put into treaty form after receiving the further approval of a second conference of the Signatory States held at Geneva in September, 1929." (P. C. Jessup, who was Mr. Root's Secretary at the Conference, in *International Conciliation*, October, 1931, No. 273, 598.) On Dec. 9, 1929, there was signed in behalf of the United States (1) the protocol of signature of the Statute of the Court, (2) the protocol of accession of the United States to the protocol of signature of the Statute of the Court, and (3) the protocol of revision of the Statute of the Court. (Dept. of State Press Releases, Dec. 14, 1929, 102, embracing correspondence between the President and the Secretary of State, 103–112.) It was not until Jan. 29, 1935, that the Senate took final action in relation to the matter, on which date a

its amended form became the Statute thereof, and also by the fact that no less than four eminent citizens of the United States have thus far been members of the Tribunal.[2] Their membership thereon causes the Court to become an institution which, in American opinion, is something that is not foreign to the United States, and in whose achievements a distinctively American part is being and remains to be played.

It seems needless to dwell upon the obvious availability and efficacy of the Court as an instrument through which international justice is within the reach of an aggrieved State.

The life of the Court is as yet too brief to indicate the extent to which States may in the years to come be disposed to invoke its aid; the relatively few cases in which it has thus far found occasion to render judgments or advisory opinions are not to be taken as indicative of what the future may bring. Nor is it possible as yet to estimate what hereafter may be the effect of its view of its own functions upon its influence in the development of international law. In another place examination is made of the method by which the Court has undertaken to interpret treaties; [3] and from that examination is disclosed the fact that its most illuminating, and what may in time prove to be the most influential, contributions have found expression in one or more of the dissenting opinions that have been rendered.[4] If there has been reason to regret that the Court has in certain instances deemed itself to be clothed with the jurisdiction that it exercised for purposes of adjudication,[5] there has been reason also for gratification that the Court has found occasion to refuse to render an advisory opinion in a case where, according to its view, such a service would have amounted to a decision on the merits of the case without the consent of an interested party.[6]

It is believed that generally, the growth of confidence in the integrity and usefulness of the Court, if resuscitated after the present war, as a dispenser of international justice will be dependent upon its success in creating the conviction that its function is to expound or mirror the law by faithful portrayal of its requirements as they are molded by the practices and conventions of States, rather than to make the law as though it held the mandate of the international

---

resolution from the Committee on Foreign Relations that the Senate advise and consent to the acceptance by the United States of these instruments was defeated. (*Cong. Rec.*, Jan. 29, 1935, Vol. LXXIX, 1146.) See also statement in Hackworth, Dig., V, § 483, and documents there cited.

See, in this connection, P. C. Jessup, The United States and the Permanent Court of International Justice, *International Conciliation*, October, 1931, No. 273; Manley O. Hudson, The Permanent Court of International Justice, 1934, Chap. 10; same writer, "The United States Senate and the World Court," *Am. J.*, XXIX (1935), 301.

[2] Their names are John Bassett Moore, Charles E. Hughes, Frank P. Kellogg and Manley O. Hudson.

[3] See The Interpretation of Treaties by the Permanent Court of International Justice, *supra*, §§ 533F–533H.

[4] See, for example, dissenting opinion of Judge Anzilotti in the Case concerning the Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Publications, Permanent Court of International Justice, Series A/B, No. 50, 383.

[5] See dissenting opinions of Lord Finlay and Messrs. Moore, de Bustamante, Oda and Pessôa, in the Second Judgment in the Case of the Mavrommatis Palestine Concessions, Publications, Permanent Court of International Justice, Series A, No. 2.

[6] See Fifth Advisory Opinion in the Case concerning Eastern Carelia, Publications, Permanent Court of International Justice, Series B, No. 5, 27–29.

society to legislate in its behalf.[7] Upon that achievement, as much as upon any other consideration, may be expected to depend the ultimate willingness of the United States to adhere to the Protocol of the Statute.

(7)

POWERS AND FUNCTIONS OF ARBITRAL TRIBUNALS

(*a*)

**§ 577. Limitations of the Powers of Arbitrators.** The extent of the powers of a court of arbitration is determined by and depends upon the agreement or *compromis* providing for the arbitration.[1] Secretary Bayard was correct in declaring in 1877, that an arbitrator should not assume to decide any question other than that submitted to him by the States seeking his judgment, or take cognizance of any collateral issues between either of them and a third State, which was not expressly submitted to him by the States directly concerned.[2]

The agreement to arbitrate should be interpreted as any other, and no special rules should be permitted to obscure the effort to ascertain and be guided by the evidence both external and internal to the text that may be indicative of the design of the parties.[3] Differences of opinion are bound to arise concerning the scope of powers assigned to arbitral tribunals, but that fact is obviously indecisive of the method by which the controversy should be settled, and points to no technical requirement to be satisfied in the solution of it.

States at variance are free to clothe a court with whatever authority is deemed expedient.[4] The agreement to arbitrate may, for example, authorize a tribunal

[7] Declared Mr. Charles E. Hughes in an address on "The World Court as a Going Concern," delivered before the Association of the Bar of the City of New York, Jan. 16, 1930, shortly before his resignation as a Judge of the Permanent Court of International Justice: "If there is a dispute as to a question of international law, and the Court finds that there is no international law on the subject, it says so. It is not its function to create rules of international law. It explores, hears arguments and determines whether there is a rule of international law applicable to a given case. Its decisions on such questions expound and clarify international law. The law thus develops in a normal way by the unfolding of its accepted principles in their application to particular disputes. But the Court does not assume the function of a legislature. The Court is naturally very cautious in this part of its work; an international court would not long survive that took to itself the legislative function or the making of law for States." (*Am. Bar Ass. Jour.*, XVI, 151, 153.)

§ 577. [1] See, for example, Parker, Umpire, in opinion in the Lusitania Cases, 1923, Mixed Claims Commission, United States and Germany, Agreement of Aug. 10, 1922, 1925 Vol., 17, 31; Plumley, Umpire, in Case of French Company of Venezuelan Railroads, Ralston's Report of French-Venezuelan Mixed Claims Commission of 1902, 367, 444.

[2] Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, July 23, 1887, MS. Notes to Colombia, VII, 125, Moore, Dig., VII, 30.

Similarly, the powers of domestic commissions established by Acts of Congress, to adjudicate upon claims of citizens against foreign States, and for which the United States has by treaty assumed an obligation to make satisfaction, are limited by the terms of the legislative enactments establishing the tribunals. Comegys *v.* Vasse, 1 Pet. 193, 212–213, Moore, Dig., VII, 30; Frevall *v.* Bache, 14 Pet. 95, Moore, Dig., VII, 30.

[3] See The Interpretation of Treaties, The Nature of the Problem, *supra*, § 530; So-Called Rules of Construction, *supra*, § 535.

[4] For constitutional reasons a government may deem itself restricted as to the mode of its agreement conferring certain judicial powers upon an arbitral tribunal, such as the issuance of commissions for taking testimony. See Report of Mr. Bayard, Secy. of State, to the President, in the cases of Pelletier and Lazare, Jan. 20, 1887, For. Rel. 1887, 593, 608, Moore, Dig., VII, 32–33, also, Moore, Arbitrations, II, 1752–1756. Similarly, it may doubt its constitu-

to decide whether a national of a contracting party has been subjected by another to treatment that is at variance with the requirements of international law, even though he may not have exhausted a local judicial remedy available to him; [5] it may prescribe rules by which the propriety of the conduct of the respondent State is to be tested,[6] as well as the theory on which damages are to be awarded; [7] it may make provision with respect to the character and form of evidence that is to be received; [8] it may clothe the court with authority to lay down rules of procedure; [9] and also to offer recommendations to the States at variance concerning their subsequent conduct in relation to the matter involved.[10] Abundant material reveals the extent to which contracting States have employed the agreement to arbitrate to register their design in such respect.

That an arbitral tribunal has power, even in the absence of express agreement between the parties to the controversy, to determine questions with respect to its own jurisdiction, appears now to be accepted doctrine,[11] and is acknowledged to be such by the Permanent Court of International Justice.[12] This signifies, in a word, that the habit of permitting such a body to pass upon the scope and nature of its own jurisdiction has become sufficiently widespread and notorious to justify the implication that any restriction of the exercise of this particular

---

tional power to yield to an arbitral tribunal the right to pass upon or review decisions of a domestic court of last resort. See Agreements to Refer Differences to International Judicial Tribunals or Commissions, *supra*, § 504.

[5] See, for example, award of Hon. Wm. R. Day, Arbitrator in the case of the claims of John D. Metzger & Co. *v.* Hayti, under protocol of Oct. 18, 1899, For. Rel. 1901, 262, 275, Moore, Dig., VII, 31–32. For the text of the protocol, see Malloy's Treaties, I, 936.

[6] See, for example, the Neutrality Rules, contained in Art. VI of the Treaty of Washington of May 8, 1871, Malloy's Treaties, I, 703.

[7] See Art. II of Special Claims Commission between the United States and Mexico, of Sept. 10, 1923, U. S. Treaty Vol. IV, 4446.

See, also, Art. V of treaty between Guatemala and Honduras of July 16, 1930, providing for the arbitration of their boundary dispute, through which it was agreed that while the only juridical line which could be established between the territories of the contracting countries was "that of the *uti possidetis* of 1821," which the arbitral tribunal should endeavor to determine, if the tribunal should find that one or both parties in their subsequent development had established, beyond that line, interests which should be taken into account in establishing the definitive boundary, the tribunal should modify as it might see fit the line of the *uti possidetis* of 1821, and fix the territorial or other compensation which it might deem just that either party should pay to the other. In its Opinion and Award of Jan. 23, 1933, the tribunal indicated the extent to which it availed itself of such authority.

[8] See Art. II of claims convention between the United States and Mexico of July 4, 1868, Malloy's Treaties, I, 1129.

[9] See Art. III of General Claims Convention between the United States and Mexico of Sept. 8, 1923, U. S. Treaty Vol. IV, 4442; also, Art. IV of Special Claims Convention, between the same parties, of Sept. 10, 1923, U. S. Treaty Vol. IV, 4446. See, in this connection, A. H. Feller, The Mexican Claims Commissions, 1923–1934, New York, 1935, § 201.

[10] See Art. IV of Special Agreement between the United States and Great Britain submitting to Arbitration the North Atlantic Coast Fisheries, Malloy's Treaties, I, 838.

[11] See controversy among commissioners under Art. VII of the Jay Treaty, and the view of the Lord Chancellor Loughborough thereon, Moore, Arbitrations, 324–327; *id.*, 2290–2310; declaration of the Geneva tribunal, under Arts. I–IX, of the Treaty of Washington, May 8, 1871, with respect to "indirect claims," *id.*, 646–647; Mr. Olney, Secy. of State, to Mr. Gana, Chilean Minister, June 28, 1895, For. Rel. 1895, I, 83, Moore, Dig., VII, 34.

See, also, § 1 of "Terms of Submission" agreed upon July 6, 1911, with respect to the special agreement of Aug. 18, 1910, providing for the British-American Pecuniary Claims Arbitration, U. S. Treaty Vol. III, 2619.

[12] See Advisory Opinion No. 16 interpretative of the Greco-Turkish Agreement of Dec. 1, 1926 (Final Protocol, Art. IV), Publications, Permanent Court of International Justice, Series B, No. 16, 20.

function must express itself in convincing evidence of an opposing design.

That an award may be rendered by a majority of the members of an arbitral tribunal has long been the view of publicists,[13] and in practice has been accepted by the United States.[14] At the present time the *compromis* commonly makes express acknowledgment of this principle,[15] or covers it by adopting the chapter on arbitral procedure of the Hague Convention for the Pacific Settlement of International Disputes.[16]

(*b*)

§ 578. **Cessation or Absence of Arbitral Functions.** Upon the rendition of its award a court of arbitration is said to become *functus officio,* and thereafter to be unable to re-open the case or re-consider its decision.[1] This conclusion may be attributable to the circumstance that such rendition may betoken or be coincident in point of time with the last act which the tribunal feels itself

[13] Lord Salisbury, British Foreign Secretary, to Mr. Welsh, American Minister to Great Britain, Nov. 7, 1878, For. Rel. 1878, 316, Moore, Dig., VII, 37.

Declares Prof. Moore: "If, by general international practice, based on the authority of international law, the concurrence of a majority of a board of arbitrators is sufficient for a decision, the natural inference would be that the United States and Great Britain, in their dealings with each other or with other powers, as independent nations, intended to observe that practice, unless they expressly agreed to disregard it." Dig., VII, 38, with reference to the view of Hon. George F. Edmunds in *North Am. Rev.,* CXXVIII, 1, maintaining unanimity to be essential to the validity of the award of the Halifax Commission, under Arts. XVIII–XXV of the Treaty of Washington of May 8, 1871.

[14] Moore, Arbitrations, I, 10–12, and 751, note, showing the position of the United States concerning the decision by a majority of the commissioners under Art. V of the Jay Treaty of Nov. 19, 1794.

Notwithstanding his argument, submitted to the British Government, and based upon the treaty of Washington, that unanimity was essential for a valid award by the Halifax Commission, Mr. Evarts, Secy. of State, in 1878 declared that the Government of the United States would "regard the maintenance of entire good faith and mutual respect in all dealings, under the beneficent Treaty of Washington, as of paramount concern, and would not assume to press its own interpretations of the treaty on this point against the deliberate interpretation of Her Majesty's Government to the contrary." (Moore, Dig., VII, 37, *citing* communication of Mr. Evarts, Secy. of State, to Mr. Welsh, Minister to Great Britain, Sept. 27, 1878, For. Rel. 1878, 290, 307–308.)

See, also Colombia *v.* Cauca Co., 190 U. S. 524, 528, Moore, Dig., VII, 38.

[15] Art. II of protocol between the United States and Mexico, May 22, 1902, for the arbitration of the Pious Fund Case, Malloy's Treaties, I, 1195; Art. IV of agreement between the United States and Norway for the submission to arbitration of certain claims of Norwegian subjects, June 30, 1921, U. S. Treaty Vol. III, 2751.

[16] See, for example, Art. XI of claims protocol between the United States and Venezuela, Feb. 13, 1909, providing for the arbitration of the Orinoco Steamship Company Case, Malloy's Treaties, II, 1886.

It will be recalled that according to Art. 55 of the Statute of the Permanent Court of International Justice, all questions are to be decided by a majority of the judges present at the hearing. See *supra,* § 575.

§ 578. [1] Mr. Strong, Arbitrator in the Cases of Pelletier and Lazare, under protocol between the United States and Haiti, of May 28, 1884, to Mr. Preston, Haitian Minister, Feb. 18, 1886, S. Ex. Doc. 64, 49 Cong., 2 Sess., 43, Moore, Dig., VII, 41; Mr. Sherman, Secy. of State, to Mr. Rengifo, Colombian Chargé, May 5, 1897, For. Rel. 1898, 250, Moore, Dig., VII, 43; Count Lewenhaupt, umpire, Spanish-American Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2192. Count Lewenhaupt intimated that, according to the terms of that agreement, the umpire might have power to decide a petition for rehearing, if certified to him by the arbitrators of both the United States and Spain.

See, in this connection, Eighth Advisory Opinion of the Permanent Court of International Justice regarding the delimitation of the Polish-Czechoslovakian Frontier (question of Jaworzina), Publications, Permanent Court of International Justice, Series B, No. 8, 37 and 38.

obliged to perform and upon the commission of which its own life is seemingly ended. The tribunal may, nevertheless, without lack of deference for the design of the contracting parties, defer the taking of the last step that shall cause the termination of its life, by declining to permit the rendition of its award to be final or unsusceptible to change until it shall have had opportunity to revise or correct or even interpret its own achievement.[2] The extent of what a court of arbitration may do in this regard, during the continuance of its life as such, yet after the rendition of its award, must of course depend upon the terms of the *compromis;*[3] it raises a question of which the solution is not found in implications derived from situations where a tribunal has in fact become *functus officio.* It may be contended that where the agreement to arbitrate provides for the establishment of a court which is to adjudicate with respect to a large group of cases and for a protracted period of time, authority is by implication conferred to exercise a measure of control over cases in which an award has been rendered even after the occurrence of that event, and within a limited period of time such as may be fixed by the tribunal under the rules thereof, as a possible incident of such power as may have been given it to prescribe rules for its procedure.[4]

A member of a claims commission can not, by retiring therefrom, after extended participation in its work, render that body *functus officio* and so deprive it of the power to decide the questions at issue.[5]

In general, however, in order to preserve as well as acquire a right to obtain a re-hearing, it is desirable that appropriate provision be made in the *compromis* both to prevent the cessation of the arbitral function until the expiration of a specified period of time after the rendition of an award, and to confer requisite authority upon the tribunal during that period to cause the finality of an award and the judicial control thereof to be subject to the condition subsequent that opportunity for re-hearing on such grounds and within such periods of time as are agreed upon shall have not been utilized, or shall have been utilized in vain.[6]

[2] See Mr. Stewart, Arbitrator for the United States, in case of Young, Smith & Company, Spanish Claims Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2186.

[3] See Sir Edward Thornton, Umpire, in Benj. Weil Case, American-Mexican Claims Commission, under convention of July 4, 1868, Moore, Arbitrations, II, 1329.

[4] See section XI, par. 6 of Rules of Procedure adopted Sept. 4, 1924 by General Claims Commission, United States and Mexico, under convention of Sept. 8, 1923, Dept. of State Publication, 1925, according to which: "Upon the application of either agent made within sixty days after the rendition of an award, and after giving the other agent an opportunity to be heard, the Commission may interpret or rectify a judgment which is obscure or incomplete or contradictory or which contains any error in expression or calculation." As illustrative of the exercise of the power, see W. H. Faulkner Case, Opinions of Commissioners, 1927 Vol., 193.

[5] "I concur in the views expressed by the American Commissioner to the effect that the withdrawal of the German Commissioner, after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented, did not oust the jurisdiction of the Commission." (Decision of Roberts, Umpire, June 15, 1939, in Black Tom and Kingsland Cases, Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims Handed down June 15, 1939, and Oct. 30, 1939, 310.) See also opinion of the American Commissioner, *id.,* 10–21.

[6] See provisions for the demanding of a revision of the award set forth in Art. X of special agreement between the United States and Great Britain of Jan. 27, 1909, providing for the arbitration of the North Atlantic Coast Fisheries, Malloy's Treaties, I, 840; Art. XIII of protocol between the United States and Mexico for the adjustment by arbitration of the

It should be acknowledged that an arbitral tribunal lacks the power to review the decisions of precedent umpires or tribunals, or to amend or interpret the same,[7] except where an adjudication of such matters is made the subject of a new submission by agreement between the parties.[8]

(8)

§ 579. **Payment and Distribution of Awards.** If the arbitration contemplates the award of a pecuniary indemnity, the *compromis* should specify whether payment is to be made to the government of the successful party or to the individual claimant (in case private claims are the subject of adjudication).[1] It should indicate likewise the form of currency in which payment is to be made; [2] as well as the time of payment.[3]

---

Pious Fund Claims of May 22, 1902, Malloy's Treaties, I, 1198. It should be noted that the arrangement was in pursuance of Art. LV of the Hague Convention of 1899 for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2029.

See Art. LXXXIII of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, *id.*, II, 2242.

[7] See Mr. Sherman, Secy. of State, to Mr. Rengifo, Colombian Chargé d'Affaires, Jan. 12, 1898, concerning the attitude of the United States respecting the reconsideration of the award of President Cleveland, March 2, 1897 (the day before the expiration of his term of office as President), as arbitrator in the Cerruti Case, under protocol between Italy and Colombia of Aug. 18, 1894, For. Rel. 1898, 270, Moore, Dig., VII, 45. For the text of the award, see *Am. J.*, VI, 1015. For the text of the award of the later Arbitral Commission under *compromis* of Oct. 28, 1909, *id.*, VI, 1018. See, also, Editorial Comment, *id.*, VI, 965, and documents and commentaries there cited.

See, also, decision of Baron Blanc, umpire, Spanish-American Commission, under agreement of Feb. 11–12, 1871, in case of L. A. Price, No. 6, Moore, Arbitrations, III, 2189; opinion of Mr. Stewart, American Arbitrator, same commission, in case of Young, Smith & Co., No. 96, *id.*, 2186.

[8] For such an agreement, see claims protocol with Venezuela, Feb. 13, 1909, providing for the arbitration of the Orinoco Steamship Company Case, Malloy's Treaties, II, 1881.

§ 579. [1] According to Art. VII of the Jay Treaty of Nov. 19, 1794, payment was to be made to the claimants, and "in specie without any deduction." Malloy's Treaties, I, 596. See, also, Arts. IV and V, claims convention with Peru, Jan. 12, 1863, *id.*, II, 1409. More commonly it is provided that payment shall be made to the government of the nationals in whose favor sums are awarded. See, for example, Art. IV, claims convention with Mexico, July 4, 1868, *id.*, I, 1130; Art. VIII, agreement with Great Britain for the arbitration of pecuniary claims, Aug. 18, 1910, U. S. Treaty Vol. III, 2621.

[2] Thus Art. IX of the claims protocol with Venezuela, Feb. 13, 1909, provided that payment should be "In gold coin of the United States of America, or in its equivalent in Venezuelan money," Malloy's Treaties, II, 1886.

See Moore, Dig., VII, 51, and Moore, Arbitrations, II, 1644–1645, 1649, respecting the issue concerning the medium of payment of the sum awarded S. G. Montano, a Peruvian citizen, by the umpire of the mixed commission under convention with Peru of Jan. 12, 1863, and the decision of the mixed commission under convention of Dec. 4, 1868.

According to Art. X of the protocol with Mexico of May 22, 1902, for the arbitration of the Pious Fund Case, there was referred to the arbitral tribunal the determination of the currency in which an award against Mexico should be payable. Malloy's Treaties, I, 1198. See Ralston, revised ed., p. 51, note 49. Concerning the award see Rule of *Res judicata, infra*, § 581.

[3] Thus, for example, Art. VIII of the agreement with Great Britain, Aug. 18, 1910, for the arbitration of pecuniary claims, provided for payment within eighteen months after the date of the final award. U. S. Treaty Vol. III, 2621.

TESTIMONIAL AND EXPENSES. "It is customary to present to arbitrators some testimonial, either in the form of plate or other token, or in money. Where the arbitrator is head of a state, the only acknowledgment given of his services is an expression of thanks, and the more substantial testimonial, whatever it may be, is bestowed upon the persons to whom he may have delegated the discharge of certain functions, such as the examination of documents, and perhaps the making of a report.

"The expenses of the arbitration are usually borne by the parties in equal proportion,

Reference in the *compromis* to a monetary standard, according to which payment is to be made, serves to fix the test of equivalents and thereby to minimize uncertainty of the value of an award at the time of the rendition thereof. According to Article IX of the General Claims Convention between the United States and Mexico of September 8, 1923: [4]

> The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country and the balance shall be paid at Washington or at the City of Mexico, in gold coin or its equivalent to the Government of the country in favor of whose citizens the greater amount may have been awarded.
>
> In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made, as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant.[5]

It is perhaps unnecessary that the agreement to arbitrate should prescribe the currency in which the terms of an award are to be expressed, even though it be highly important that the amount thereof be fixed with precision and set forth

---

but each side pays its own agent and counsel, as well as its own individual expenses, such as the printing of its case, documents, and proofs." (Moore, Dig., VII, 50.) See Art. X of General Claims Commission, United States and Mexico, Sept. 8, 1923, U. S. Treaty Vol. IV, 4441, 4444.

Declared Chief Justice Taft in his opinion and award of Oct. 18, 1923, as Sole Arbitrator in the arbitration between Great Britain and Costa Rica: "So far as the payment of the expenses of the arbitration is concerned, I know of none for me to fix. Personally, it gives me pleasure to contribute my service in the consideration, discussion and decision of the questions presented. I am glad to have the opportunity of manifesting my intense interest in the promotion of the judicial settlement of international disputes, and accept as full reward for any service I may have rendered, the honor of being chosen to decide these important issues between the high contracting parties." (*Am. J.*, XVIII, 147, 174.)

The Department of State has declared that "it would not comport with the dignity of the American diplomatic service nor be a wise precedent to establish to permit a party interested in an arbitration before an American diplomatic officer to remunerate him for the discharge of his duties in any capacity whatever." (Mr. Wilson, Acting Secy. of State, to Mr. Fox, Minister to Ecuador, Dec. 3, 1909, For. Rel. 1909, 246.)

[4] U. S. Treaty Vol. IV, 4441, 4444.

[5] According to the same article: "In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property or right shall be paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately."

According to Art. IX of the Special Claims Convention between the United States and Mexico of September 10, 1923 (U. S. Treaty Vol. IV, 4445): "The total amount awarded to claimants shall be paid in gold coin or its equivalent by the Mexican Government to the Government of the United States at Washington."

See, also, Art. VIII of Claims Convention between the United States and Panama of July 28, 1926, U. S. Treaty Vol. IV, 4546, 4550, as amended by Art. II of Claims Convention of Dec. 17, 1932, U. S. Treaty Vol. IV, 4552.

in terms that leave no room for doubt as to the extent of the fiscal burden imposed upon the respondent.[6]

The mode of distribution to private claimants of an award paid to the government of the successful party is a matter of domestic concern.[7]

(9)

§ 580. **Barring of Unpresented Claims.** "It is usual in general claims conventions to insert a stipulation expressly barring all claims, falling within the jurisdiction of the tribunal, which were not presented to it."[1] Thus, for example, Article II of the agreement with Great Britain of August 18, 1910, for the arbitration of pecuniary claims, provided that all claims outstanding between the two governments at the date of the signature of the agreement, and originating in circumstances or transactions anterior to that date, whether submitted to arbitration or not, should thereafter be barred, unless reserved by either party for further examination in accordance with the previous article.[2]

According to Article VIII of the General Claims Convention between the United States and Mexico of September 8, 1923,[3] the parties agreed to consider the decision of the Commission to be established under the convention as final and conclusive upon each claim decided, and to give full effect to such decision, and also to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the convention (except as to claims arising from revolutionary disturbances and referred to in the preamble thereof). The parties further agreed "that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission shall from and after the conclusion of the proceedings of the Commission be considered and treated as fully settled, barred and

---

[6] Declared the General Claims Commission, United States and Mexico, under convention of Sept. 8, 1923, in the case of Peerless Motor Car Company: "The Commission renders the award [of $11,465.50 together with interest thereon at the rate of 6 per cent. from Oct. 15, 1913, to the date on which the award was rendered] in the currency of the United States conformably to its practice in other cases of making all awards in a single currency, having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which it appears the two Governments also had in mind in framing the first paragraph of Article IX of the Convention of September 8, 1923, with respect to the payment of the balance therein mentioned 'in gold coin or its equivalent.'" (Opinions of Commissioners, 1927 Vol., 303, 305.)

See, in this connection, A. H. Feller, The Mexican Claims Conventions, 1923–1934, § 279.

[7] Respecting the distribution of the Geneva award through the medium of "Alabama" Claims Courts, see Moore, Arbitrations, V, 4639–4685.

As to the adjudication of conflicting claims to an award, see cases cited in Moore, Dig., VII, 51–52.

See Opinion by J. R. Clark, Jr., Solicitor for Dept. of State, Aug. 14, 1912, on the Distribution of Alsop Award by the Secretary of State, Washington, 1912.

§ 580. [1] Moore, Dig., VII, 52. "It has been held, with practical uniformity, that where a treaty provides a tribunal for the settlement of claims, and stipulates that all claims not presented to it shall be finally barred, this part of the treaty is no less obligatory than the rest, and that it precludes the two governments from renewing the claims thus barred, instead of merely giving them an option to decline to pay them." (*Id.*, VII, 53.) *Compare* Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Jan. 26, 1886, MS. Inst. Mexico, XXI, 427, Moore, Dig., VII, 52.

[2] U. S. Treaty Vol. III, 2620. See, also, Art. V, claims convention with Mexico, July 4, 1868, Malloy's Treaties, I, 1131; Mr. Rives, Assist. Secy. of State, to Mr. Gregg, May 12, 1888, 168 MS. Dom. Let. 359, Moore, Dig., VII, 54.

[3] U. S. Treaty Vol. IV, 4441, 4443.

thenceforth inadmissible, provided the claim filed has been heard and decided." [4]

If the agreement to arbitrate makes no provision for the barring of unpresented claims,[5] or if the tribunal declares a particular claim or class of claims to be outside of its jurisdiction, the matter remains a proper subject for diplomatic treatment.[6] In a word, if the opposing States have neither agreed to, nor succeeded in obtaining opportunity for, an arbitral adjudication, the government of the claimant is not without the right to make renewed effort to obtain redress.

(10)

FINALITY OF AWARDS

(*a*)

§ 581. **Rule of *Res Judicata*. Rehearings and Revisions.** The rule of *res judicata* is applied to the awards of arbitral courts. The decision of an international tribunal over matters as to which it is made the supreme arbiter is said to be final, and not the subject of revision, except by the consent of the contesting sovereigns.[1] "That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law. If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end." [2] This view is in harmony with that expressed by the Permanent Court of International Justice.[3]

This principle was given impressive recognition by the decision of the arbitral tribunal in the Pious Fund Case of 1902.[4] It has, moreover, oftentimes found

[4] See, also, Art. VIII of Special Claims Convention, of Sept. 10, 1923, U. S. Treaty Vol. IV, 4445, 4447.

See Art. VII of Claims Convention between the United States and Panama, of July 28, 1926, U. S. Treaty Vol. IV, 4546, 4549.

[5] Mr. Porter, Acting Secy. of State, to Mr. Curry, Jan. 2, 1886, MS. Inst. Spain, XX, 136, Moore, Dig., VII, 53.

[6] Mr. Bayard, Secy. of State, to Mr. Curry, Minister to Spain, April 9, 1886, MS. Inst. Spain, XX, 183, Moore, Dig., VII, 54. See, also, Same to Mr. McLane, July 29, 1885, MS. Inst. France, XXI, 231, Moore, Dig., VII, 54.

§ 581. [1] See Comegys *v.* Vasse, 1 Pet. 193, 212, Moore, Dig., VII, 55. See, also, La Ninfa, 75 Fed. 513, Moore, Dig., VII, 55, respecting the significance of an arbitral award under a treaty of the United States, providing that the decision of the arbitrators shall constitute a final settlement of all questions submitted with respect to the courts of the United States.

Moore, Dig., VII, 55–56, with respect to the award in favor of R. W. Gibbes by the umpire of the American-New Granadian Commission, under convention of Sept. 10, 1857.

[2] Trail Smelter Arbitral Tribunal, Decision of March 11, 1941, *Am. J.*, XXXV, 699.

[3] "In three successive advisory opinions, regarding the delimitation of the Polish Czechoslovak frontier (Question of Jaworzina, No. 8, Series B, p. 38), the delimitation of the Albanian frontier at the Monastery of Saint Naoum (No. 9, Series B, p. 21, 22), and the Polish Postal service in the Free City of Danzig (No. 11, Series B, p. 24), the Permanent Court of International Justice based its appreciation of the legal effects of international decisions of an arbitral character on the underlying principle of *res judicata*. This principle was affirmed in the judgment of the court on the claim of Belgium against Greece on behalf of the *Société Commerciale de Belgique* (Series A/B, No. 78, p. 174)." (*Id.*, 700.)

[4] The United States and Mexico had been at variance as to the effect of the decision of Sir Edward Thornton, as umpire, Nov. 11, 1875, and amended Oct. 24, 1876, awarding to the Roman Catholic Bishops of Monterey and of San Francisco the sum of $904,700.99 in Mexican gold dollars, this amount being for twenty-one years' interest of the annual amount of $43,080.99. This annual sum represented the amount derived from property taken from

expression in the provisions of agreements to arbitrate.[5] The Department of State is, therefore, wisely reluctant to encourage American claimants to expect an endeavor on the part of the United States to reopen adjudicated cases.[6]

Difficulty may present itself in determining whether in a particular case the rule of *res judicata* is properly applicable. It will probably be regarded as inapplicable in some situations where a tribunal which has not become *functus officio* is called upon to revise a previous award rendered by itself in a controversy between the same parties and relating to the same subject-matter, especially if a part of the judicial task remained uncompleted when the request for revision was made.[7] Such, moreover, is likely to be the case in a situation where

---

the Bishop of the Californias by the Mexican Government, and disposed of by it, the interest not being paid to him notwithstanding governmental recognition of an obligation to make payment. Moore, Arbitrations, II, 1348–1352. By a protocol of May 22, 1902 (Malloy's Treaties, I, 1194), there was referred to a tribunal selected from the Permanent Court of Arbitration at The Hague, the issue whether the claim of the United States to further installments of interest (after Feb. 2, 1869) was conclusively established, and its amount fixed by force of Sir Edward Thornton's award, as *res judicata*. The tribunal decided this question affirmatively. Adverting to the identity of the parties to the suit as well as of the subject matter, the tribunal awarded to the United States the sum of $1,420,682.67, Mexican, representing installments of interest from Feb. 2, 1869, to Feb. 2, 1902, and an annuity of $43,050.99, Mexican, on Feb. 2, 1903, and annually thereafter in perpetuity.

It was declared that "because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence," Sir Edward Thornton's award had not the force of *res judicata* as to form of currency in which payment should be made except for the amount he had decreed. Adverting to the absence of a stipulation in the protocol for payment in gold, it was held that the party defendant had the right to free itself of its obligation by paying in silver, which had been legal currency in Mexico. It should be observed that by the terms of the protocol the question as to the currency in which any award against Mexico should be payable was expressly referred to the tribunal. If the rule of *res judicata* was applicable to the amount of the interest installments fixed by Sir Edward Thornton, it is not perceived why the extent of Mexico's obligation should have been lessened by permitting payment in a depreciated currency. It may be doubted whether "the mode of payment" when it related directly to the extent of the pecuniary obligation involved did not in fact "relate to the basis of the right in litigation." For the text of the award, Oct. 14, 1902, see For. Rel. 1902, Appendix II, 16–18, *Am. J.*, II, 898.

See, also, other instances cited in Ralston, revised ed., §§ 55–57; also, Ralston, Supp., § 55a.

[5] Mr. Bayard, Secy. of State, to Mr. Rodriguez, March 22, 1886, with respect to such a provision in the Spanish-American agreement of Feb. 11–12, 1871, 159 MS. Dom. Let. 388, Moore, Dig., VII, 56; also Mr. Hay, Secy. of State, to Mr. Sparkman, June 6, 1899, 237 MS. Dom. Let. 396, Moore, Dig., VII, 58.

It must be clear that the finality of an arbitral award is unaffected by the mode by which the contractual obligation to have recourse to arbitration is perfected. See Mr. Bayard, Secy. of State, to Mr. Rodriguez, March 22, 1886, 159 MS. Dom. Let. 388, Moore, Dig., VII, 56.

"Of course an international award may not be maintained as *res judicata* against a nation not a party to it, and it was so declared in the arbitral sentence of Victor Emmanuel upon the question of the frontier between British Guiana and Brazil." (Ralston, revised ed., § 58, citing *Rev. Gén.* 1904, document, p. 18.)

[6] Mr. Rives, Assist. Secy. of State, to Mr. Shipman, Feb. 2, 1888, 167 MS. Dom. Let. 70, Moore, Dig., VII, 57; Mr. Day, Assist. Secy. of State, to Mr. Oberlander, Jan. 7, 1898, 224 MS. Dom. Let. 249, Moore, Dig., VII, 58.

See The Sabotage Claims against Germany Growing out of Explosions at Black Tom and Kingsland, *supra*, § 295B.

[7] "Whether final, in part, or not, the previous decision did not give final answers to all the questions. The Tribunal, by that decision, did not become *functus officio*. Part of its task was yet before it when the request for revision was presented. Under those circumstances, the difficulties and uncertainties do not arise that might present themselves where an arbitral tribunal, having completed its task and finally adjourned, would be requested to reconsider its decision." (Decision of Trail Smelter Arbitral Tribunal, March 11, 1941, *Am. J.*, XXXV, 703.)

Declares Sandifer: "In view of the limited jurisdiction and tenure of most *ad hoc* tribunals, and in the light of the treaties creating them, the correctness of the conclusion of Justice

the proofs presented by a litigant which were responsible for the previous decision are shown to have been tainted by fraud.[8]

If a court is not *functus officio* and no proper application of the rule of *res judicata* may be raised as an obstacle, the question may still present itself whether the tribunal possesses the power to revise its previous award and whether also authority to revise embraces also authority to grant a rehearing on the merits of the case. Such are the twofold aspects of the single jurisdictional problem of which the solution must be sought in the design of the parties to the agreement to arbitrate. The ascertaining of that design is essentially a fact-finding endeavor which is not facilitated by the formulation of rules or suggestions purporting to accentuate what the parties should be deemed to have designed.[9] If the agreement to arbitrate be interpreted to signify that the tribunal is, under the circumstances of the particular case, possessed of authority both to revise and to grant a rehearing, a further question may also present itself whether grounds for a rehearing (or a revision) are present.[10] In such a situation, the judicial task, having passed beyond the jurisdictional stage, calls for a decision based upon evidence of what practice appears to ordain. Statements concerning what it does ordain have not, however, been uniform. In the case of the Sabotage Claims against Germany, Mr. Justice Roberts, the Umpire, on December 15, 1933, declared in a dictum:

> I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules.[11]

The Trail Smelter Arbitral Tribunal in its decision of March 11, 1941, declared that "a mere error in law is no sufficient ground for a petition tending to revision." It added that it was of opinion "that the proper criterion lies in a distinction not between 'essential' errors in law and other such errors, but

---

Strong [in his statement of Feb. 18, 1886, in relation to his award of June 13, 1885, in the *Lazare* case against Haiti, Moore, Arbitrations, II, 1801] that, after a tribunal has rendered its decision and been discharged of the duties imposed upon it by the arbitral agreement, it has no authority to entertain a petition for rehearing, can not seriously be questioned. In the absence of a specific reservation of authority to the tribunal, rehearing in such a case can be had only through agreement between the parties." (Section 100.)

[8] See Unconscionable Awards, *infra*, § 583.

[9] In the Case of the Sabotage Claims against Germany, the decision of the Umpire of June 15, 1939, indicated that in the instant case there was jurisdiction both to revise and to pass upon the merits of the question on the record as it then stood. See Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims handed down June 15, 1939, and Oct. 30, 1939, 310–312.

See discussion in Sandifer, Chap. IX.

[10] See decision of Trail Smelter Arbitral Tribunal, March 11, 1941, *Am. J.*, XXXV, 703–707.

[11] Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims, 1933–1939, 1124.

See comment on the statement quoted in the text, by the Trail Smelter Arbitral Tribunal in its decision of March 11, 1941, *Am. J.*, XXXV, 706.

between 'manifest' errors, such as that in the Schreck case or such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law." [12] The test thus suggested is still vague. It is submitted that when the decision to which objection is made was based upon a supposition which it is inconceivable that the States at variance would, for any reason, have agreed for purposes of adjudication, to accept as a test of the propriety of the conduct of either, a sufficient ground for revision exists, the judicial error in such case being the misconception on the part of the court of the basis on which its conclusion was sought.

The task of revision may differ from that involved when a rehearing is granted.[13] The latter may, however, embrace the former, and obviously does so when as a consequence of a rehearing an earlier decision requires modification. In both situations the judicial authority to act must be derived from the design of the parties as manifested in the agreement to arbitrate. It is significant that both Article 83 of the Hague Convention of 1907 for the Pacific Settlement of International Disputes,[14] and Article 61 of the Statute of the Permanent Court of International Justice lay down conditions (which however, somewhat differ) to be met when proceedings for revision are sought to be instituted.[15]

(*b*)

§ 582. **Award Outside of Limits of Submission.** An award outside of or departing from the limits of submission is not binding, for in such case the tribunal acts in excess of its powers.[1] Thus in the case of the Northeastern Boundary Dispute, the King of the Netherlands, arbitrator under the convention between the United States and Great Britain of Sept. 29, 1827, abandoned, as has been observed, the issue referred to him, of determining the true line of demarcation indicated in the treaty of 1782–1783, and instead recommended a line of his own devising. Hence acceptance of the award was not deemed obligatory, and the dispute was ultimately adjusted by diplomacy.[2]

[12] *Id.*, 706 and 707. The tribunal added: "At least, this is as far as it might be permissible to go on the strength of precedents and practice. The error of interpretation of the Convention alleged by the petitioner in revision is not such a 'manifest' error." (*Id.*)

The *Schreck* case was one before the United States-Mexican Mixed Claims Commission of 1868, in which the Umpire, Sir Edward Thornton, granted a revision. See Moore, Arbitrations, II, 1357–1358.

It is suggested that if an arbitral tribunal should attach to a convention between the States at variance an interpretation contrary to what they both acquiesced in, and based its award on that interpretation, there would be an error of the kind that would justify revision.

[13] See Sandifer, 284.

[14] Malloy's Treaties, II, 2242. See *supra*, § 570.

[15] See *supra*, § 575.

§ 582. [1] Declared Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, respecting the claim of the Orinoco Steamship Company: "A decree of a court of arbitration is only final provided the court acts within the terms of the protocol establishing the jurisdiction of the court. . . . A disregard of such terms necessarily deprives the decision of any claim to finality." (For. Rel. 1908, 774, 783.) See, also, Same to Same, June 21. 1907, *id.*, 800, 802–803.

[2] For the text of the award see Moore, Arbitrations, I, 127; concerning its recommendatory character, and the mutual waiver of the award, *id.*, 137–138, and documents there cited; also Moore, Dig., VII, 59–60. See, also, P. Fiore, "*La Sentence Arbitrale du Président de la République Argentine dans le Conflit de Limites entre la Bolivie et le Pérou*," *Rev. Gén.*, XVII, 225–256, cited by Oppenheim, 2 ed., II, 19.

Excessive action on the part of an arbitral tribunal may be due to a misconstruction of its powers, manifest in the reasons given in the award.[3] Thus it was declared by the Tribunal at The Hague in its decision in the Orinoco Steamship Company Case that

> Excessive exercise of power may consist, not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied.[4]

In that case recourse to arbitration was had in order to adjust a controversy between the United States and Venezuela concerning the effect of the award of Dr. Barge, umpire, of the mixed claims commission under protocol between those States of February 17, 1903.[5] The United States had contended that there should be a reopening of the case because of violations of the terms of the protocol, or errors in the final award "arising through gross errors of law and fact."[6] According to Article I of a protocol of February 13, 1909, there was submitted to the arbitral Tribunal the question, whether or not the decision of Dr. Barge, in view of all the circumstances and under the principles of international law, was void, and whether it should be considered so conclusive as to preclude a re-examination of the case on its merits. It was agreed that should the Tribunal decide that the decision ought to be considered final, the case would be deemed by the United States as closed; but that if, on the other hand, the Tribunal should decide that the decision of Dr. Barge should not be considered as final, the Tribunal should then hear, examine and determine the case on its merits.[7] In the award of October 25, 1910, it was declared that the parties had admitted by implication in their agreement to arbitrate, that "excessive exercise of jurisdiction and essential error in the judgment" constituted "vices involving the nullity of an arbitral decision." It was said that inasmuch as the Barge award embraced several independent claims, and consequently several decisions, the nullity of one was without influence upon any of the others, especially where the integrity and good faith of the arbitrator were not questioned. Thereupon, the Tribunal pronounced separately on each of the points at issue.[8] With respect to certain of these it annulled the decision of Dr. Barge, and held, in the language of the Agent of the United States, "that departure

[3] Report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, respecting the award of the umpire in the Pelletier Case against Haiti, under protocol of May 28, 1884, Moore, Arbitrations, II, 1793–1800, Moore, Dig., VII, 60–61, and 68–69.

[4] *Am. J.*, V, 230, 233, G. G. Wilson, Hague Arbitration Cases, 217, 223.

[5] For the text of the protocol, see Malloy's Treaties, II, 1870. For the text of the award, see Ralston's Report, Venezuelan Arbitrations, 1903, 83.

[6] Communication of Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, For. Rel. 1908, 775, 780–786.

[7] Malloy's Treaties, II, 1882. See attitude of the United States in 1885–1888, respecting the award by the commission under convention with Paraguay, Feb. 4, 1859 (Malloy's Treaties, II, 1362), adverse to the claim of the United States and Paraguay Navigation Company, Moore, Arbitrations, II, 1543–1545. See, generally, as to the Claim, *id.*, 1485–1549.

[8] *Am. J.*, V, 230; also *Nouv. Rec. Gén.*, 3 *sér.*, IV, 79; G. G. Wilson, Hague Arbitration Cases, 217.

from the terms of the protocol is a just ground for annulling an international award and furthermore that disregard of the rules of law enjoined by the terms of submission amounts to a departure from the submission."[9] No fault can be found with this conclusion. It is difficult, however, to conclude that the words "essential error" point to a satisfactory test of a departure from the terms of submission.[10] The mere disagreement of a defeated litigant with the legal conclusions of the arbitral tribunal, and the conviction of the former that the latter essentially erred in interpreting or applying the law, or in construing the significance of particular facts, would not necessarily establish a departure, or otherwise remove the obligation to respect the award. Recourse to arbitration, with the incidental obligation imposed upon the parties to yield that respect, implies that the litigating States have agreed to defer to the conclusions of the tribunal and to relinquish freedom to sit in judgment upon them as a court of appeal. Any other implication would furnish a defeated litigant with a convenient and easy means of escape, encouraging it to shape its course according to the extent of its dissatisfaction with the terms of an adverse award.

Upon the pronouncement of the award by a tribunal from the Permanent Court of Arbitration at The Hague, on October 13, 1922, in the case between the United States and Norway, the Agent of the United States in open court stated that he deemed it to be his duty, on behalf of the United States, to reserve all of its rights "arising out of the plain and manifest departure of the award from the terms of submission and from the 'essential error,' to use the language of the authorities, by which it is invalidated."[11] On February 26, 1923, upon the payment by the United States to Norway of the amount of the award embracing interest,[12] Secretary Hughes took occasion to hand to the Norwegian Minister a statement in which it was said that by payment, the Government

[9] William Cullen Dennis, "The Orinoco Steamship Company Case," *Am. J.*, V, 35, 54, where it was also said that "It is believed that there is nothing in the positive or negative action of the court which is unfriendly to the further contention of the United States that there may be essential error without any departure except that which arises from a palpable denial of justice." See, also, G. Scelle, "*Une Instance en Révision devant la Cour de la Haye*," *Rev. Gén.*, XVIII, 164.

[10] See language of Art. I, protocol of agreement between the United States and Venezuela, of Feb. 13, 1909, under which the Orinoco Steamship Company Case was arbitrated, Malloy's Treaties, II, 1882.

"The formula 'essential error' originated in a text voted by the International Law Institute in 1876. From its inception, its very authors were divided as to its meaning. It is thought significant that the arbitral tribunal in the Orinoco case avoided it; the Permanent Court in the St. Naoum case alluded to it. The Government of the Kingdom of the Serbs, Croats and Slovenes alleged essential error both in law and in fact (Series C, No. 5, II, p. 57, Pleadings by Mr. Spalaikovitch), but what the court had in mind in the passage quoted above (see p. 36 of the present decision), was only a possible error in fact. The paragraph where this passage appears begins with the words: 'This decision has also been criticized on the ground that it was based on erroneous information or adopted without regard to certain essential facts.'" (Trail Smelter Arbitral Tribunal, decision, March 11, 1941, *Am. J.*, XXXV, 707.)

[11] *Am. J.* XVII, 399. See also letter from the Hon. Chandler P. Anderson, American Arbitrator, to the Secretary General of the Permanent Court of Arbitration, of like date, *id.*, 399, in which he expressed the opinion that the award of his colleagues Messrs. Vallotton and Vogt had "disregarded the terms of submission and exceeded the authority conferred upon" the Tribunal.

For the text of the award see *id.*, XVII, 362.

[12] The sum paid was $12,239,852.47. See in this connection editorial comment by Dr. J. B. Scott, *id.*, XVII, 287.

of the United States gave "tangible proof of its desire to respect arbitral awards," and again acknowledged its "devotion to the principle of arbitral settlements even in the face of a decision proclaiming certain theories of law which it cannot accept." [13] The Secretary thereupon made critical analysis of the terms of the award, declaring that it could not be deemed by his government "to possess an authoritative character as a precedent." In the course of his strictures he did not, however, advert to "essential error," or declare that the award constituted a departure from the terms of submission.

A departure from the terms of submission is a matter of fact that may become apparent upon a close comparison of the text of the award and the terms of the agreement providing for the arbitration. If it is not thus apparent, or if one of the parties does not acknowledge the existence of it, the truth is, nevertheless, likely to be within the reach of the States at variance, especially if they are disposed to invoke the aid of a Commission of Inquiry or of a Court of Arbitration.[14] Yet their failure so to agree is not decisive of the strength of the contention of either in relation to the matter. It is the character of the conduct of the tribunal in departing from the terms of submission which produces the right to attack the award or to decline to heed it. If the available facts are such as to sustain the contention of an aggrieved litigant that there has been a departure from those terms, it is not apparent why it should not be free to avail itself thereof, at least in the absence of arrangement providing for a remedy to cover such a contingency. This does not signify that the aggrieved litigant assumes through such action on its part to be the sole judge of its cause, but rather that when the facts reveal the tribunal as having acted in excess of its powers, that litigant in availing itself thereof is merely taking a stand of which the correctness must be accepted by any judicial body which may later be empowered to pass on the validity of the award.[15]

[13] *Id.*, 287.

For the texts of protests made by Venezuela against certain awards of the Belgian-Venezuelan and Mexican-Venezuelan Mixed Claims Commissions, under conventions of 1903, see Orinoco Steamship Company Case, Appendix to Case of United States, 904, 916, 964, and 970.

On May 2, 1921, the United States demanded of Panama that the latter transfer to Costa Rica the territory awarded to it by the Loubet award, and that the boundary line on the Pacific side, as defined in that award, and on the Atlantic side as determined by the award of Chief Justice White, be physically laid down, as provided by the Porras-Anderson Treaty. Department of State Press Release, May 2, 1921. Nor was Secy. Hughes disposed to yield to the desire of Panama that its claim that the White award marked a departure from the terms of submission be referred to arbitration. Dept. of State Press Release, July 21, 1921.

See Panama, *supra*, § 20.

For the text of the Porras-Anderson Convention between Costa Rica and Panama, of March 17, 1910, providing for the arbitration before Chief Justice White, see For. Rel. 1910, 820; for the text of the award of Sept. 12, 1914, see For. Rel. 1914, 1000; for protests of Panama respecting the award addressed to Costa Rica, Oct. 17, 1914, and to the United States, Oct. 20, 1914, see For. Rel. 1914, 1016 and 994, respectively. See Panama, *supra*, § 20.

For the text of objections of Nicaragua to the award of the King of Spain of 1906, as arbitrator in the boundary dispute between Honduras and Nicaragua, see Mr. Chamorro, Nicaraguan Minister of Foreign Affairs, to the American Minister at Managua, Jan. 28, 1914, For. Rel. 1918, 14.

[14] See J. W. Garner, "Appeal in Cases of Alleged Invalid Arbitral Awards," *Am. J.*, XXVI, 126; H. Lauterpacht, "The Legal Remedy in Case of Excess of Jurisdiction," *Brit. Y.B.*, 1928, 117.

[15] See illuminating note by J. L. Brierly on "The Hague Conventions and the Nullity of Arbitral Awards," *Brit. Y.B.*, 1928, 114. *Cf.* the differing views of A. De Lapradelle in "*L'Excès de Pouvoir de L'Arbitre*," *Rev. Droit Int.* (De Lapradelle), II, 5.

Seasonable protest against an award regarded as constituting a departure from the terms of submission should be made by the litigating State that desires to avail itself of its rights accruing from such action. It may be doubted, however, whether the requisite protest need be lodged with, or made before the tribunal that has rendered the award, except in so far as the protest embraces also a request to that body calling for further action on its part. The United States is said to have "protested seasonably" against the Barge award of April 14, 1904, according to its agent in the Orinoco Steamship Company Case against Venezuela, when it made known its objection to its adversary in due course through the diplomatic channel.[16]

(*c*)

§ 583. **Unconscionable Awards.** The duty of the executive to refuse to enforce an award which turns out to have been inequitable or unconscionable has been maintained in repeated rulings of the Department of State, and is sanctioned by the Supreme Court of the United States.[1] Thus in one instance where proceedings were impeached by Venezuela for fraud, on the part of the tribunal, under convention of April 25, 1866, the United States agreed by a convention of December 5, 1885, to the rehearing of the claims.[2]

In the cases of Weil and of La Abra Silver Mining Company before the American-Mexican Commission of July 4, 1868, when the United States discovered that, through fraud on the part of American claimants, it had been made the instrument of wrong towards a friendly State, by means of impositions upon the arbitral tribunal as well as upon itself, it repudiated the acts and made reparation.[3]

[16] See Wm. C. Dennis, in *Am. J.*, V, 35, 39.

Venezuela made protest against an award of the Belgian-Venezuelan Commission, under convention of 1903, before that body on Aug. 26, 1903. See Case of United States, Orinoco Steamship Company Case, Appendix, 904. Dr. Dennis, Agent of the United States, made protest before the tribunal from the Permanent Court of Arbitration at The Hague against the terms of its award in favor of Norway, directly upon the rendition of the same on October 13, 1922. *Am. J.*, XVII, 399.

§ 583. [1] The statement in the text is substantially the language of Mr. Bayard, Secy. of State, in a Report to the President, in the case of Antonio Pelletier, Jan. 20, 1887, *citing* Frelinghuysen *v.* Key, 110 U. S. 63, For. Rel. 1887, 593, 606; Moore, Dig., VII, 69.

[2] For the texts of these conventions, see Malloy's Treaties, II, 1856 and 1858, respectively. Also Moore, Arbitrations, II, 1659–1692, and documents there cited; Moore, Dig., VII, 62–63.

[3] This was accomplished not only by repayment to Mexico of undistributed portions of moneys received in payment of awards, but also by an appropriation in repayment of portions of such moneys as were already distributed. Moore, Arbitrations, II, 1324–1348, also Moore, Dig., VII, 63–68, and documents there cited. Moreover, the Supreme Court of the United States held that as the person invoking the interposition of the Government to collect his claim against a foreign State impliedly engaged to act in good faith, the honesty of his claim was always open to inquiry, and that if it proved to be fraudulent or fictitious, it became the duty of his government to withhold from him any money received by it in payment thereof. La Abra Silver Mining Co. *v.* United States, 175 U. S. 423, 458–459, Moore, Dig., VII, 67–68, *citing* Frelinghuysen *v.* Key, 110 U. S. 63, 71–73; Boynton *v.* Blaine, 139 U. S. 306. See discussion in Sandifer, Section 103.

See separate opinion by Nielsen, Commissioner, in Francisco Mallén Case, Opinions of Commissioners, convention between the United States and Mexico, Sept. 8, 1923, 1927 Vol., 264, 272–273, where he disagreed with the contention of the Agent of the United States that the claimant had attempted to mislead his own Government and that of the United States. In this connection the Commissioner called attention to the motion in behalf of the United States to dismiss the so-called Rio Grande Case before the British-American Claims Arbitral

The Department of State is rightly indisposed to seek enforcement of an award favorable to an American citizen, which is deemed unjust, by reason, for example, of the founding of the claim on the tortious conduct of the claimant, or of irregularities in the arbitral proceedings, or of the existence of documents adverse to the claimant and not submitted to the tribunal.[4]

To quote Judge Ralston:

> The United States, upon a number of occasions, has seen fit to consent to the reopening of awards believed unjust. This was the case with the Venezuelan Claims Commission of 1866, whose awards were reopened and reviewed by the Commission of 1885, upon which sat two Americans and one Venezuelan. Awards under the Mexican treaty of 1848 were set aside by the courts in the case of the Gardiner claim, and were reviewed through act of Congress referring the Atocha claim to the Court of Claims. In the interest of rejected claims, Congress reopened two of the awards of the commission under the Chinese Claims Treaty of 1858, permitting the Attorney-General to decide one case finally and the Court of Claims the other. In the case of the *Caroline* the Secretary of State, against the protest of the claimant, returned to Brazil money which had been paid after a diplomatic settlement, and Congress appropriated a large sum to reimburse Brazil for moneys paid the United States representative, but which never reached the Treasury.[5]

It will be observed that the foregoing discussions have reference to the attitude of the governments concerned rather than of arbitral tribunals upon which fraud may have been perpetrated by a litigating State.

In his decision of December 15, 1933, Mr. Justice Roberts, as Umpire in the cases of the Sabotage Claims against Germany, made the following statement:

> The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.[6]

The Commission exercising the jurisdiction which it undoubtedly possessed, on June 15, 1939, set aside, revoked and annulled an earlier decision of October

---

Tribunal under special agreement of August 18, 1910, citing the American Agent's Report, p. 335.

[4] Report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, respecting the award in favor of Antonio Pelletier against Haiti, and respecting that in favor of A. H. Lazare, against the same State, Moore, Arbitrations, 1793–1800, and 1800–1805, respectively, Moore, Dig., VII, 68 and 69.

[5] Ralston, revised ed., § 191.

[6] Mixed Claims Commission, United States and Germany, Decisions and Opinions from Jan. 1, 1933 to Oct. 30, 1939 (Excepting decisions in the Sabotage Claims of June 15 and Oct. 30, 1939), 1127–1128.

16, 1930, reached at Hamburg; [7] and it went further, and, passing upon the merits of the claims, found that the liability of Germany had been established.[8] The conclusion of the Umpire as well as the American Commissioner that, under the existing conditions, the Commission possessed jurisdiction to grant a rehearing differed from that of Sir Edward Thornton, as Umpire in the *Weil* and *La Abra Silver Mining Co.* cases before the American-Mexican Mixed Claims Commission of 1868.[9] In both situations the Umpires were, however, merely acting as interpreters of the particular agreements under which their respective functions were established.

(11)

§ 583A. **Arrangements Contemplating Arbitration.** The value of arbitration as an instrument of justice depends in part upon the care taken, especially by previous arrangement, to safeguard a litigant against the effort of its adversary to utilize the occasion to take unfair advantage of the former and thereby defeat it. The procedural latitude yielded to litigating States through the absence of restrictions in the texts of preliminary arrangements,[1] not infrequently opens a convenient door to such an achievement, which even an impartial tribunal may find it difficult to thwart. By agreement manifested in the terms of a *compromis* or in rules of procedure adopted antecedent to the adjudication, requisite checks may be applied. The nature of some deserve attention. The few here suggested are designed to simplify the development of a case as well as the task of the tribunal which adjudicates thereon.[2]

It is believed that (*a*) the initial pleading oftentimes referred to as the "case" should be confined to a statement of facts and be accompanied by all of the evidence in support thereof, "in order that the opposite party may have the opportunity to answer it in the counter-case, if the pleadings are filed simultaneously, or that the defendant's evidence be filed in the answer to the plaintiff government's memorandum or memorial, where the pleadings are filed succes-

[7] Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims Handed down June 15, 1939, and Oct. 30, 1939, 313.

[8] *Id.*

In his decision of the same day, Mr. Justice Roberts, the Umpire, declared: "I find that, for the reason alleged by the United States in its petitions for rehearing, — material fraud in the proofs presented by Germany, and for the further reason that on the record as it now stands the claimants' cases are made out, the pending motions should be and they are granted." (*Id.*, 312.)

See L. H. Woolsey, "Litigation of the Sabotage Claims Against Germany," *Am. J.*, XXXV, 282, 295. See also The Sabotage Claims against Germany Growing out of Explosions at Black Tom and Kingsland, *supra*, § 295B.

[9] Moore, Arbitrations, II, 1329–1330. See also, in this connection, Sandifer, 312.

§ 583A. [1] Much latitude is yielded by the provisions of Chap. III, pertaining to Arbitral Procedure, of The Hague Convention of 1907 for the Pacific Settlement of International Disputes. See, for example, Art. LXIII, Malloy's Treaties, II, 2239.

[2] It is unnecessary to advert to the delay in producing an exact or final issue between the parties when pleadings are filed by both simultaneously. In numerous situations the States at variance, as in a case involving a boundary dispute, are not to be expected to agree to a different procedure. The situation is otherwise, however, where a complainant State demanding reparation on account of the alleged unlawful conduct of another is essentially a plaintiff in the litigation. In such case there is every reason that the first pleading of the respondent should follow and be essentially responsive to the allegations of its adversary; and this is always possible.

sively;"[3] (*b*) that where the pleadings are filed successively, the respondent's initial pleading referred to as the "counter case" be confined to a response to the points raised in the "case" of the complainant, and that where the pleadings are filed simultaneously no fresh pretensions be advanced in the second document or pleading (oftentimes described as the "counter case") that are additional to those set forth in the "case" of the same party as the foundation of its claim; (*c*) that in the filing of subsequent pleadings the same principle be observed so that whether such pleadings be filed simultaneously or successively they be confined in point of content to the issues already raised;[4] (*d*) that the matter of argument be provided for with the requirement that it be reserved for special documents unrelated to the pleadings and kept apart therefrom, and that if possible it be in writing; (*e*) that the privilege of interrogating either party or the witnesses thereof be confided to the tribunal subject to the possible condition that a party be permitted to make response to any fresh statements of fact set forth in answers to such questions as may have been propounded; (*f*) that provision be made for the production of documentary evidence by one party on the demand of its adversary; (*g*) that the requirements be minutely specified regarding the authentication of documents to be introduced as evidence;[5] (*h*) that the right be accorded either party to put specific questions to the tribunal and the obligation imposed upon it to make due response thereto; (*i*) that opportunity be given for dissenting opinions by judges who find themselves unable to concur in the conclusions of the majority of those

[3] C. W. Bishop, International Arbitral Procedure, Baltimore, 1930, 235–236. Dr. Bishop's conclusions, *id.*, 235–246, are worthy of careful examination and have been of utmost value to the author in the preparation of this section.

[4] See *id.*, 236–239, where it is said: "The object of the pleadings is to reach an issue. Points of an opponent which are admitted should be stated to be admitted, and those not admitted should be specifically denied. The rules of procedure should be framed to promote justice, not evade the issue, and the spirit animating the parties should be one of fairness. The cardinal rule to be enforced by the arbitrator is that neither party should be permitted to be taken by surprise."

It is of utmost importance that the stage of the proceedings in which evidence may be introduced be strictly limited, and that no documentary evidence be received subsequent to the filing of pleadings with which it is associated. Moreover, written or other arguments should not be permitted to become vehicles for the introduction of evidence not previously offered.

"Attempts have repeatedly been made to produce at the last moment on the oral hearing arguments not theretofore presented or relied upon, although it is hard to imagine a less justifiable method of procedure save under prior permission of the Court and in exceptional exculpatory circumstances." (Ralston, Supp., § 366 *a*.)

In Part IV (*d*) of the General Claims Protocol, between the United States and Mexico, of April 24, 1934, it is declared: "With the Memorial the claimant Government shall file all the evidence on which it intends to rely. With the Answer the respondent Government shall file all evidence upon which it intends to rely. No further evidence shall be filed by either side except such evidence, with the Brief, as rebuts evidence filed with the answer. Such evidence shall be strictly limited to evidence in rebuttal and there shall be explained at the beginning of the Brief the alleged justification for the filing thereof." (U. S. Executive Agreement Series, No. 57.)

See in this connection, A. H. Feller, The Mexican Claims Commissions (1923–1934) § 253; also Hunt's Report, American and Panamanian General Claims Arbitration, Dept. of State, Arbitration Series No. 6, 1934, 22–23.

[5] Thus, it is desirable that the character of the several certifications acknowledged by the parties to be requisite for the proper authentication of documentary evidence be specified.

The documentary facts set out by the government are not ordinarily verified, their presentation from official sources, backed as they are by the dignity of the government, being usually regarded as ample proof of authenticity. The counter-case is presented under like circumstances as far as applicable." (Ralston, revised ed., § 349.)

who comprise the tribunal; (*j*) that the privilege of demanding an interpretation, as well as a rehearing or revision, of the award be definitely provided and that the conditions for the exercise of such privilege be set forth in detail; and (*k*) that the languages to be employed by either party and the tribunal be specified.[6]

By such process the parties may relieve the tribunal of the embarrassing task of passing upon or enunciating rules for its own procedure, and likewise minimize the danger of proceeding with an adjudication where the absence of an adequate procedural arrangement may jeopardize the value of the ultimate award.[7]

b

§ 584. **Joint Commissions.** A joint commission may be described as a body comprising an equal number of representatives of the opposing states, and through which, therefore, each contestant has an equal voice.[1] Those representa-

[6] It is believed that grounds on which rehearings and revisions are to be allowed should be amplified with utmost care.

[7] Among the recent sets of procedural rules applied in sets of cases to which the United States has been a party, the following are to be noted: Rules of Procedure pursuant to agreement between the United States and Great Britain, of April 26, 1912, for use in American and British Pecuniary Claims Arbitration under special agreement of Aug. 18, 1910, as agreed upon by the Agents of the respective parties July 11, 1912, Nielsen's Report, Washington, Govt. Printing Office, 1926, 11–16; Rules of Nov. 15, 1922, adopted by Mixed Claims Commission under agreement with Germany of Aug. 10, 1922, R. C. Morris' First and Second Report, Washington, Govt. Printing Office, 1923; Rules of Practice and Procedure of the Tripartite Claims Commission (United States, Austria, and Hungary), under agreement of Nov. 26, 1924, R. W. Bonynge's Report, Washington, Govt. Printing Office, 1930, Annex II; Rules and Regulations approved and established by the General Claims Commission under Convention between the United States and Mexico, of Sept. 8, 1923, under date of Sept. 4, 1924; Rules of Procedure of same Commission, as amended Oct. 25, 1926; Rules and Regulations established by the Special Claims Commission under convention between United States and Mexico of Sept. 10, 1923, under date of Aug. 22, 1924; Rules and Regulations of Special Mexican Claims Commission under Act of Congress April 10, 1935, adopted Sept. 16, 1935; General Claims Protocol between the United States and Mexico, of April 24, 1934, U. S. Executive Agreement Series, No. 57; Rules of the General Claims Commission, United States and Panama, under convention of July 28, 1926, under date of April 1, 1932, Hunt's Report, American and Panamanian General Claims Arbitration, Dept. of State, Arbitration Series No. 6, Appendix III.

See Sandifer, § 20, Conclusions.

§ 584. [1] The mere conference of an equal number of representatives of opposing States, assembled with a view to negotiating an agreement in relation to the solution of an international controversy, does not necessarily indicate the creation of a joint commission notwithstanding the designation of the negotiators as commissioners. This is true when, for example, the opposing groups of representatives do not unite to constitute or act as a single entity known as a commission. When those groups act as distinct entities rather than as opposing units of a single body, they constitute in reality two commissions rather than a joint one.

The treaty of Washington with Great Britain, of May 8, 1871, embracing provisions for the adjustment by arbitration of the Alabama and other claims, was the work of a joint high commission. In the preamble of the treaty it was announced that the President had appointed, on the part of the United States, designated persons "as Commissioners in a Joint High Commission and Plenipotentiaries." (Malloy's Treaties, I, 700.) Respecting the labors of the commission, see Moore, Arbitrations, I, 535–546.

On May 2, 1923, in an effort to reach a satisfactory understanding with Mexico respecting the questions at issue between the United States and Mexico, President Harding, on the recommendation of the Secretary of State, appointed the Honorable Charles Beecher Warren and the Honorable John Barton Payne as American Commissioners to meet two Mexican Commissioners for the purpose of exchanging impressions. Conferences were held in Mexico City from May 14 to August 15, 1923. The opposing groups of commissioners did not con-

tives are commonly nationals, respectively, of the State which appoints them. The function of such a body may be that of a commission of inquiry empowered to investigate and report with respect to an international controversy,[2] or that of a commission of conciliation authorized to formulate proposals with a view to adjusting an issue or to endeavor to bring the States at variance to an agreement,[3] leaving them free to reject its recommendations. A joint commission may, however, be clothed with a broader power, as is oftentimes the case, and given jurisdiction to decide issues in the event that a majority of its membership finds it possible to agree. This power to decide may be exercised by the commission acting in a judicial capacity or otherwise, according to the terms of the convention to which it owes its life.[4] Mixed claims commissions, until the commissioners appointed by the opposing States are equally divided with respect to the solution of the question submitted to them and refer the matter to an umpire, may be said to constitute joint commissions.[5]

The use of joint commissions for the purpose of adjusting international controversies has long been familiar to statesmen. In a treaty or truce of April 23, 1512, Denmark and Sweden "agreed to a cessation of hostilities and to submit their disputes to a board of twenty-four councillors, twelve to be chosen on each side." [6]

A joint commission when clothed with power to exercise a judicial function, differs from an arbitral tribunal, in that the former lacks an umpire (even though it may have a presiding officer), and in case of an even division of opinion, finds itself impotent to decide the questions at issue.[7] This limitation is, nevertheless, a circumstance that may encourage States at variance over a question of gravest magnitude to have recourse to such a body. No decision adverse to the pretensions of either contestant can be rendered without the acquiescence of at least one of its own representatives. Such contestant may be willing to confide to them an authority to heed the claims of its opponent which it might be

---

stitute a single entity and are not, therefore, to be deemed to have constituted a joint commission. Nevertheless, the record of their negotiations was described in a publication by the Department of State in 1925, as "Proceedings of the United States-Mexican Commission Convened in Mexico City, May 14, 1923."

Compare Protocol of the Conferences at Washington in May, 1898, Preliminary to the Appointment of a Joint Commission for the Adjustment of Questions at Issue between the United States and Great Britain, in Respect to the Relations of the Former with the Dominion of Canada, Malloy's Treaties, I, 770.

[2] See International Commissions of Inquiry, *supra*, §§ 557 and 558.

[3] See International Commissions of Conciliation, *supra*, §§ 558A and 558B.

[4] See, for example, Article I of Convention with Great Britain, as to the Alaskan Boundary, of January 24, 1903, Malloy's Treaties, I, 788.

[5] See, for example, the Mixed Claims Commission under Convention with Mexico of July 4, 1868, Malloy's Treaties, I, 1128.

[6] O. S. Rydberg, *Sverges Traktater med Främmande Magter*, Stockholm, 1895, III, 570, of which an English translation has been prepared for the author, to whose attention the agreement was brought by the late Charles E. Hill, in his Danish Sound Dues and the Command of the Baltic, Durham, N. C., 1926, 44.

[7] "A joint commission is a familiar agency which is distinct from that of arbitration for the reason that the States concerned in its creation have each an equal representation." (Charles E. Hughes, in an address before the Canadian Bar Association, at Montreal, Sept. 4, 1923, The Pathway of Peace, New York, 1925, 3, 16.)

See, also, John W. Foster, Arbitration and The Hague Court, Boston and New York (1904), 87–95.

unwilling to confer upon one or more aliens of any nationality. The confidence of a contestant that its rights as such will not be sacrificed by its representatives, except for good cause, may thus serve greatly to increase its preference for a body composed exclusively of an equal number of individuals representative of the States at variance. These considerations encourage practical tests of this amicable mode of adjustment when no other proves to be acceptable, and under circumstances when recourse to self-help is seemingly the only feasible alternative. For the adjustment of any international controversy of whatsoever character and however menacing to the maintenance of peace, a joint commission may offer a means of solution. There is solid reason, therefore, to suggest that treaties to which the United States is a party, and which are designed to facilitate uses of amicable modes of adjustment of prospective controversies should make appropriate provision for the use of joint commissions for the solution of differences which the contracting parties may be unwilling to refer to other agencies.[8]

American statesmen have long regarded with favor the use of joint commissions for a variety of purposes. As early as April 21, 1785, John Jay, as Secretary for Foreign Affairs, submitted to the Congress a report in which he suggested that all disputes with the Crown of Great Britain respecting the so-called eastern boundary line of the United States be referred to a joint commission to be composed of an equal number of commissioners to be appointed by the United States and by the King. Such commission was to act in a judicial capacity. A judgment rendered by a majority of the commissioners was to be "absolute, final, and conclusive, between the parties." [9] In 1790, this report was submitted by President Washington to the Senate.[10] No arrangement was, however, made in pursuance of these suggestions.

A dispute arising from opposing claims to certain islands in Passamaquoddy Bay, and to the Island of Grand Manan in the Bay of Fundy, was settled by means of a joint commission of two, pursuant to Article IV of the Treaty of Ghent.[11] The use of a joint commission was the mode by which Secretary Olney and Lord Salisbury proposed in 1897, through a treaty which failed to receive the requisite approval of the Senate, to adjust territorial and other differences of first magnitude which might arise between the United States and Great Britain.[12]

A joint commission was the agency by which the Alaskan Boundary Dispute

[8] See The United States as a Party to Treaties for Obligatory Arbitration, *supra*, §§ 566, 567 and 567A.

[9] Am. State Pap., For. Rel., I, 94. In the course of his highly interesting report Secy. Jay made the suggestion "That two commissions of the like tenor, to be agreed upon between our and their ministers, be issued to the whole number, viz. one by the United States, and the other by His Britannic Majesty."

See Recourse to Arbitration by the United States, Territorial Differences, *supra*, § 563.

[10] See message of February 9, 1790, Am. State Pap., For. Rel., I, 90; also report of a Committee of the Senate, March 9, 1790, *id.*, 100.

[11] Malloy's Treaties, I, 614. For the decision of the Commission, see *id.*, I, 619. See, also, Moore, Arbitrations, I, 45–64, and documents there cited.

[12] For the text of the treaty, see For. Rel. 1896, 238. See, also, correspondence prior to its signature, *id.*, 222–237.

between the United States and Great Britain was adjusted under a convention of January 24, 1903.[13]

Pursuant to the convention between the United States and Great Britain of January 11, 1909, concerning the boundary waters between the United States and Canada, a so-called International Joint Commission was established which was clothed with jurisdiction to pass upon all cases involving the uses or obstructions or diversions of the waters with respect to which under Articles III and IV of the treaty the approval of the Commission was required.[14] The power to decide was lodged in a majority of the Commission. The Commission was also to be utilized as a commission of conciliation in relation to any other matters of difference arising between the contracting parties involving the rights, obligations, or interests of either in relation to the other along the common frontier between the United States and the Dominion of Canada. When so utilized, however, the reports of a majority of the Commission were not to be regarded as decisions or to possess the character of an arbitral award.[15]

With the widening appreciation of the fact that the exercise by a State of a legal right acknowledged in every quarter to be such, may, nevertheless, produce actual and grave injury to another, there has arisen a sense of the importance of providing means designed to facilitate the avoidance of such action. Accordingly, on September 4, 1923, in an address before the Canadian Bar Association, at Montreal, Secretary Hughes suggested the applicability of joint commissions as a practical deterrent. He said that in relation to "domestic questions" which had an international bearing, it would be quite possible to make more frequent use of such an agency, "not to decide but to inform, not to arbitrate but to investigate, to find the facts and to report to the governments of the States represented the effect of measures and where injury would lie." [16]

[13] Art. I of the Convention with Great Britain of Jan. 24, 1903, providing for the adjudication, declared that "a tribunal shall be immediately appointed to consider and decide the questions set forth in Article IV of this convention. The tribunal shall consist of six impartial jurists of repute who shall consider judicially the questions submitted to them, each of whom shall first subscribe an oath that he will impartially consider the arguments and evidence presented to the tribunal and will decide thereupon according to his true judgment. Three members of the tribunal shall be appointed by the President of the United States, and three by His Britannic Majesty. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the members thereof." Malloy's Treaties, I, 788. For the decision of the tribunal, Jan. 24, 1903, see *id.*, I, 792.

[14] Treaty Vol. III, 2607. See Article VIII.

[15] Art. IX.

See, in this connection, C. J. Chacko, The International Joint Commission, New York, 1932, 307–314.

"The complaint regarding damages in the State of Washington, caused by fumes from the smelter of the Consolidated Mining and Smelting Co. of Trail, British Columbia, was referred to the International Joint Commission, United States and Canada, on August 7, 1928, for investigation, report, and recommendation pursuant to article 9 of the treaty of January 11, 1909, between the United States and Great Britain." (Dept. of State Press Releases, March 7, 1931, 162. For the Report of the International Joint Commission as of Feb. 28, 1931, see *id.*, 164.) See *supra*, § 563.

[16] Charles E. Hughes, The Pathway of Peace, Representative Addresses, 1921–1925, New York, 1925, 3, 16. Speaking unofficially, he said in this connection: "I may take the liberty of stating as my personal view that we should do much to foster our friendly relations and to remove sources of misunderstanding and possible irritation, if we were to have a permanent body of our most distinguished citizens acting as a commission, with equal representation of both the United States and Canada, to which automatically there would be referred,

In August, 1929, the United States and Canada agreed to appoint two commissioners to consider the claim of the latter growing out of the sinking of the Canadian auxiliary schooner *I'm Alone* by the United States Coast Guard vessel *Dexter* on the high seas on March 22, 1929.[17] The agreement was in pursuance of the provisions of Article IV of the Convention between the United States and Great Britain of January 23, 1924, concerning the Prevention of Smuggling of Intoxicating Liquors into American territory.[18] In their "Joint Final Report" of January 5, 1935, the Commissioners announced the conclusion that the sinking of the ship was an unlawful act, that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government, and further, that as a material amend in respect of the wrong, the United States should pay the sum of twenty-five thousand dollars to His Majesty's Canadian Government. The Commissioners declared that "they recommend accordingly." [19]

As has been noted elsewhere,[20] it was through the medium of a joint commission that recommendations were made which led to a final agreement signed on October 25, 1934,[21] providing for the payment by the Turkish Government to that of the United States of a specified sum in full settlement of claims of American citizens which were embraced in an agreement of December 24, 1923.

From the foregoing data it should be obvious that a joint commission offers a flexible mode of amicable adjustment of international controversies of whatsoever kind; that it may be utilized to investigate, to recommend, or to decide; that by reason of its composition it is likely to enjoy the special confidence of the opposing States.

c

§ 585. **The Covenant of the League of Nations.** The Covenant of the League of Nations embraced in the Treaty of Versailles of June 28, 1919, was

---

for examination and report as to the facts, questions arising as to the bearing of action by either government upon the interests of the other, to the end that each reasonably protecting its own interests would be so advised that it would avoid action inflicting unnecessary injury upon its neighbor." *Id.*, 17. See, also, same author, Our Relations to the Nations of the Western Hemisphere, Princeton, 1928, 29–30, 110.

[17] See "The Adjustment of the I'm Alone Case" by this author, *Am. J.*, XXIX, 296, and especially documents there quoted.

[18] U. S. Treaty Vol. IV, 4225, where it was provided that "Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

"Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided."

[19] Dept. of State, Arbitration Series No. 2(7), *Am. J.*, XXIX, 329. It may be noted that the Commissioners recommended also that specified compensation be paid for the benefit of the captain and members of the crew.

[20] See *supra*, § 309A.

[21] U. S. Executive Agreement Series, No. 73.

designed to make provision for the amicable adjustment of differences of every kind and degree. As amended in 1924,[1] the Members of the League agree, in the event of a dispute between them, "likely to lead to a rupture," to submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.[2] There is agreement by the Members that any dispute between them "which they recognize to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy," shall be submitted to arbitration or judicial settlement.[3] There is no provision, however, serving to render recourse to arbitration or judicial settlement obligatory except in so far as the parties to a controversy may be constrained to take such action through a mutual desire to avoid the alternatives that may confront them. There is otherwise no compulsion to effect the adjudication before a tribunal of such justiciable differences, however defined or restricted, as experience has shown to be susceptible of reasonable adjustment by such process. The duty to carry out in the best of faith any award or decision is acknowledged; and there is agreement not to resort to war against a Member of the League which complies therewith.[4]

Should there arise between Members of the League any dispute likely to lead to a rupture, and which is not submitted to arbitration or judicial settlement (in accordance with Article XIII of the Covenant), it is agreed that the matter shall be submitted to the Council.[5] That body is to endeavor to effect a settlement, and if its efforts are successful, it is to make public a statement giving such facts and explanations regarding the dispute and the terms of settlement as the Council deems appropriate. If the dispute is not thus settled, the Council either unanimously or by a majority vote is to make and publish a report con-

§ 585. [1] See text of the Covenant, embracing amendments of Articles XII, XIII and XV, in force as from Sept. 26, 1924, in League of Nations document No. C.L.102.1926.V.

[2] See Art. XII. It is also provided that in any case under this Article, the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council within six months after the submission of the dispute.

[3] See Art. XIII. It is there added that "Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement."

According to the same article: "For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them."

See Arbitration, Justiciable Differences, *supra*, §§ 560–561.

With respect to disputes between a Member of the League and a State not a Member thereof, or between States which are not Members, see Art. XVII. See, also, in this connection, The League of Nations and Intervention, *supra*, § 84.

[4] Art. XIII. This Article also provides that "in the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto."

[5] Art. XV. Concerning the membership and organization of the Council, see Art. IV.

According to Art. XV, any party to the dispute may effect the submission of it to the Council by giving notice of the existence of the dispute to the Secretary General of the League, who is to make all necessary arrangements for a full investigation and consideration thereof. For such purpose, the parties to the dispute are to communicate to him, as promptly as possible, the statements of their case with all the relevant facts and papers. It is declared that the Council may forthwith direct the publication thereof.

taining a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.[6] If the report is unanimously agreed to by the Members of the Council other than the representatives of one or more of the parties to the dispute, the Members of the League agree not to go to war with any party to the dispute which complies with the recommendations of the report. If the Council fails to reach a report which is unanimously agreed to by the Members thereof, other than the representatives of one or more of the parties to the dispute, it is declared that the Members of the League reserve to themselves the "right to take such action as they shall consider necessary for the maintenance of right and justice." [7]

The Council may refer a dispute, which has been submitted to it, to the Assembly of the League; and either party to the difference may, under specified conditions, demand such a reference.[8]

The foregoing provisions for the use of the Council (or the Assembly) contemplate the obligatory adjustment, by amicable although essentially non-judicial processes, of differences which, regardless of their character, States have been generally indisposed to submit to an international tribunal. The Council, once possessed of jurisdiction, enjoys freedom in method and purpose.

It is not sought to discuss the failure of States, members of the League of Nations, when at variance with each other, to utilize or observe the provisions of the Covenant to effect the amicable adjustment of differences of gravest character,[9] or the failure of members, not themselves parties to a dispute, to prevent

[6] Art. XV. It is here also provided that any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

[7] There is an important restriction in Art. XV to the effect that "if the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

According to Art. XVI: "Should any Member of the League resort to war in disregard of its covenants under Articles XII, XIII, or XV, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

[8] Art. XV. It is here provided that in any case referred to the Assembly, all the provisions of Arts. XII and XV relating to the action and powers of the Council shall apply to the action and powers of the Assembly, "provided that a report made by the Assembly, if concurred in by the representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the Members thereof other than the representatives of one or more of the parties to the dispute."

Concerning the membership and organization of the Assembly, see Art. III.

[9] The adjustment of the dispute between Colombia and Peru in relation to Leticia, and which became acute in 1932–1933, was finally effected by direct negotiations between representatives of the States at variance acting under the chairmanship of the Brazilian Minister of Foreign Affairs, and was registered in a treaty signed at Rio de Janeiro, May 24, 1934. (League of Nations Treaty Series, Vol. CLXIV, No. 3786, 37. Also Republica de Colombia, *Protocolo de Rio de Janeiro,* Bogotá, 1935, 93.) Those negotiations were facilitated by the acceptance by those States on May 25, 1933, of recommendations proposed by the Council of the League in a report which it had adopted on March 18, 1933. (See League of Nations, *Official Journal,* 1933, 944–946; also, Dept. of State Press Releases, March 4, 1933, 159, and

through the framework of the Covenant recourse to non-amicable measures involving armed conflict, or their failure to safeguard from attack a member which invokes the protection of the League as against an antagonist,[10] or their failure to penalize effectually a member under conditions when the provisions of Article XVI might be applicable.

It was too much to expect that any scheme for the amicable adjustment of international differences, however responsive to the high purpose expressed in the preamble of the Covenant, should not break down in the face of the character of the peace settlements in which it was incorporated. The prevention of causes of conflict is of vastly greater concern to the international society than prescriptions offering a cure for, or deterrent of, matured policies of hostility which those causes may have begotten. The outbreak of World War II in 1939 must produce fresh realization of this fact. The peace that is to be must reckon with it if arrangements for the relinquishment of armed force of the settlement of international differences are to become practical barriers against war.

d

**§ 585A. The United States as a Coöperator with the League of Nations in Efforts to Adjust Controversies Pertaining to the Far East.** It seems important to observe that in special relation to controversies in the Far East involving China and Japan, the United States has frequently acted in coöperation with the League of Nations. In the course of the dispute between those countries in 1931, the Government of the United States, in response to an invitation from the President of the Council, sent for a brief period a representative to sit at the Council table, permitting him to participate in discussions of that body when they related to the application of the Briand-Kellogg Pact.[1]

---

March 25, 1933, *id.*, 193, revealing the American approval of the League formula, and the coöperation of the United States with the Advisory Committee appointed by the Council.) The League's acknowledged interest in the amicable solution of the controversy assumed a practical form in the proposals which were in fact accepted preliminary to the negotiations productive of the final treaty of adjustment. They embraced, among other things, the taking charge of administration of the territory at Leticia by a Commission to be appointed by the Council upon whose arrival there that territory was to be evacuated by Peruvian forces, also the cessation of acts of hostilities on either side and the holding of the military forces of the two parties within their respective frontiers. (See League of Nations, *Official Journal*, 1933, 944–945.) The interest of the League, not merely in the cessation of military activities in 1933, but also in a complete and final settlement of the controversy, was shown by the efforts of the Advisory Committee in January, 1935, in view of the failure of the Colombian Congress to ratify the agreement of May 24, 1934, to express the hope that that body might ratify the agreement as soon as possible, and to request the Council's Committee of Three to give special attention to the matter. (See League of Nations, Monthly Summary, XV, January, 1935, 12.) See, also, in this connection, U. P. Hubbard, The Coöperation of the United States with the League of Nations, 1931–1936, *International Conciliation*, April, 1937, No. 329, at pp. 402–406; L. H. Woolsey, "The Leticia Dispute Between Colombia and Peru," *Am. J.*, XXIX, 94.

[10] See J. H. Spencer, "The Italian-Ethiopian Dispute and the League of Nations," *Am. J.*, XXXI, 614.

Concerning the resolution adopted by the Council Dec. 14, 1939, to the effect that the Union of Soviet Socialist Republics had "placed itself outside the League of Nations," and declaring it to be "no longer a member of the League," see League of Nations, *Official Journal*, November–December, 1939, 506 and 508.

§ 585A. [1] See Mr. Stimson, Secy. of State, to the Secretary General of the League of Nations, Oct. 9, 1931, Dept. of State Press Releases, Oct. 17, 1931, 295; invitation to the United

The American Government expressed its approval of a resolution of the Council of October 24, 1931, embodying recommendations for the settlement of the dispute,[2] as well as of a resolution of that body of December 10, 1931, contemplating the appointment of a Commission of Enquiry,[3] assenting to the inclusion in its membership of an American citizen.[4]

Again, in 1933, the American Government accepted an invitation to coöperate in the work of the Advisory Committee created by the Assembly of the League for the purpose of following the situation in the Far East.[5] Subsequently, in September, 1937, when the Advisory Committee assembled in consequence of the existing Sino-Japanese conflict, the United States was represented thereon by Mr. Leland Harrison, the American Minister to Switzerland.

On October 6, 1937, the Department of State announced that the Government of the United States had been forced to the conclusion that the action of Japan in China was inconsistent with the principles which should govern the relationships between nations and was contrary to the provisions of the Nine Power Treaty of February 6, 1922, regarding principles and policies to be followed in matters concerning China, and to those of the Kellogg-Briand Pact of August 27, 1928, and further, that the conclusions of the Government with respect to the foregoing were in general accord with those of the Assembly of the League of Nations,[6] which had adopted and approved the report of the Advisory Committee.[7]

---

States to send representative to sit at Council table, Oct. 16, 1931, *id.*, 296; acceptance of invitation by the United States, Oct. 16, 1931, *id.*, 297; instructions to the American Consul at Geneva, Oct. 16, 1931, *id.*, 298.

Declared Secy. Stimson on Nov. 6, 1931: "The policy of the Government of the United States remains unchanged, namely, by acting independently through the diplomatic channels and reserving complete independence of judgment as to each step, to coöperate with and support the other nations of the world in their objective of peace in Manchuria." (Dept. of State Press Releases, Nov. 7, 1931, 430.)

See, in this connection, H. L. Stimson, The Far Eastern Crisis, New York, 1936; W. W. Willoughby, The Sino-Japanese Controversy and The League of Nations, Baltimore, 1935; U. P. Hubbard, The Coöperation of the United States with the League of Nations, 1931–1936, *International Conciliation,* April, 1937, No. 329.

[2] See Memorandum for the Japanese Government, Nov. 5, 1931, Conditions in Manchuria, Senate Doc. No. 55, 72 Cong., 1 sess., 30. For the text of the resolution see *id.*, 22.

[3] See Statement by the Secy. of State, Dec. 10, 1931, *id.*, 46.

[4] "We assented to the inclusion in its membership of an American, and on the request of M. Briand I suggested and the League appointed Major-General Frank R. McCoy of the American army as that member." (H. L. Stimson, *op. cit.*, 81.)

See Efforts to Restrict Freedom to Embark Upon War. The Briand-Kellogg Pact, *infra,* § 596A.

[5] In accepting the invitation, Secy. Hull declared in part: "As it is necessary that the American Government exercise independence of judgment with regard to proposals which may be made and/or action which the Advisory Committee may recommend, it would seem that appointment by it of a representative to function as a member of the Committee would not be feasible. However, believing that participation by a representative of this Government in the deliberations of the Committee would be helpful, I am instructing the American Minister to Switzerland, Mr. Hugh R. Wilson, to be prepared so to participate, but without right to vote, if such participation is desired." (See Dept. of State Press Releases, March 18, 1933, 175–178.)

[6] Dept. of State Press Releases, Oct. 9, 1937, 284.

See, also, statement by the President at Chicago, Oct. 5, 1937, *id.*, 275.

[7] The Assembly adopted on Oct. 6, 1937, two reports submitted by its Advisory Committee the previous day, the second of which requested the President of the Assembly to take the necessary action with regard to a proposed meeting of the members of the League which

The United States participated in the so-called Nine Power Conference assembled at Brussels on November 3, 1937, pursuant to an invitation extended by the Belgian Govérnment at the request of His Majesty's Government in the United Kingdom with the approval of the American Government, in harmony with the recommendation of the Advisory Committee of the Assembly and approved by that body.[8] The Conference inspired by Geneva, and designed to "examine the situation in the Far East and to study peaceable means of hastening the end of the regrettable conflict which prevails there," [9] was not successful in achieving the end desired.[10]

---

were parties to the Nine Power Treaty of Feb. 6, 1922. See Verbatim Record of 18th Ordinary Session of the Assembly of the League of Nations, 13th Plenary Meeting, 6; 14th Plenary Meeting, *id.*, 1.

[8] See Report adopted by the Conference, Nov. 24, 1937, Dept. of State Press Releases, Nov. 27, 1937, 396.

For the second report of the Advisory Committee of the Assembly in relation to a proposed conference, see *New York Times*, Oct. 6, 1937, also League of Nations Document A.80.1937.VII.

[9] See text of the Belgian invitation, Oct. 16, 1937, Dept. of State Press Releases, Oct. 16, 1937, 309.

[10] See Declaration adopted by the Conference, Nov. 15, 1937, Dept. of State Press Releases, Nov. 20, 1937, 380; Report adopted by the Conference, Nov. 24, 1937, *id.*, Nov. 27, 1937, 396.

# TITLE B

## NON-AMICABLE MODES SHORT OF WAR

### 1

§ 586. **In General.** On occasions, when their differences with others have not been adjusted by amicable means, aggrieved States not infrequently have recourse to non-amicable measures for the purpose of obtaining desired redress or of removing the cause of controversy. Such measures may or may not lead to war.[1] It is the steps taken which are not, at least for the time being, regarded by the State against which they are directed as amounting to acts of war, that are here observed.

Non-amicable measures may involve the use of force or of other forms of conduct. They may be employed for the purpose of checking the commission of legal as well as illegal acts on the part of a foreign State.[2] They may indicate a preference for the exercise of sheer power over any other instrumentality however efficacious. Their very use may, under the existing circumstances, constitute a violation of international law.

A State which resorts to force in order to obtain a desired form of redress from another, and by such process to settle a controversy through ways of its own devising, asserts the right not only to be the sole judge of its own cause, but also to be the enforcer by its own strong arm of demands which in its judgment are not unwarranted. It may be sought to excuse recourse to measures of self-help on the ground that no legal obligation rests upon the aggrieved State to follow a different course, and that there is, in particular, no duty resting upon

§ 586. [1] Declared Judge J. B. Moore, in a communication to Hon. Hamilton Fish, M.C., Feb. 12, 1937, *New York Times,* Feb. 18, 1937, p. 16: "Writers on international law, in treating of international processes, classify them as amicable and non-amicable. Among the former are negotiations, good offices, mediation and arbitration. Non-amicable processes are divided into two classes — those short of war and war itself. Those short of war embrace withdrawal of diplomatic relations, retorsion or retaliation, and the display of force, these three being progressively coercive in their nature and intention. After those come reprisals, 'pacific' blockade, embargo and non-intercourse.

"In describing these measures as being 'short of war' it is not meant that they may not involve acts of war. What is actually meant is that, if not opposed, they may not result in the legal condition of things called a state of war. But, as they are essentially coercive in their nature, experience has shown that they are likely to result in an avowed state of war.

"As all history shows, wars have for the most part grown out of forcible or coercive acts committed before the legal condition of things called a state of war, formally declared, came into existence."

[2] Declared President Roosevelt in his annual message to the Congress, Jan. 4, 1939: "But the mere fact that we rightly decline to intervene with arms to prevent acts of aggression does not mean that we must act as if there were no aggression at all. Words may be futile, but war is not the only means of commanding a decent respect for the opinions of mankind. There are many methods short of war, but stronger and more effective than mere words, of bringing home to aggressor governments the aggregate sentiments of our own people." (84 *Cong. Rec.,* 74.)

it to pursue its adversary in an arbitral forum. Doubtless the disposition of States to agree increasingly to utilize various modes of amicable adjustment of international controversies lessens opportunity for reliance upon such a contention. The willingness of a considerable number to accept the treaty providing for the Renunciation of War as an Instrument of National Policy, concluded August 27, 1928, and thereby to agree that "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means," [3] indicates a widespread readiness to relinquish the use of non-amicable means in all situations within the field where the treaty is intended to be applicable. Yet the limits of that field, as revealed by evidence of a design not to restrict defensive measures to which a contracting party may on occasion feel it necessary to resort, point to a broad and undefined area within which non-amicable and coercive measures are not proscribed.[4] There is still a gap left open; and this continues to encourage abuses of power manifested in the imposition by force of excessive penalties as well as the exaction of compliance with exorbitant demands.

The influence of international law is impaired as long as entities which acknowledge the obligation to be governed by it deny the illegality of conduct whereby one of them, if possessed of requisite power, essays to apply it without external restraint against a weaker country, despite the availability of agencies that may be capable of passing or adjudicating upon the issues that are involved, and of affording reasonable as well as amicable means of adjustment.

Relinquishment of the use of some forms of self-help will doubtless depend in part upon the success of experiences in utilizing amicable measures, especially those of a judicial character, as a practicable substitute. The willingness of States to agree that specified acts should under no circumstances be committed by an aggrieved party, would of course operate as a deterrent thereof on the part of States that were faithful to such an undertaking. The international society may not, however, be disposed so to commit itself until its several members, embracing its strongest ones, deem it to be relatively undesirable and unnecessary to employ force as a means of securing redress for grievances in some special situations confronting them, such as those where a State charged with wrongful conduct and perhaps guilty thereof, is disinclined or unable to make fitting response to its international obligations. A diminution of the recurrence of such cases will ultimately do much to lessen a sense of need of preserving remedies based upon self-help. In the meantime, it becomes necessary to observe the various non-amicable modes of adjusting differences to which recourse is had, and to the differing kinds and degrees of pressure which under some circumstances are applied against recalcitrant States as a means of causing them to yield desired redress on account of their alleged shortcomings.

[3] Art. II, U. S. Treaty Vol. IV, 5132.
[4] See Reservations to Multi-partite Agreements, *supra*, § 519A.

2

§ 587. **Withdrawal of Diplomatic Relations.** In order to obtain redress for grievances for the satisfaction of which diplomatic negotiation has proved unavailing, a State may sever its diplomatic relations with the State charged with wrongdoing. Such action is not only expressive of national indignation, but also frequently serves to impress upon the latter the desirability of making amends.

On June 13, 1908, Secretary Root declared that in view of the persistent refusal of the existing Government of Venezuela (under President Castro) to give redress for governmental action by which substantially all American interests in that country had been destroyed or confiscated, or to submit the claims of American citizens for such redress to arbitration, the United States was forced to the conclusion that the further presence in Caracas of its diplomatic representatives subserved no useful purpose, and was determined to close its legation in that capital, and to place its interests, property and archives in Venezuela in the hands of representatives of Brazil.[1] Through the medium of that State, a new Venezuelan administration under President Gomez made known to the United States in December, 1908, a desire to settle satisfactorily all international questions.[2] In February, 1909, Mr. William I. Buchanan, as Special Commissioner of the United States, effected agreements with Venezuela providing either for direct settlement or the arbitration of all pending claims.[3] The American Minister, Mr. Russell, was thereupon instructed to return to his post.[4]

It will be recalled that in 1909 the United States severed its diplomatic relations with Nicaragua while the latter was under the administration of President

§ 587. [1] Telegram to Mr. Sleeper, American Chargé d'Affaires, For. Rel. 1908, 820. See, also, generally, *id.*, 774–830.

[2] Mr. Root, Secy. of State, to Mr. Buchanan, Special Commissioner, Dec. 21, 1908, For. Rel. 1909, 609.

[3] Mr. Root, Secy. of State, to Mr. Buchanan, Special Commissioner, Dec. 21, 1908, For. Rel. 1909, 609–624. According to a protocol of Feb. 13, 1909, *id.*, 617, it was agreed that the claim in behalf of the Orinoco Steamship Company, that in behalf of the Orinoco Corporation and of its predecessors in interest, and that in behalf of the United States and Venezuela Company should be referred to an arbitral tribunal composed of three arbitrators chosen from the Permanent Court at the Hague. The Orinoco Steamship Company's claim was duly submitted to arbitration; the other two claims were settled by direct negotiation. *Id.*, 624–629.

[4] Mr. Buchanan was commissioned "to represent the President with full power to confer with the Government of Venezuela in all matters relating to the reëstablishment of diplomatic relations between the United States and Venezuela." He was instructed that upon the incorporation in a protocol of the terms of adjustment desired, "the minister of the United States to Venezuela will be directed to return to his post and the United States will be ready to receive a diplomatic representative of Venezuela." (Mr. Root, Secy. of State, to Mr. Buchanan, Special Commissioner, Dec. 21, 1908, For. Rel. 1909, 609.)

See, also, documents in Moore, Dig., VII, 103–105.

In response to a request of Mr. Monroe, American Minister at Paris, Dec. 6, 1796, for the appointment of a time when he might present his successor, Mr. Pinckney, as well as his own letters of recall, Mr. De La Croix, the French Minister of Foreign Affairs, replied: "The directory has charged me to notify to you 'that it will no longer recognize nor receive a minister plenipotentiary from the United States, until after a reparation of the grievances demanded of the American Government, and which the French Republic has a right to expect.'" (Am. State Pap., For. Rel. I, 746.) "The Directory refused to give Pinckney a permit to sojourn in Paris as a private foreigner, and afterwards sent him a notice to quit the territories of the Republic. He then retired to Amsterdam to await developments." (Moore, Dig., V, 598, *citing* Am. State Pap., For. Rel. II, 10.)

Zelaya, whose régime was denounced as "a blot upon the history" of that State, and whose direct order in causing the execution of two American citizens who had been officers in the revolutionary forces in that country was deemed to be at variance with the practice of civilized nations.[5]

The withdrawal of diplomatic relations never constitutes in itself internationally illegal conduct; for no legal duties rest upon an aggrieved State to maintain uninterrupted official intercourse with any other through the diplomatic channel, and still less with one whose conduct is, for any reason, deemed to be reprehensible. Such action may be taken, moreover, not primarily as a means of obtaining redress in satisfaction of an alleged grievance, but for other reasons, as in the case where a State regards its position as a co-belligerent or ally of another as inconsistent, and perhaps interfered with, by the maintenance of diplomatic relations with the enemy of that other. Doubtless such considerations impelled Turkey in 1917, to sever diplomatic relations with the United States.[6] Again, a State may as a preventive measure, on grounds analogous to those of self-defense, break off diplomatic relations with another when it is felt by the former that the diplomatic representative of that other who is accredited to itself is being utilized by his government for purposes that are detrimental to its interests within its territory or within areas adjacent thereto.[7] It must be obvious, however, that the unwisdom of the severance or withdrawal of diplomatic relations, save for ample cause, must always be apparent.

3

§ 588. **Retorsion. Retaliation.** The term retorsion is said to refer broadly to "the action taken by a State in order to compensate it for some damage suffered through the action of another State, or in order to deter the action complained of."[1] Retorsion frequently takes the form of retaliation, when, for example, the act of the complaining State is of the same kind as that of its opponent.[2] This

[5] Mr. Knox, Secy. of State, to the Nicaraguan Chargé d'Affaires, Dec. 1, 1909, For. Rel. 1909, 455.

In April, 1914, after Rear-Admiral Fletcher had seized the customhouse at Vera Cruz, General Huerta, as head of the Provisional Mexican Government, gave Mr. O'Shaughnessy, the American Chargé d'Affaires *ad interim* at Mexico City, his passports, with a view to severing diplomatic relations with the United States. For. Rel. 1914, 636.

[6] See Ahmed Nessimi, Turkish Minister of Foreign Affairs, to the American Ambassador at Constantinople, April 20, 1917, For. Rel. 1917, Supp. 1, 603.

[7] On Dec. 27, 1935, the Government of Uruguay informed the Soviet Minister at Montevideo of its decision "to declare suspended the diplomatic relations which have hitherto existed between Uruguay and the Union of Soviet Socialist Republics," on the ground that the Soviet Legation at Montevideo was a center of the Communist activity which had just been responsible for bloodshed in Brazil. (League of Nations Doc. No. C.40.M.18.1936.VII.) Concerning the discussion which this action produced at Geneva in the light of objections made by M. Litvinoff, in the Council of the League of Nations, see "Freedom to Withdraw Diplomatic Relations," and documents there cited, *Am. J.*, XXX, 284. Also, League of Nations, *Official Journal*, 1936, 90–106; 232–239.

§ 588. [1] Westlake, 2 ed., II, 6.

See Marshall, C. J., in The Nereide, 9 Cranch, 388, 422, Moore, Dig., VII, 106, respecting the duty of the courts not to interfere with the political department in asserting the right to commit acts of retorsion.

[2] Thus Hall declares that retorsion "consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated. Thus if the productions of a particular state are dis-

fact has led to the intimation that retorsion is a species of retaliation.[3] Retorsion is seen, however, in acts which are not retaliatory because neither identical with, nor closely analogous to, those of which complaint is made. Thus in 1870, President Grant, anticipating a repetition by Canadian authorities of "their unneighborly acts" towards American fishermen, recommended that the Executive be empowered to suspend, by proclamation, the operation of the laws authorizing the transit of goods, wares and merchandise in bond across the territory of the United States to Canada; and further, if need be, to suspend the operation of any laws permitting the entrance of Canadian vessels into American waters.[4] Such a response on the part of the United States would have furnished an instance of this form of non-amicable action.

Retorsion is frequently the retaliatory answer given to the unfriendly yet not illegal acts of another State. This is true, when, for example, the ports of a country are closed against vessels belonging to and arriving from a foreign State whose ports are by law closed against vessels of the former.[5] When retaliation is the consequence of lawful conduct, no legal issue confronts the States at variance. It may be observed, however, that the fear of such retaliation may and oftentimes does serve to restrain the exercise of lawful though discriminatory and possibly unfriendly treatment of a foreign State or of its nationals.

Retorsion may be the answer given to internationally illegal conduct.[6] In such case it becomes difficult to estimate the value of the excuse of the aggrieved State in responding by either retaliation or by some other form of action that is to be regarded as normally lawless. It should be clear that the aggrieved State may in fact make its retort through non-retaliatory yet none the less effective conduct which is untainted by unlawfulness in an international sense. No doubt it will oftentimes be contended that the freedom of retortive conduct from such a quality depends upon the character of the acts of which complaint is made. This contention, if sound, does away with the distinction between a response which is normally lawful, and one which though normally unlawful is under the circumstances excusable. Perhaps it is unimportant to endeavor to ascer-

---

couraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbors by like laws and tariffs." Higgins' 8 ed., § 120, p. 433, *citing* De Martens, *Précis*, § 254; Phillimore, iii, § vii; Bluntschli, § 505.

[3] Thus there has come into being the tautological phrase that retorsion is "retaliation in kind." Wharton, Com. Am. Law, § 206, Moore, Dig., VII, 105–106. The derivation of the word retaliation from the Latin verb *retaliare*, signifying to return like for like, in contrast to that of retorsion from *retorquere*, signifying to twist or turn back, ought to suffice as a warning against such a statement. It would not be inaccurate to describe retaliation as retorsion in kind.

[4] Message of Dec. 5, 1870, For. Rel. 1870, II, Moore, Dig., VII, 107.

[5] See, for example, Act of April 18, 1818, Chap. 65, 3 Stat. 432, Moore, Dig., VII, 106; and interpreting the same, see The Pitt, 8 Wheat. 371, Moore, Dig., VII, 106; and The Frances and Eliza, 8 Wheat. 398, Moore, Dig., VII, 106. Also Mr. Marcy, Secy. of State, to Mr. Parker, Oct. 5, 1855, MS. Inst. China, I, 127, Moore, Dig., VII, 106.

[6] Declares Westlake: "As a matter of law there is retorsion when state A deems that it has received from state B not merely damage but legal injury, exempting it from the duty of a strict observance of law towards the wrongdoer, and replies by another breach of law intended to be compensatory or deterrent." (2 ed., II, 6.) *Compare* Lauterpacht's 6 ed. of Oppenheim, II, §§ 29–32.

tain in any particular case whether the conduct of the aggrieved State is of one kind rather than the other.[7] It suffices to observe that in some situations in consequence of the character of the initial acts of the offender, the aggrieved State in having recourse to acts of self-help described as those of retorsion, will be unwilling to admit that its conduct is in violation of international law, or that its adversary is in a position to assert that that conduct is at variance with the requirements of that law.

Acts of retorsion may assume a variety of forms.[8] They are seen, for example, in the display of force made by the maintenance of a naval squadron in or near the waters of a foreign State charged with wrongdoing. Such means have been employed by the United States in dealing with disordered countries, or with those not at the time accepted for all purposes as full-fledged members of the family of nations, and chiefly for the purpose of deterring the continuance of reprehensible conduct.[9]

In order to obtain redress for existing grievances, the Government of the United States has, on various occasions, both with and without Congressional authority, made use of force against a delinquent State without, however, attempting to take even temporary possession or control of its territory or other property. Thus, in 1858, with such authority vigorous steps were taken against Paraguay. In order to assure the obtaining of redress for the consequences of the wrongful firing upon the American naval vessel *Water Witch* while in the waters of the river Parana, and a fair mode of adjusting the pecuniary claim of the United States and Paraguay Navigation Company, a large naval fleet was sent out. Its presence in the waters of the Plate was deemed of value in enabling the special commissioner of the United States, Mr. James B. Bowlin, to secure a satisfactory adjustment.[10]

By reason of the failure of the community at Greytown, Nicaragua, to yield to the peremptory demand of Captain Hollins, commanding the U.S.S. *Cyane,*

[7] *Id. Compare* Certain Non-political Acts of Self-defense, *supra,* §§ 65–68.

[8] Certain acts, however, by reason of the circumstances attending their commission (see Certain Non-political Acts of Self-defense, *supra,* §§ 65–68), or the nature of what is attempted or accomplished (see Reprisals, *infra,* §§ 589–590), are commonly given a narrower description which serves to obscure the broader classification within which they also naturally fall.

The classification of the several non-amicable measures which States employ for the purpose of obtaining redress may be unimportant. Publicists are not agreed in the matter, while statesmen are unconcerned. The classification here employed is suggested by that of the late Professor Westlake. Int. Law, 2 ed., II, 6–11. It has the merit of being etymologically sound, and of not violating any technical distinctions which States generally, or the United States in particular, have relied upon.

[9] See, for example, President J. Q. Adams, Annual Message, Dec. 6, 1825, Richardson's Messages, II, 299, 308, Moore, Dig., VII, 107; see also other instances cited in Moore, Dig., VII, 108–109.

[10] Professor Moore adverts to the "singular circumstance" that this claim which the commission held to be unfounded, although presented by one Hopkins himself (with whom it originated), "had not actually been presented by the United States to the Paraguayan Government prior to the sending out of the expedition." (Dig., VII, 111, also Moore, Arbitrations, 1485–1549.)

Mr. Bowlin obtained apologies for the treatment of the *Water Witch,* a substantial indemnity for the family of the helmsman mortally wounded during the attack on the vessel, a treaty of amity and commerce (concluded Feb. 4, 1859, Malloy's Treaties, II, 1364), and a claims convention (concluded the same day, *id.,* II, 1362), providing for the arbitration of the claim of the United States and Paraguay Navigation Company.

to make satisfactory apology for insults directed against Mr. Borland, the American Minister to Central America, and to pay twenty-four thousand dollars as an indemnity for injuries to the Accessory Transit Company, that town was on July 13, 1854, twice bombarded by the *Cyane,* and its destruction finally completed by fire set by a naval force sent ashore for that purpose.[11] President Pierce, in defending this action, declared the community to be "a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages."[12] The bombardment of Greytown is not, therefore, illustrative of the procedure which the United States would employ against any member of the family of nations. It is not believed that the case points to a wise or humane method of seeking justice from countries or backward peoples that have not attained statehood and are not at the time regarded as eligible therefor.[13]

## 4

## REPRISALS

### a

§ 589. **The Growth of the Practice.** The modern law of reprisals finds its origin in the intercourse of alien peoples and cities centuries before the rise of international law. From early times the idea prevailed that for wrongs committed by a foreigner, his fellow-countrymen as well as himself were responsible. All were deemed severally liable for the default of the individual, a fact attributable to the oneness of interest deemed to exist between a sovereign and his subjects.[1] The obtaining of reparation was necessarily left to private individuals. Merchants banded together for the purpose of inflicting punishment upon, or of obtaining redress from, those who had wronged any of their number.[2] By

[11] Brit. & For. State Pap., XLVI, 859–888, and XLVII, 1004–1038, Moore, Dig., VII, 112–116, 346–354, and documents there cited.

[12] Annual Message, Dec. 4, 1854, Richardson's Messages, V, 273, 282, Moore, Dig., VII. 353.

[13] See also documents in Moore, Dig., VII, 116–117, with reference to the steps taken in 1863 and 1864, in Japanese waters, against the rebellious Prince of Nagato.

The United States, in 1888, did not hesitate to employ its naval vessels to procure the release by the Haitian Government of the American steamer *Haytian Republic,* the seizure and possession of which by that Government were believed to be unjust. Moore, Dig., VII, 117, *citing* For. Rel. 1889, 491–494, 497, 503–511.

§ 589. [1] "Reprisals (*repressalia*) were based on the solidarity which, according to ancient views, still far from having ceased to operate, existed between a prince and his subjects or between a city and its citizens. A wrong done by any of them to a foreign prince, city or person was the wrong of all, and all were answerable for it; the cause of any of them who had suffered a wrong from a foreign prince, city or person was the cause of all, and often in practice all took it up, though perhaps in theory it was only for the wronged one or his prince or city to do so." (Westlake, 2 ed., II, 8.) See, also, T. A. Walker, History of the Law of Nations, I, 121.

[2] Fauchille, 8 ed., § 981; bibliography, *id.,* § 971; Clunet, *Tables Générales,* I, 482–483, 891; bibliography in Hershey, revised ed., 542; Hall, Higgins' 8 ed., § 120; P. Lafargue, *Les Représailles en Temps de Paix,* Paris, 1899; Lawrence, 5 ed., § 136; Mérignhac, III, 48–53; E. Nys, *Les Origines du Droit International* (1894), 62–72; Lauterpacht's 5 ed. of Oppenheim, II, §§ 33–43; Rivier, II, 191–198; Stockton, Outlines, 286–289; Westlake, 2 ed. II, 6–11; Westlake, "Reprisals and War," *Collected Papers,* 590, reprinted from *Law Quar. Rev.,* XXV, 120; Dana's Wheaton, §§ 290–292; Woolsey, 6 ed., § 118.

land and sea the work was carried on. Persons and property were seized and even destroyed.[3] From such conduct there grew up in the Middle Ages a distinct practice given a description of its own. When property could not be retaken from him who had wrongfully seized it, or when reparation for its loss was not otherwise obtainable, the aggrieved merchants proceeded to seize the person of the wrongdoer or other property belonging to him or to his fellow-countrymen, and either to keep possession thereof until some measure of justice had been obtained, or to apply the same (in the case of property) in satisfaction of the loss sustained.[4]

It was this forcible taking of a pledge as a means of obtaining reparation which appears to have been the conduct which the term "reprisals" was first employed to describe.[5] Whether, moreover, contractual or tortious delinquencies were the causes productive of reprisals, the sum claimed was, according to Professor Westlake, in either case originally capable of pecuniary statement.[6]

The relation of the sovereign to the efforts of his aggrieved subjects to force some measure of justice from foreigners underwent a natural transformation. From the very magnitude of their undertakings, he ceased to be indifferent as to their success, and undertook himself to control or license their use of force. The making of reprisals began to be authorized by the issuance of formal letters

[3] See, for example, case of the quarrel between the English and Norman sailors in 1292, mentioned in Ward, Hist. Law of Nations (Dublin, 1795), I, 176–177; Moore, Dig., VII, 131, *citing* Ward, I, 294–296.

See, also, N. Politis, "*Les Représailles entre États Membres de la Société des Nations*," *Rev. Gén.*, XXXI (1924), 5; Rev. Fr. Yves de la Brière, "*Évolution de la Doctrine et de la Pratique en Matière de Représailles*," *Recueil des Cours*, 1928, II, 241; A. E. Hindmarsh, Force in Peace, Cambridge, Mass., 1933; S. Maccoby, "Reprisals as a Measure of Redress Short of War," *Cambridge Law Journal*, II, 60; Edwin Borchard, "Reprisals on Private Property," *Am. J.*, XXX, 108.

[4] E. Nys, *Les Origines du Droit International*, 65.

[5] To refer, therefore, at the present time to the rough means employed generally by ancient merchants in order to obtain reparation by force as "reprisals," is to describe their acts by a term the equivalent of which was not in fact applied to them, and which doubtless remained for centuries unknown. The word "reprisal" is the English equivalent of the French *représaille*, derived from the old French *reprisaille*. The latter was derived from the Italian *ripresaglia*. It appeared in Middle Latin in the plural as *repraesaliae*. See Du Cange, *Glossarium Mediae et Infimae Latinitatis*, 1886, VII, 434, with copious illustrations and citations, including Bartolus, *Tract. de Repraesal.*; also E. Nys, *Les Origines du Droit International*, 62; Oxford English Dictionary, VIII, 485. The word was not employed in the Roman law. It is not found, for example, in the appropriate volume (V) of *Vocabularium Jurisprudentiae Romanae jussu Instituti Savigniani*, Berlin, 1910; or in Forcellini's *Totius Latinitatis Lexicon*. Grotius regarded in his time the phrase *jus repressaliarum* as a description attributable to "*recentiores jurisconsulti*." See *De Jure Belli ac Pacis*, Book III, Chap. II, § 4. Although the word "reprisal" and its equivalents in the Latin languages are thus of relatively modern origin, the conduct which they were used to describe had a very early beginning. Grotius was quick to discern the similarity between the law of reprisals of the seventeenth century and the custom of the Athenians known as "*androlepsia*" — ἀνδροληψία. *Id.*, Book III, Chap. II, § 7. That custom permitted the relatives of an Athenian murdered by a foreigner, if satisfaction were refused, "to seize three fellow-countrymen of the murderer and hold them for judicial condemnation to compensation, or even to the death penalty." (T. A. Walker, Hist. Law of Nations, I, 41, *citing* Vattel, II, 18, § 351, Demosth. c. *Aristocr.*, § 96.) According to Gustave Glotz, *androlepsia* was not a custom peculiar to the law of the Greeks, but prevailed also among the Romans, as well as among the Ossetes, and was seen also in the early Irish law. *La Solidarité de la Famille dans le droit Criminel en Grèce*, Paris, 1904, 221–222, *citing* Plut. *Rom.*, 23; Dareste, *Étude d'hist. du dr.*, p. 141; d'Arbois de Jubainville, *Étude sur le dr. Celt.*, I, 192.

In the preparation of this note the author acknowledges his indebtedness to the assistance of Prof. O. F. Long, of Northwestern University.

[6] Westlake, Collected Papers, 592.

to those entrusted with the work.[7] Thus as the public endeavor gradually supplanted private effort in the attempt to obtain justice from foreign States, such authority was increasingly withheld from private agencies, until the practice of authorizing so-called "special reprisals" was generally abandoned.[8] The State itself assumed the task of taking foreign property by force. It did so, moreover, not merely for the sake of its nationals whose claims it had espoused, but also for itself as sovereign, in behalf of an essentially public cause, and that irrespective of the character of the claim.[9] Thus, for example, the failure to make appropriate amends for a national insult became as certain a ground for the making of reprisals as the failure to offer any means of redress for wrongfulness of conduct directed against a private individual.

Again forms of reprisals ultimately broadened. Not merely the taking but also the withholding of property, and that whether or not accompanied by the use of force, were believed to be within the limits assigned to that process. Finally, at the present time, there is a tendency on the part of publicists to regard as acts of reprisal almost any non-amicable measures of constraint which an aggrieved State may employ in order to obtain justice from its adversary.[10]

For sake of clearness, and for the purpose of preserving solid distinctions of both historical and etymological worth, it is deemed wise to confine the use of the term "reprisals" to the act of taking or withholding of any form of property of a foreign State or its nationals, for the purpose of obtaining, directly or indirectly, reparation on account of the consequences of internationally illegal conduct for which redress has been refused.

b

§ 590. **The Practice of the United States.** The nature and use of reprisals early engaged the thought of American statesmen. Attention was, however, drawn to the policy rather than the rightfulness of such acts. Jefferson under-

[7] "The license was granted by letters of marque or of reprisal, or of marque and reprisal. The former term has been connected by some with *marca*, a boundary, the letters being an authority to make captures outside the boundary of the territory; but it may be derived much more easily from *marcare* or *marchiare*, words which are found in documents of the thirteenth century in connection with *pignorare*, apparently in the sense of marking goods for a claimant's security." (Westlake, 2 ed., II, 9.)

Mr. Grover Clark in concluding his illuminating article on "The English Practice with Regard to Reprisals by Private Persons," *Am. J.*, XXVII, 694, at 723, found it possible to say: "As defined by the practice in England from the 13th to the 18th century, reprisals by private persons, in the strict sense of the word, were: acts in which, under authorization from the sovereign, property was seized as a means of securing compensation for a claim or claims against another State or its sovereign or any of its subjects, the claim or claims having arisen as a result of what were deemed to be unlawful acts committed by the State or its sovereign or subjects against which, or against whom, the reprisals were taken."

[8] "There is no example in the history of the United States of the granting of authority for special reprisals." (Moore, Dig., VII, 122.)

[9] Westlake, *Collected Papers*, 593–596, with reference to the English reprisals of 1754.

[10] According to A. E. Hindmarsh: "Public reprisals may thus be defined as coercive measures taken by one State against another, without belligerent intent, in order to secure redress for, or to prevent recurrence of, acts or omissions which under international law constitute international delinquency." (Force in Peace, 58.)

*Cf.* significance of the term "acts of reprisal or retaliation" employed in Arts. 23 and 24 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXII, *Supplement*, Section 2, 179.

stood their serious aspect, declaring that reprisals never failed to bring about war when directed against a State able to make that response.[1] Albert Gallatin, in 1835, vigorously opposed the contention that a State having just cause for reprisals should feel obliged to resort thereto.[2]

By reason of the failure of the French Chamber of Deputies to make the necessary appropriation for the payment to the United States of the first installment, some time overdue, in settlement of the French spoliation claims, in accordance with the terms of the convention of July 4, 1831,[3] President Jackson, in his annual message of December 1, 1834, expressed the opinion that the United States should insist upon prompt execution of the treaty, and in case of a refusal or longer delay on the part of France, should "take redress into their own hands." He declared it to be "a well-settled principle of the international code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war." [4] The resentment produced in France by the President's recommendation was appeased by expressions contained in his annual message of the following year.[5] Payment of the installments due was ultimately made, both of the States at variance having previously, however, accepted an offer of mediation emanating from Great Britain. The formal use thereof was rendered unnecessary by an announcement by France of a readiness to fulfill its obligation.[6]

The United States has since regarded with increasing disfavor the policy of making reprisals for the purpose of exacting pecuniary indemnities from delinquent States in satisfaction of the private claims of its nationals.[7]

§ 590. [1] See opinion of Mr. Jefferson, Secy. of State, May 16, 1793, Jefferson's Works, 628, Moore, Dig., VII, 123; see, also, Report of Mr. Clay, Senate Committee on For. Rel., Jan. 6, 1835, in the course of which he said: "Reprisals do not of themselves produce a state of public war; but they are not unfrequently the immediate precursor of it. When they are accompanied with an authority, from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance." (Senate Doc. No. 40, 23 Cong., 2 Sess., 40, Moore, Dig., VII, 126.)

[2] Communication to Mr. Everett, Secy. of State, January, 1835, 2 Gallatin's Writings, 494, Moore, Dig., VII, 122.

[3] Malloy's Treaties, I, 523. By Art. II, France agreed to pay 25,000,000 francs in six annual installments of 4,166,666.66 francs, the first to be paid one year after the exchange of ratifications of the convention, and the others at successive intervals of a year, one after another, until the whole should be paid. Each installment was to bear interest at 4 per cent from the date of the exchange of ratifications. Ratifications were exchanged Feb. 2, 1832.

[4] Richardson's Messages, III, 97, 106. See also, Message of President Jackson, Dec. 7, 1835, *id.*, III, 147, 152–161.

[5] *Id.*, III, 147, 152–161. See, also, the Message of President Jackson of Jan. 15, 1836, *id.*, III, 188, Senate Ex. Doc. 62, 24 Cong., 1 Sess., 1, 4; J. S. Bassett, Life of Andrew Jackson, New York, 1916, 666–673, and documents there cited.

[6] Brit. & For. State Pap., XXIV, 1156–1165; also, generally, Moore, Arbitrations, V, 4447–4468, and documents there cited; Moore, Dig., VII, 123–130.

See, also, third Annual Message of President Buchanan, Dec. 19, 1859, recommending penetration into the interior of Mexico by an American force "for the purpose of obtaining indemnity for the past and security for the future" from the rebellious General Miramon, a move which, the President declared, would enable the constitutional government of General Juarez to extend its power over the whole Mexican Republic. Richardson's Messages, V, 552, 563–568; Moore, Dig., VII, 130, VI, 482–483.

[7] Mr. Seward, Secy. of State, Report to the President, March 30, 1861, 8 MS. Report Book, 154, Moore, Dig., VII, 130; Mr. Bayard, Secy. of State, to Messrs. Benedict, Taft, and Benedict, May 18, 1886, 160 MS. Dom. Let. 237, Moore, Dig., VII, 130.

The practice of European States does not as yet indicate a similar tendency.

By reason of the failure of Nicaragua to pay an indemnity demanded by Great Britain in reparation for the treatment accorded the British Consul at Bluefields, together with some twenty British subjects, naval forces were landed at Corinto, April 27, 1895, and took military possession of the place. Upon the conclusion of an agreement for the adjustment of the difference, the forces were withdrawn.[8] Again, in 1901, France seized the customhouse at Mytilene, in order to obtain compliance by Turkey with certain demands embracing a settlement of the so-called Lornado claim for a substantial sum. The procedure adopted proved efficacious in obtaining a settlement.[9] In 1908, certain Venezuelan guardships were seized by a Netherland naval force as a means of obtaining satisfaction for the seizure by Venezuela of certain Dutch vessels. By a protocol of the following year, Venezuela agreed to pay an indemnity, and the Netherlands agreed to release the guardships.[10]

(1)

§ 591. **The Tampico Incident, 1914.** More recently the United States made significant use of reprisals to enforce redress on account of a public claim arising from indignities committed against itself. On April 9, 1914, a paymaster of the U.S.S. *Dolphin* and two seamen therefrom were arrested without just cause at Tampico, Mexico, by an officer and squad of men in the army of General Huerta, head of the provisional government of Mexico. Shortly thereafter the Commander of the Huertista forces ordered the release of the paymaster and his men. This was followed by apologies from the commander and an expression of regret from General Huerta himself. Rear Admiral Mayo, U.S.N., in

"Our own Government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not." (President Roosevelt, Annual Message, Dec. 5, 1905, For. Rel. 1905, xxxiv.)

[8] For. Rel. 1895, II, 1032–1034, Moore, Dig., VII, 134.

Concerning the well-known case of the confiscation by the King of Prussia in 1752 of the revenues of Silesia previously hypothecated to British creditors, and the stoppage of the interest on a loan to the latter, see Martens, *Causes Célèbres* (ed. of 1827), II, 1–88, Pitt Cobbett's Cases, 3 ed., I, 334.

Respecting the capture of Neapolitan vessels by Great Britain in 1840, on account of the grant by the King of Naples of a monopoly of all sulphur worked and produced in Sicily, and deemed contrary to a treaty between Great Britain and the Two Sicilies, of Sept. 26, 1816, see Phillimore, III, 1 ed., 27, cited in Moore, Dig., VII, 132. For the text of the treaty see Hertslet's Commercial Treaties, II, 131.

Concerning the case of *Don Pacifico,* and the reprisals made by Great Britain against Greece in 1850, see Phillimore, 1 ed., III, 29–31; also Moore, Dig., VII, 132–133, and documents there cited.

[9] For. Rel. 1901, 529–530.

See Mr. Bayard, Secy. of State, to Mr. Pendleton, Minister to Russia, Jan. 17, 1888, respecting the seizure or attachment by the German Consul-General at Apia in 1885, of the sovereign rights of the King of Samoa in the municipality of Apia, and the disavowal of this action by the German Government, For. Rel. 1888, I, 594, 600, Moore, Dig., VII, 134.

[10] For. Rel. 1909, 630–635. The sudden dismissal by Venezuela of the Dutch Minister Resident was also a source of friction. It may be observed that the Dutch Government made preliminary inquiry whether the United States would object to coercive measures in Venezuela should the national honor of the Netherlands require them. The Department of the State declared in response that the United States would not feel at liberty to object to measures described in the inquiry "not involving occupation of territory either permanent or of such a character as to threaten permanency." (*Id.,* 631–632.)

command of the American naval forces near Tampico, regarded the arrest as so serious that he was not satisfied with the apologies offered, but demanded that the flag of the United States be saluted with special ceremony by the military commander of the Port. General Huerta, although willing to fire a salute of twenty-one guns, insisted that the American forces should fire a like salute, gun for gun. This proposition being declined, President Wilson on April 20, 1914, sought Congressional authority for the use of the armed forces of the United States in such ways and to such an extent as might be necessary to obtain from General Huerta and his adherents "fullest recognition of the rights and dignity of the United States."[1] On April 22, 1914, the following joint resolution was approved:

> In view of the facts presented by the President of the United States in his address delivered to the Congress in joint session on the twentieth day of April, nineteen hundred and fourteen, with regard to certain affronts and indignities committed against the United States in Mexico: Be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.
>
> *Be it further resolved,* That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.[2]

Admiral Fletcher, U.S.N., commanding a large naval force off the Mexican coast, had on the previous day, pursuant to instructions, landed marines at

§ 591. [1] President Wilson, Address to the Congress, April 20, 1914, For. Rel. 1914, 474.

When the reparation demanded has been a salute to the flag of the aggrieved State, the practice of the United States with respect to a return of the salute does not appear to have been uniform. In 1855, the French Government agreed to accept as satisfaction for the indignity suffered by its consul at San Francisco during the previous year, a salute of the national flag borne by a French ship or squadron entering the harbor of San Francisco. It was agreed that the vessel thus saluted should return the salute gun for gun. See Correspondence between Mr. Marcy, Secy. of State, and Mr. Mason, American Minister to France, 1854–1855, Moore, Dig., V, 79–80, and documents there cited. By reason of the capture of the Confederate cruiser *Florida* by the U.S.S. *Wachusett* Oct. 7, 1863, in the harbor of Bahia, the salute of the Brazilian flag was demanded of the United States. In accordance with instructions, Commander F. B. Blake, U.S.N., commanding the U.S.S. *Nipsic,* on July 23, 1866, hoisted the Brazilian flag at the foremasthead of his ship in Brazilian waters and fired a salute of twenty-one guns. The report of the case does not indicate that the salute was returned. (Mr. Lidgerwood, American Chargé d'Affaires at Rio de Janeiro, to Mr. Seward, Secy. of State, Aug. 1, 1866, and enclosures, Dip. Cor. 1866, II, 317–318.) In connection with the case of the *Virginius,* it was agreed by Mr. Fish, Secy. of State, and the Spanish Minister at Washington, Dec. 8, 1873, that on Dec. 25, following, a vessel of war of the United States would be in the harbor of Santiago de Cuba, and at the hour of 12 meridian, the United States flag would be raised on a Spanish fort or battery, and a salute of twenty-one guns fired. It was agreed that "this being done, the United States vessel, or, if there be more than one, one of them, will raise the Spanish flag, and return the salute, gun for gun." (For. Rel. 1874, 990–991.) The salute to the flag of the United States was, however, spontaneously dispensed with, pursuant to the terms of an earlier protocol. *Id.,* 1115–1116. The United States demanded of Salvador the salute of the American flag on account of an assault on the American consulate in the City of San Salvador in 1890, by forces of the Provisional Government. The flag was duly hoisted at the consulate by a commissioned officer of those forces, and a salute of twenty-one guns was fired. It does not appear from the report of the American naval officer detailed to witness the ceremony, that the salute was returned. For. Rel. 1890, 75–77.

[2] 38 Stat. 770.

Vera Cruz, and seized the customhouse in order to prevent anticipated importation of munitions of war from reaching General Huerta. On April 21, the American Chargé d'Affaires *ad interim* at Mexico City was given his passports. On April 25, the United States, and on April 26, General Huerta, accepted the mediatory proposals of Brazil, Argentina and Chile.[3] A military force, under Major-General Funston, U.S.A., relieving the naval forces at Vera Cruz, occupied that city and there remained for a period of months.[4]

Notwithstanding a disclaimer of hostility against a State upon which reprisals are made, the nature of the procedure is one still calculated to produce war. Hence countries not desirous of bringing about such a condition are reluctant to have recourse to such action unless the delinquent State is so inferior in point of military or naval resources that its indignation is not to be dreaded. Reprisals are essentially the remedy of the strong against the weak. It is unlikely, therefore, that the United States will ever again make use thereof, unless the State itself has suffered a national affront through a grave violation of international law, and unless its adversary remains stolidly indifferent as to its duty to make amends. It is believed, moreover, that both policy and sound practice discountenance the employment of reprisals so long as any amicable mode of obtaining justice remains unexhausted.[5]

(2)

§ 591A. **The Corfu Incident, 1923.** Following the assassination on Greek soil, August 27, 1923, of the Italian General Tellini, President of a Commission sent by the existing Conference of Ambassadors to delimit the Greek-Albanian frontier, together with that of other Italian members of his suite, the Italian Government on August 29, made peremptory demands upon that of Greece, the reasonableness of which was challenged by the latter.[1] As a means of causing compliance with its demands, Italy, on August 31, proceeded to bombard and occupy the Island of Corfu; in the course of the bombardment, non-combatant refugees were killed and injured.[2] On September 1, the Greek Government appealed to the Council of the League of Nations under Articles 12 and 15 of the Covenant.[3] The Council after the consideration of certain proposals from M. Quiñones de León, of Spain, referred them to the Conference of Ambassadors on September 6.[4] That body reached a decision requiring Greece to accept an arrangement calling for reparations and penalties which embraced the ultimate payment to Italy of an indemnity amounting to fifty million Italian lire on account of alleged neglect in seeking out and punishing the wrong-doers.[5] The

[3] For. Rel. 1914, 489 and 492. Also Recognition of New Governments, the Position of the United States, *supra*, § 44.

[4] See also Hackworth, Dig., I, 151–152, and II, 420–421, with documents there cited.

[5] Mr. Seward, Secy. of State, Report to the President, March 30, 1861, 8 MS. Report Book, 154, Moore, Dig., VII, 130.

§ 591. [1] For a summary of the demands of the Italian Government as well as of the Greek response thereto, see League of Nations, *Official Journal*, 1923, 1413–1414.

[2] *Id.*, 1414–1415.

[3] *Id.*, 1412.

[4] *Id.*, 1294–1301.

[5] A decision of the Conference of Ambassadors of Sept. 7, 1923, was supplemented by one

indemnity does not appear to have been measured by fiscal losses sustained by the families of the victims or to have been designed for necessary payment to them. It seemingly betokened a penalty imposed upon Greece in satisfaction of the public injury sustained by Italy.

The action of the Conference of Ambassadors was not denunciatory of the propriety of the Italian conduct under international law or under the requirements of the Covenant of the League of Nations.[6] It remained for a Commission of Jurists to conclude in 1924, that coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and that it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.[7]

5

§ 592. **Pacific Blockade.** The term pacific blockade refers to the cutting off of access to or egress from a foreign port or coast by a naval operation designed to compel the territorial sovereign to yield to demands made of it, such as the granting of redress for the consequences of its wrongful conduct, and by a process whereby the blockading State does not purport to bring into being a state of war.[1] Such action is to be deemed pacific merely in the sense that the blockad-

on Sept. 13, which was duly accepted by Greece. A final decision of Sept. 27, 1923, announced that "the Conference of Ambassadors . . . observing also that several omissions have been noted on the part of the Greek authorities as regards the conduct of the enquiry; and observing that, as regards the discovery of the guilty parties, several negligencies have been recorded; considering that the 5th condition contained in the Note of September 8th, can, in consequence, not be regarded as fulfilled; decides that the Hellenic Government shall pay to the Italian Government by way of penalty on this account a sum of 50 million Italian lire, the Conference and the Italian Government renouncing their right to have recourse to the Court of International Justice at the Hague as provided for in paragraph 7 of the Note of September 8th, as well as their claim to any other penalty, and regarding the question as settled so far as they are concerned, subject to any special application of Italy to the Court of International Justice in respect of the question of the cost of occupation; decides that the payment of the sum of 50 million Italian lire mentioned above shall be effected by remitting to the Italian Government the 50 million Italian lire deposited on September 10th, 1923, in the Swiss National Bank, and that the Court of Justice shall, in consequence, be requested to order the transfer of the said sum by the Swiss National Bank to the Bank of Italy at Rome for the credit of the Italian Government. The Conference notes on this occasion that the Italian Government declares that it will execute on September 27th the decision previously taken by it to evacuate Corfu on that date." (World Peace Foundation Pamphlets, Vol. VI, 1923, 209, Appendix X to article by Manley O. Hudson entitled "How the League Met the Corfu Crisis," *id.*, 176.)

[6] See John H. Wigmore, "The Case of Italy *v.* Greece under International Law and the Pact of Nations," *Illinois L. R.*, XVIII, 131, 145.

See, also, K. Strupp, "*L'Incident de Janina entre la Grèce et L'Italie*," *Rev. Gén.*, XXXI, 255; David J. Hill, "The Janina-Corfu Affair," *Am. J.*, XVIII, 98.

[7] See League of Nations, *Official Journal*, 1924, 523, 524.

Declares Dr. Lauterpacht: "If this interpretation is correct, it indicates a serious defect in the Covenant which demands amendment." (Lauterpacht's 6 ed. of Oppenheim, II, 127.)

§ 592. [1] "A pacific blockade . . . is an act of force primarily directed against the State blockaded with a view to coercing it to follow the line of policy desired. As it occurs in time of peace there are no belligerents, and therefore no neutrals, since neutrality is merely the condition of a State in relation to two opposing belligerents." (A. H. Hogan, Pacific Blockade, Oxford, 1908, p. 26. This work contains a good bibliography.)

See, also, N. Söderquist, *Le Blocus Maritime*, containing bibliography, Stockholm, 1908;

ing State is disposed to remain at peace, while the State whose territory is blockaded does not elect to treat the operation as producing war or as compelling it to make war upon its adversary.

Although this procedure does not necessarily involve the taking or withholding of property, it prevents, if successful, highly important uses of the territory of the State against which it is established. Moreover, the detention or sequestration of the ships of such State, as a means of obtaining redress, constitutes a form of reprisal.

On certain occasions European States have found it possible to resort to pacific blockade without producing a state of war. The instances have sufficed in number to justify the conclusion that such procedure does not necessarily constitute internationally illegal conduct.[2]

The United States has never had recourse to pacific blockade. Its chief interest in the employment thereof by other States has been confined to the question whether such action was or should be designed to apply to the ships and commerce of a third power.

In 1897, upon notification from six European States of their determination to place the Island of Crete in a state of blockade,[3] and to restrict thereby the rights of quasi-neutral powers, the United States did not concede the claim asserted.[4] Again, in 1902, in response to information that Germany contemplated a pacific blockade of certain Venezuelan ports, embracing in its operation the vessels of third States, Secretary Hay declared that the United States, adhering to the position taken in 1897, did "not acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of States not parties to the controversy, or discriminate against the commerce of neutral nations,"

---

H. Staudacher, *Die Friedensblockade,* with bibliography, Leipzig, 1909; Naval War College, International Law Situations, II (1902), 84–97; *id.,* 1932, 94–101; C. Barès, *Le Blocus Pacifique, Toulouse,* 1898; Lauterpacht's 6 ed. of Oppenheim, II, §§ 44–49; A. E. Hindmarsh, Force in Peace, Cambridge, Mass., 1933, 71–74; A. H. Washburn, "The Legality of the Pacific Blockade," *Columbia Law Rev.,* XXI, 55, 227, 442; H. P. Falcke, *Le Blocus Pacifique,* Leipzig, 1919, with bibliography; J. Teyssaire, *Le Blocus Pacifique, Beauvais,* 1910.

Declares Professor Moore, "Reprisal is a measure short of war, but it is not otherwise 'pacific'; and so with pacific blockade. If the measure is not, like blockade in the ordinary sense, attempted to be extended to the citizens and property of third powers, their appears to be in it nothing exceptionable from the legal point of view, so long as the legality of the reprisals continues to be acknowledged." (Dig., VII, 135.)

See, also, Report by the Secretary-General of the League of Nations, 1927, on Legal Position arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16 of the Covenant, Particularly by a Maritime Blockade (League of Nations Doc. No. C.241.1927.V.), together with Memorandum on Pacific Blockade up to the time of the Foundation of the League of Nations, by M. Giraud, Member of the Secretariat, League of Nations, *Official Journal,* 1927, 834 and 841; American Institute of International Law, Project No. 29, on Measures of Repression, Art. 10, *Am. J.,* XX, *Supp.,* 383.

The author acknowledges his special indebtedness to a Report by S. Z. Searles, of Columbia University Law School, 1936, on "Quasi-Neutrals in Pacific Blockades."

[2] T. E. Holland, Studies, 144; also Westlake, 2 ed., II, 17.

[3] According to the notification, dated March 20, 1897, "The blockade will be general for all ships under the Greek flag. Ships of the six powers or neutral powers may enter into the ports occupied by the powers and land their merchandise, but only if it is not for the Greek troops or the interior of the island. The ships may be visited by the ships of the international fleets." (For. Rel. 1897, 254, Moore, Dig., VII, 139.)

[4] Mr. Sherman, Secy. of State, to Sir Julian Pauncefote, British Ambassador, March 26, 1897, For. Rel. 1897, 255, Moore, Dig., VII, 139.

and that it reserved all its rights in the premises.[5] The blockade which was duly established by Germany, Great Britain and Italy, acting in concert, appears to have been regarded by them as an act of war, accompanied by all of the conditions of such a measure, and with the same effect as if war had been declared.[6] Hence it is not to be relied upon as an instance of pacific blockade.

In acknowledging the receipt of a note from Ambassador Jusserand, of December 7, 1916, informing the Government of the United States that the Entente powers had decided upon a blockade of Greece, effective on a specified date, "a period of 48 hours being allowed to vessels of third powers to depart from Greek harbors,"[7] Secretary Lansing declared, on December 21, 1916:

> Inasmuch as this Government has been informed by the Greek Government that peaceful relations subsist between Greece and the Allies, the Government of the United States adheres to its traditional position which has heretofore been set forth in relation to the Cretan blockade of 1897, and the Venezuelan blockade of 1902, that the United States does not concede the right of a foreign power to interfere with the commercial rights of uninterested countries by the establishment of a blockade in the absence of a state of war, and therefore reserves the consideration of all international rights and of any question which may in any way affect the commercial interests of the United States.
>
> The United States, therefore, does not acquiesce in any extending of the doctrine of pacific blockade which may adversely affect the rights of States not parties to the controversy or discriminating against the commerce of neutral nations; and my Government reserves all of its rights in the premises.[8]

One finds difficulty in reconciling the view thus expressed by Secretary Lansing with that emanating from the United States Naval War College in 1932, to the effect that while a blockading force "may not take vessels of third States as

[5] Telegram to Mr. Tower, American Ambassador to Germany, Dec. 12, 1902, For. Rel. 1903, 420, Moore, Dig., VII, 140. See, also, German promemoria of Dec. 20, 1901, For. Rel. 1901, 196.

[6] Thus Lord Lansdowne, British Foreign Secy., in a note of instruction to Sir M. Herbert, British Ambassador at Washington, Jan. 13, 1903, declared: "The establishment of a blockade created *ipso facto* a state of war between Great Britain and Venezuela, involving, it might be contended, the abrogation of any treaty existing between the two countries." (Brit. and For. State Pap., XCVI, 475, 481.)

See, also, Mr. Tower, American Ambassador to Germany, to Mr. Hay, Secy. of State, Dec. 17, 1902, For. Rel. 1903, 421; Same to Same, telegram, Dec. 18, 1902, *id.*, 423; Same to Same, Dec. 22, 1902, enclosing blockade proclamation, *id.*, 425; T. E. Holland, "War Sub Modo," *Law Quar. Rev.*, LXXIV, 133–135; also language of Award of Tribunal of Arbitration composed of members of the Permanent Court at the Hague, Feb. 22, 1904, under protocols of May 7, 1903, respecting the preferential treatment gained by the blockading powers, For. Rel. 1904, 506.

[7] For. Rel. 1916, *Supp.*, 80.

[8] For. Rel. 1916, *Supp.*, 105. Nevertheless, M. Giraud, of the Secretariat of the League of Nations in the course of his Memorandum on Pacific Blockade appended to a Report by the Secretary-General, May 17, 1927, declared: "It is true that, in 1916, when the Allies blockaded Greece without declaring war on her, the United States did not protest." (League of Nations, *Official Journal*, 1927, 841, 844.)

No document has been seen indicating that the United States protested against the pacific blockade effected by a group of European powers against the coast of Montenegro and northern Albania in 1913. See, in this connection, H. P. Falcke, *Le Blocus Pacifique* (French translation by Ant. Contat), Leipzig, 1919, 203–204.

prize, it may prevent their entrance; and for such detention the blockading State assumes no liability, though notice must be given the vessel of the third State at the line of blockade or in an unquestionable manner." [9] Such a concession to the blockader is one which it has not been supposed that the United States was prepared to make. As Professor George Grafton Wilson declared in 1935: "From the nature of pacific blockade as a measure short of war, its consequences should be confined only to the parties concerned." [10]

It is not to be anticipated that the United States would acknowledge that its rights as a quasi-neutral under international law could be diminished by the institution of a pacific blockade by a group of members of the League of Nations acting at the instigation of that body in penalizing a covenant-breaking member.[11] Nor is it probable that the United States, even if sympathetic with the policy that dictated such action, would be disposed to waive its rights in the premises and allow such a precedent to be established against itself.[12]

Without attempting to appraise the extent of the influence of the stand taken by the United States upon the condition of the law at the present time in relation to pacific blockades, it suffices to observe that from the views which it has succinctly made known in strongly opposing the enforcement of such measures against itself as a quasi-neutral, it is not to be expected lightly to depart.

The assertion that the right to coerce a delinquent State by means of a pacific blockade embraces incidentally the right to interfere with vessels of third States, whether on the high seas or within the territorial waters of the blockaded State, appears to be at variance with sound principle.[13] To restrict in time of peace the

[9] Naval War College, Int. Law Situations, 1932, 95, where it is added: "Vessels of third States must also be granted reasonable time to load and depart from a port under pacific blockade."

[10] Wilson and Tucker, 9 ed., 1935, 240. That author adds that from instances to which he adverts it may be deduced "that States not parties to the pacific blockade are in no way bound to observe it, though their ships cannot complain because they are required to establish their identity in the ordinary manner." (*Id.*, 242.)

[11] Declares Dr. Lauterpacht, in his 6 ed. of Oppenheim, II, p. 136: "As regards the nationals of States not members of the League, it is difficult to see how their intercourse with the nationals of the offending State can be completely cut off without a declaration of war against the offending State and the exercise of the full belligerent rights against the nationals of a neutral State which would thereupon accrue."

[12] *Cf.* Report by the Secretary-General of the League of Nations submitted to the Council June 15, 1927, concerning the Legal Position arising from the Enforcement in Time of Peace of the Measures of Economic Pressure indicated in Article 16 of the Covenant, Particularly by a Maritime Blockade, in which it is said: "Third States may in fact be led, by their sense of the importance to the whole world of the observance of the methods of pacific settlement laid down by the Covenant, or by sympathy with the League's attitude in the particular case, to acquiesce in the application of the pacific blockade to their own ships." (League of Nations, *Official Journal*, 1927, 834, 839.)

[13] According to the resolution of the Institute of International Law in 1887, respecting Blockade in the Absence of a State of War: "The establishing of a blockade in the absence of a state of war should not be considered as permissible under the law of nations except under the following conditions:

"1. Ships under a foreign flag shall enter freely in spite of the blockade.

"2. Pacific blockade must be officially declared and notified, and maintained by a sufficient force.

"3. The ships of the blockaded Power which do not respect such a blockade may be sequestrated. When the blockade is over, they shall be restored to their owners together with their cargoes, but without any compensation whatsoever." (*Annuaire*, IX, 300, J. B. Scott, Resolutions, 69.)

See, also, views of publicists given in Moore, Dig., VII, 141–142.

operations of such vessels is to subject to injury him who has done no wrong, a result which must always be regarded as opposed to the requirements of justice. That a blockading State may, when at war, cut off all communications by sea between the vessels of neutral powers and the blockaded coast of its enemy is due to the general acquiescence of maritime States which yield to a belligerent as such special rights incidental to the state of war.[14] Such a concession is not indicative of the nature or scope of privileges possessed by a blockading State in time of peace.

If ships of quasi-neutral States are entitled to freedom from interference there would appear to be no legal duty to notify such vessels or the governments of the States to which they belong of the establishment of a pacific blockade as a condition essential to the validity of the operation.[15] The expediency of such a notification would, however, seem to be obvious.

6

§ 593. **Embargo.** The term "embargo" is employed to describe generally the detention within the national domain of ships or other property otherwise likely to find their way to foreign territory.[1]

If a State confines the operation of such a measure to the resources of its own territory or to its own vessels, the embargo is known as a *civil* or *pacific* one. Its purpose in such case may be to protect, for example, domestic shipping from foreign depredations; and also to prevent domestic vessels from being used as carriers to a foreign State whose conduct is thus sought to be influenced. When employed to accomplish the latter end a pacific embargo becomes a non-amicable mode of procedure. The right of a State to resort to such a measure for such a purpose is, however, unquestionable. In 1807, following President Jefferson's recommendation, the United States placed an embargo on American ships as a means of protecting American commerce from illegal belligerent operations on the part of both Great Britain and France.[2] Although Great Britain is said to

---

"*Résumé* — It would seem from the weight of authorities and from the majority of later cases, that pacific blockades should not bear upon third States except as they are affected by the constraint directly applied to the State blockaded, *i.e.*, the vessels of a third State should be entirely free to go and come while such measures of constraint as may be decided upon may be applied to the blockaded State." (Naval War College, Int. Law Situations, 1902, 87.)

[14] See Blockade, *infra*, §§ 824–825.

[15] Hogan, Pacific Blockade, 33–35, in which the learned author criticizes the requirement respecting notices in the declaration of the Institute of International Law of 1887.

§ 593. [1] "An embargo (from the Spanish and Portuguese *embargar*, to *hinder* or *detain*, the root of which is the same as that of *bar, barricade*) is, in its special sense, a detention of vessels in a port, whether they be national or foreign, whether for the purpose of employing them and their crews in a naval expedition, as was formerly practiced, or for political purposes, or by way of reprisals." (Woolsey, 6 ed., § 118.)

See, also, Fauchille, 8 ed., §§ 298 [10] and 985; Hall, Higgins' 8 ed., §§ 120 and 122; Sir S. Baker's 4 ed. of Halleck, I, 516; Hershey, revised ed., 539; Lawrence, 5 ed., § 137; Lauterpacht's 5 ed. of Oppenheim, II, § 40; Phillimore, III, §§ 24–48; Westlake, 2 ed., II, 8; Dana's Wheaton, § 293, especially Dana's Note No. 152; Wilson and Tucker, 9 ed., 238–239; Library of Congress, List of References on Embargoes, compiled under direction of Herman H. B. Meyer, Washington, 1917.

See A. E. Hindmarsh, Force in Peace, Cambridge, Mass., 1933, 64–71.

[2] Act. of Congress, Dec. 22, 1807, 2 Stat. 451, 452. Respecting this and supplementary acts of Jan. 9, 1808, 2 Stat. 453; March 12, 1808, 2 Stat. 473; April 25, 1808, 2 Stat. 499; and

have been injured by this action, the conduct of the United States afforded no just ground for complaint.[3]

It is important to observe that a State may place an embargo on the produce of its soil or the output of its territory with no unfriendly purpose, and without thought of obtaining redress for an alleged grievance. It may have recourse to such action with a view to preserving what is withheld for domestic uses, or as a means of preventing its employment abroad as sustenance for States at war with each other or for parties engaged in civil strife within a particular country. Thus on March 14, 1912, in accordance with a joint resolution of the Congress, President Taft, finding that conditions of domestic violence existed in Mexico, and were being promoted by the use of arms and munitions of war procured from the United States, placed an embargo on the shipment of such articles to Mexico, except under such limitations and exceptions as the Executive might prescribe.[4] Again, by a joint resolution approved January 8, 1937, there was prohibited the exportation of ammunition and implements of war from the United States to Spain during the existence of the "state of civil strife" obtaining in that country.[5] Still again, by a joint resolution approved May 28, 1934, it was declared that if the President found that the prohibition of the sale of arms and munitions of war in the United States "to those countries now engaged in armed conflict in the Chaco" might contribute to the re-establishment of peace between those countries, and if after consultation with the governments of other American Republics and with their coöperation, as well as that of such other governments as he might deem necessary, he should make proclamation to that effect, it would be unlawful to sell, except under such limitations and exceptions as the President might prescribe, any arms or munitions of war in any place in the United States to the countries then engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.[6] Through a proclamation issued on the same day, the President found occasion to exercise the authority thus conferred upon him.[7] These may be regarded as typical instances of acts that were unassociated with a non-amicable effort to obtain redress from foreign States.

---

Jan. 9, 1809, 2 Stat. 506; and for decisions interpretative thereof, see Moore, Dig., VII, 143–147. President Jefferson's Message of Dec. 18, 1807, is contained in Am. State Pap., For. Rel., III, 25.

[3] Woolsey, 6 ed., § 118; also Taylor, § 434.

See Charles S. Hyneman, First American Neutrality, 26, and 66.

[4] For the text of the resolution, see 37 Stat. 630; for that of the President's proclamation of like date, see For. Rel. 1912, 745.

See Act of Jan. 31, 1922, § 1, 42 Stat. 361; 22 U.S.C.A. § 236.

[5] It was provided also that when in the judgment of the President the conditions described in the resolution had ceased to exist, he should proclaim the fact, and that the provisions thereof should thereupon cease to apply. (50 Stat. 3.)

See also President Roosevelt's proclamation No. 2236, of May 1, 1937, forbidding the exportation of arms, ammunition and implements of war to Spain, in pursuance of a Joint Resolution of the Congress approved May 1, 1937, *Am. J.*, XXXI, *Official Documents*, 156. For the text of the Joint Resolution, see 50 Stat. 121; 22 U.S.C.A. § 245a.

[6] 48 Stat. 811.

[7] 48 Stat. 1744, No. 2087. The President revoked his proclamation of May 28, 1934, on

It is equally important to observe that an embargo may in fact be applied in such a way as to constitute participation in a foreign conflict as where it is employed to assist or injure a party thereto. In such a situation the measure becomes an instrument of intervention.[8] This circumstance must suggest the wisdom of caution in the use of an embargo for such a purpose.[9]

The laying of an embargo may be the means whereby a State endeavors to respond to and thwart the unlawful conduct of another with which it is at peace, and which may or may not be engaged in war with a third State. In general, the legitimacy of the measure in such a situation is to be ascertained chiefly in the light of, and by reference to, the character of the acts of which complaint is made.[10]

**a**

§ 594. **The Same.** An embargo is said to be *hostile* when it involves the detention or seizure of the ships of a foreign power. When such action is for the purpose of compelling the State to which the vessels belong to make reparation for conduct deemed to be illegal, the case is one of reprisal, and depends for its justification upon the existence of circumstances similar in kind to those required to save other forms of reprisal from appearing as the sheer abuse of power. So long as this general mode of enforcing reparation is tolerated, hostile embargo does not, on principle, deserve special condemnation. It is believed that at the present time the United States might deem it inexpedient to have recourse to such action.

By a joint resolution of Congress of March 26, 1794, an embargo was laid on all ships and vessels in ports of the United States bound for any foreign port or place.[1] Numerous treaties of the United States, moreover, contemplating the

---

Nov. 14, 1935. 49 Stat. 3480. See, in this connection, United States *v.* Curtiss-Wright Export Corporation, 299 U. S. 304.

[8] Because he deemed the embargo on arms and munitions of war for Mexico pursuant to the Joint Resolution of March 14, 1912, to be detrimental to the so-called Constitutionalist party and proportionally advantageous to that of General Huerta, President Wilson, on Feb. 3, 1914, raised the embargo. For. Rel. 1914, 447. See Mr. Bryan, Secy. of State, to all diplomatic missions of the United States, Jan. 31, 1914, *id.*, 446.

On Oct. 19, 1915, President Wilson, again availing himself of the Act of March 14, 1912, laid an embargo on the shipment of arms to Mexico. Simultaneously, however, in a communication to the Secretary of the Treasury, the President made an exception with respect to munitions of war for the use of the recognized *de facto* government, or for industrial or commercial uses within the limits of territory under its effective control. For. Rel. 1915, 772.

[9] Judge John Bassett Moore found occasion to observe on February 12, 1937: "No one who wished unlimited power to make war could ask for more than the authority, in his own discretion, to impose and revoke, and to modify and adjust, embargoes upon our foreign commerce." (Letter to Hon. Hamilton Fish, M.C., *New York Times,* Feb. 18, 1937, p. 16.)

[10] See Aspects of Neutral Responses to Unlawful Treatment by a Belligerent, *infra,* § 888B.

§ 594. [1] 1 Stat. 400, Moore, Dig., VII, 142–143, where Prof. Moore declares that "The immediate cause was the British order in council of Nov. 6, 1793, and a reported hostile speech by Lord Dorchester to the Indian tribes which were in hostility with the United States. It was expected that the measure would lead to a restriction of the supply of provisions to the British fleet in the West Indies, though the letter of the act operated equally against the French. Washington, in a message to Congress of March 28, 1794, stated that he had requested the governors of the several States to call out the militia for the detention of vessels, if necessary; and he recommended that the embargo be extended to fishing vessels, to which it had not been held to apply. It was also construed not to apply to armed vessels possessing public commissions, except letters of marque." President Washington's message is contained in Am. State Pap., For. Rel., I, 429.

exercise of such a right, made provision for the indemnification of owners of vessels and cargoes affected thereby.[2] It appears to have been anticipated that vessels of the contracting parties, though not in conflict with each other, might, nevertheless, directly suffer loss by the operation of an embargo established primarily to coerce a third State.

Again, the treaties indicated special concern over the seizure of vessels of a quasi-neutral State, for a military expedition or other public purpose of the State laying an embargo. The right of the latter to make use of such resources seems, however, to have been recognized so long as indemnification was assured those whose property was taken.[3] It was the subject of agreement between the United States and Italy as late as 1871.[4] This right is said to be derived from or closely analogous to the belligerent right of angary or *jus angariae*.[5] It is not believed, however, that the United States would in time of peace resort to an embargo in order to possess itself of vessels of a State against which it had no cause of complaint.

To make use of hostile embargo in anticipation of war, with a view to gaining advantage through the confiscation of the ships of a probable enemy upon the outbreak of hostilities has long been discountenanced. The extent to which the existing practice of States encourages, under certain conditions, the extension of a reasonable time for the departure of certain classes of enemy vessels in port at the commencement of war is noted elsewhere.[6]

7

§ 595. **Non-intercourse.** In order to save itself and its nationals from being subjected to treatment deemed subversive of international law, as well as to

[2] See, for example, Art. XVI, treaty with Prussia, Sept. 10, 1785, Malloy's Treaties, II, 1482; Art. XVI, treaty with Prussia, July 11, 1799, *id.*, II, 1492; Art. VII, treaty with Brazil, Dec. 12, 1828, *id.*, I, 135; Art. VIII, treaty with Venezuela, Jan. 20, 1836, *id.*, II, 1833.

[3] Thus according to Art. XVI, of the treaty with Prussia of July 11, 1799, it was declared that "In times of war, or in cases of urgent necessity, when either of the contracting parties shall be obliged to lay a general embargo, either in all its ports, or in certain particular places, the vessels of the other party shall be subject to this measure, upon the same footing as those of the most favoured nations, . . . But on the other hand, the proprietors of the vessels which shall have been detained, whether for some military expedition, or for what other use soever, shall obtain from the Government that shall have employed them an equitable indemnity as well for the freight as for the loss occasioned by the delay." (Malloy's Treaties, II, 1492.)

[4] Art. IV, treaty of commerce of Feb. 26, 1871, *id.*, I, 970.

[5] Lauterpacht's 6 ed. of Oppenheim, II, § 40. Declares Dana: "But embargo has been employed for a still different purpose; that is, to gain possession of neutral vessels found in port on the breaking out of a war, to be used for transportation of munitions or troops, or for other temporary belligerent purposes. It is difficult to distinguish this from the seizure of innocent neutral vessels, at any later period of the war, for the use of the belligerent government. This act is called *Angaria*, or *le droit d'Angarie*, or *Prestation*. It is a kind of forced loan or preëmption, attempted to be justified only by the necessities of war, and always accompanied with compensation. It has had the sanction of usage and of good writers. . . . These treaties [those of the United States of 1785, 1799, and 1828 with Prussia, and of 1830 with Venezuela] certainly seem to recognize this *angaria* as a right, or at least as a practice of nations, and only seek to regulate its exercise. Heffter (§ 150) speaks of *angaria* as either entirely prohibited by modern treaties, or as allowed only in case of urgent necessity and upon terms of full indemnity." (Note No. 152, Dana's Wheaton.) See, also, instructive note in Woolsey, 6 ed., § 118, No. 1.

See The Right of Angary, *infra*, §§ 633–634.

[6] Declares Prof. Moore: "It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war,

compel the abandonment of reprehensible conduct, a State may suspend all commercial intercourse with that other whose acts are the source of complaint. However non-amicable in character, the propriety, if not the wisdom, of recourse to such procedure must be apparent. The United States, in 1798, and also in a later decade, did not hesitate to suspend commercial intercourse with France.[1]

§ 595A. **Increases or Decreases of National Armaments.** It is difficult to estimate with precision or confidence the effect of increases or decreases of national armaments upon the development of international law. The announcement in the Covenant of the League of Nations that the members of that organization "recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety" [1] may still be accepted in some quarters as authoritative testimony in support of the contention that the growth of such armaments is generally conducive to, or provocative of, war, and to that extent injurious to the fabric of the law through which the members of the international society normally undertake to govern their relations with each other.[2]

Doubtless the broadening potentialities of instruments adapted for the prosecution of armed conflict by air or land or sea cause the possessors of those instruments whose territories are sufficiently limited in size to permit a group of numerous States huddled together within the limits of a part of a single continent, to become increasingly dangerous to each other in case war ensues. In view of this circumstance, it is a reasonable contention that steps towards disarmament are essentially peace-producing and, therefore, to be looked upon as buttresses of the international society with whose welfare the outbreak of war is always difficult to reconcile.[3] Such a view will, moreover, seemingly be fortified by the circumstance noted elsewhere,[4] that belligerent possessors of some weapons, such as aircraft and submarines, are inclined to employ them ruthlessly whenever the military advantages from so doing are sufficiently obvious, regardless of conventional or theoretical restraint; and it will be urged that pos-

---

so that, if war should come, they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars." (Dig., VII, 453.) See The *Boedus Lust*, 5 Ch. Rob. 245.

See Vessels in or Sailing for Port at Outbreak of War, *infra*, §§ 763–765.

§ 595. [1] See "An Act to suspend the commercial intercourse between the United States and France, and the dependencies thereof," June 13, 1798, 1 Stat. 565. Concerning the relations between the United States and France 1798–1803, see Moore, Arbitrations, V, 4399–4446; also Moore, Dig., VII, 148, and documents there cited.

See, also, "An Act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo," Feb. 28, 1806, 2 Stat. 351, and concerning it, Moore, Arbitrations, V, 4476–4477; "An Act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies; and for other purposes," March 1, 1809, 2 Stat. 528. It was amended by an Act of June 28, 1809, 2 Stat. 550. "The non-intercourse Act of March 1, 1809, was, by force of the Act of May 1, 1810, 2 Stat. 605, and the President's proclamation of November 2, 1810, revived on February 2, 1811." Moore, Dig., VII, 149, *citing* Brig Aurora *v.* United States, 7 Cranch, 382. See decisions interpretative of the non-intercourse acts in Moore, Dig., VII, 148–151.

§ 595A. [1] Art. VIII, U. S. Treaty Vol. III, 3338.

[2] See Lauterpacht's 6 ed. of Oppenheim, II, Chap. IX.

[3] Whatever is peace-producing must be regarded as advantageous to the international society and as generally beneficial to the system of law which governs the relations between its members.

[4] See Aspects of Aerial Bombardment, *infra*, § 663.

sessors of relatively large stocks of such instrumentalities will be proportionally disinclined to forego the use of them for aggressive purposes as against less favored countries of whose conduct they make complaint.

It may be urged that the acquisition and enlargement of military, naval and air forces discourage the possessors thereof to permit the law pertaining to war to develop along lines that restrict inconveniently the use of such instrumentalities. Doubtless a State, the size and character of whose air forces confer upon it distinct advantages as a belligerent, will be unwilling to accept fresh conventional restraints upon aerial bombardment that serve to rob it of the relative advantage which its existing forces yield. In such case, however, it is the preservation of that advantage, rather than any other consideration, which is likely to thwart agreement. A common zeal for increased armaments is likely to inspire an international race for relative advantages in which the winner must be expected to oppose the growth of legal restraints which minimize the value of its achievement. Thus, the contest, itself productive of an enlargement of a means whereby belligerent expectations, if not aspirations, are sought to be realized, inevitably reacts upon the law of nations and checks its progress.

American interest in securing by agreement checks upon the competitive struggle has been, and remains, acute.[5] The United States played an impressive part in the production of the Treaty Limiting Naval Armament concluded at the Washington Conference, February 6, 1922.[6] It accepted the Treaty for the Limitation and Reduction of Naval Armament concluded at the London Conference, April 22, 1930,[7] as well as the Treaty for the Limitation of Naval Armament signed at the London Conference, March 25, 1936.[8] These three agreements reveal the vigor and resourcefulness of the effort, whether by quantitative or qualitative limitation,[9] to utilize such bases of accord as in fact existed, despite the diminishing number of powers that were prepared ultimately to acquiesce, in whole or in part, in what was deemed by a few to be feasible.[10]

[5] Concerning the agreement with Great Britain of 1817, for the limitation of armament on the Great Lakes, Malloy's Treaties, I, 628, see *supra*, § 508.

[6] U. S. Treaty Vol. III, 3100. See in this connection, Conference on the Limitation of Armament, 1921–1922, Washington, Govt. Printing Office, 1922.

[7] U. S. Treaty Vol. IV, 5268. See Proceedings of the London Naval Conference of 1930, and Supplementary Documents, Publications of the Dept. of State, Conference Series, No. 6, 1931.

[8] U. S. Treaty Vol. IV, 5548. See also documents of the London Naval Conference of 1935 (December, 1935–March, 1936) British Foreign Office Publication, 1936, p. 5. The President of the United States ratified the Treaty on May 28, 1936. On July 2, 1936, there was a deposit of the instrument of ratification in behalf of the United States.

[9] See statement by Mr. Norman H. Davis, Head of the American Delegation at the London Naval Conference, March 25, 1936, in relation to the use of a qualitative as distinct from a quantitative limitation as set forth in Part II of the Treaty of London signed on that date, *id.*, 104–106.

[10] The Japanese Delegation at the London Conference of 1935–1936 withdrew therefrom because the other participants could not accept the Japanese proposals contemplating a "common upper limit" for their naval forces. See *id.*, 138 and 274.

Concerning the Disarmament Conference at Geneva, for which preparations were made by the Preparatory Commission set up by the Council of the League of Nations, and which began its sessions in February 1932, and in which the United States participated, see League of Nations, Conference, Documents, 3 vols., 1932–1934 (IX, Disarmament, 1932, IX, 63; 1935, IX, 4; 1936, IX, 4); also Preliminary Report of the Work of the Conference, by the President, Mr. Arthur Henderson (IX, Disarmament, 1936, IX, 3), embracing (at p. 38) tentative proposal in behalf of the United States, May 24, 1933; Message of the President of

Finally, the eighth point of the Atlantic Charter promulgated by President Roosevelt and Prime Minister Churchill on August 14, 1941, was a plea for ultimate disarmament.[11]

If the relation of national armaments to international law be observed from another angle, what looms large on the horizon is the fact that the maintenance and enlargement of such establishments are the consequence rather than the cause of some activities or forms of conduct to which States have recourse, notably after they have become belligerents, and which international law is not generally acknowledged to proscribe. Thus, the exaction by the victor in a war of the transfer of territory by its foe warns the former (whether or not it be the transferee) that the transferor is to be expected to make every endeavor to acquire such military or naval strength as will enable it to regain by force what it has been obliged to relinquish. That warning, moreover, causes the victor in turn to hesitate to agree to such a reduction of its armaments as will weaken its ability to meet the challenge when it comes. In this way, conquest in a broad sense constitutes a blight upon disarmament. Again, the latitude accorded a belligerent in proceeding to destroy the commerce of its enemy as by paralyzing its shipping, or by interference with its importation of needed supplies, or by blockading its coasts, inspires the endeavor by that enemy, even before becoming a belligerent, to arm itself defensively, and by its own strong arm to safeguard its essential needs.[12] Moreover, the expectation that a particular maritime State will, on becoming a belligerent, immediately proceed to arm its merchantmen serves to encourage other States to maintain and possibly increase their submarine fleets with a special view to opposing the operations of the former.[13] Anticipation of the abuse by belligerents of their acknowledged privileges encourages States which contemplate non-participation in prospective conflicts to

---

the United States to the Chancellor of the Reich, May 17, 1933, contained in Minutes of General Commission, II, 461 (IX, Disarmament, IX, 1933). See also in this connection, Ursula P. Hubbard, "The Coöperation of the United States with the League of Nations," *International Conciliation,* No. 329, April, 1937, 303–315.

Also Lauterpacht's 6 ed. of Oppenheim, II, 96–105, and documents there cited.

Concerning the Conference which assembled at Geneva in 1927, see Records of the Conference for the Limitation of Naval Armament held at Geneva from June 20th to August 4th, 1927, Geneva, 1927.

[11] It was there declared: "Since no future peace can be maintained if land, sea or air armaments continued to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments." (Dept. of State Bulletin, Aug. 16, 1941, 126.)

See International Organization for Peace, *infra,* § 923.

[12] The desire to facilitate the capture or destruction of enemy merchantmen immediately upon the outbreak of war by means of an available destroyer of commerce in a locality favorable for its operation as such is responsible for the assertion of the claim of right to convert a private ship into a vessel of war on the high seas. Such unrestricted conversion is the handmaiden of commerce destroying, and as such inspires the arming of private ships by the prospective enemy of the converter, when the former anticipates that its merchantmen will be subjected to predatory attacks by the private ships of its enemy converted on every sea into naval vessels commissioned to engage in offensive operations. See "The Part of International Law in the Further Limitation of Naval Armament," *Am. J.,* XX, 237, 246.

[13] See Private Vessels Defensively Armed, *infra,* § 709; Attack, Armed Vessels, Merchantmen, *infra,* §§ 742–743.

maintain and develop armaments sufficient to check by force, if need be, the assertion of pretensions that may be contemptuous of neutral rights.

The foregoing considerations suffice to illustrate the character of an obstacle which is subversive of attempts to produce agreement for the limitation of national armaments by the States which are best equipped with them.[14] Until there is general relinquishment through common agreement on the part of those States of certain privileges which they as belligerents may be expected to endeavor to exercise, there must be sincere doubt in many quarters as to the wisdom of lessening the power of the individual State to make its will felt in opposing, as a belligerent or as a neutral, the assertion by another, which embarks upon war, of what it conceives to be the full measure of its rights as a participant in the conflict. Whether such relinquishment is to be forthcoming must depend upon a widespread appreciation of the full price which is being paid for the latitude which the law today accords to belligerent States, and upon a general conclusion that that price is excessive. With that conclusion there is thrust into view the broad question whether States should themselves be allowed to become belligerents.

If through an international organization of States, wrought through the influence of those which are to be victors in the present conflict, an international entity were established and maintained for something akin to international police purposes, as a partial substitute for the belligerent action of individual States, an opportunity for practical disarmament on a large scale would present itself and also make widespread appeal. Acceptance of it would simplify the problem in international law by removing from the horizon situations where the possessors of particular instrumentalities might be expected to be contemptuous of what were supposedly its injunctions.[15]

[14] States are at times reluctant to disclose the precise reasons which deter them from accepting reciprocal arrangements for the limitation of particular forms of armament. The obstacle is frequently referred to as a lack of a sense of security; and it is on occasion invoked as a pretext for unwillingness to share in a common sacrifice. This circumstance renders elusive the task of ascertaining the price to be paid for the abandonment of the use of a particular instrumentality, or for the approval of a special qualitative or quantitative limitation.

[15] See International Organization for Peace, *infra*, § 923.