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# THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS

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# THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS




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# THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS

## Chiefly in Continental Europe

BY

ELEANOR WYLLYS ALLEN, LL.B., PH.D.

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"*. . . quum non habeat imperium par in parem.*"

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# PREFACE

CERTAIN portions of this volume on the Position of Foreign States before National Courts have already been published in three separate studies covering the German, French and Belgian material respectively. These studies appear here in an amplified form, in their place among material relative to other states of Europe.

In expressing my thanks to those who have helped me in the preparation of this work, I wish especially to mention the members of the Committee of the Bureau of International Research of Harvard University and Radcliffe College, under whose auspices this book is published, and particularly its chairman, Professor George Grafton Wilson. To another member of this Committee, Professor Manley O. Hudson, Director of the Research in International Law of the Harvard Law School, I am indebted for the privilege of participating in the work of the Committee on the Competence of Courts in Regard to Foreign States. The meetings of this committee, extending over some two years, were not only a great stimulus in the preparation of this book, but served to keep constantly in the writer's mind the great variety of possible approaches to the subject and the conflicting points of view even of those devoting their attention to the subject as experts.

Thanks are also due to numerous other persons who at one time or another have helped with criticism or suggestion. Among these are Richard W. Hale, Esquire, for assistance in the matter of legal terminology, Professor Maurice Bourquin, lately of the University of Brussels, Professor J. H. W. Verzijl, of the University of Utrecht, Professor Georges Ripert of the Faculty of Law of the University of Paris, who have each been kind enough to read certain portions of the text, and to

Judge Jasper Yates Brinton of the Mixed Courts of Egypt, for kindly suggestions.

Finally, the staff of the Harvard Law School has been most helpful in assisting to locate obscure material.

ELEANOR WYLLYS ALLEN.

Cambridge, 1932.

# INTRODUCTION

THE Position of Foreign States before National Courts has been a subject of contemplated international regulation for more than fifty years. One of the notable non-official efforts to this end was the Project adopted by the Institute of International Law at its Hamburg session on September 11, 1891. This resolution suggested material limitations upon the immunity of states and sovereigns from suit in foreign courts. In September, 1924 the Assembly of the League of Nations undertook a consideration of the "subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present time." In the spring of 1927 the Committee of Experts for the Progressive Codification of International Law decided to include among the questions which appeared ripe for international regulation the question of the Competence of the Courts in regard to Foreign States. It felt that it was "desirable to ascertain, exception always being made of the case of acts of State, whether and in what cases, particularly in regard to action taken by a State in the exercise of a commercial or industrial activity, a State can be liable to be sued in the courts of another State."

In the meantime, one phase of the general question had been dealt with in a diplomatic conference which resulted in the International Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels, signed at Brussels, April 10, 1926.

More recently the Research in International Law of the Harvard Law School has prepared a Draft Convention defining the occasions upon which foreign states may be subject to suit before local courts.

In view of the general interest and concern thus evidenced

in the problem, a study based upon the actual practice of the courts in this respect seems pertinent. The considerations prompting the limitation of this study to continental Europe was the fact that the Anglo-American attitude is comparatively uniform and clear. The principle of *stare decisis*, although it may not have resulted in a diminution of cases, has rendered the decisions more or less uniform. Furthermore, the material is both more easily available and better understood. The omission of Scandinavian, South American and Oriental material is attributable partly to lack of adequate sources, and partly to the necessity of drawing some limits to the scope of this undertaking.

The work is divided into two main parts: a factual analysis of the subject of the study, annotated with the available decisions, and a detailed analysis of the decisions themselves. In the first part, all the known issues connected with the subject are raised. The pertinent decisions of the courts of the different nations are grouped under each point, with a mere indication of the holdings. This part serves to give a schematic representation of the different views on each given point, and to suggest the reconciliations that must be effected if any successful international agreement is to be reached. The notes in Part I make mention of practically every case dealt with in Part II. In addition, pertinent holdings of English and American courts are summarily referred to here, to complete the picture of the different points of view that have been expressed on the same issue. The second part contains the more detailed analysis of the individual European decisions which served as illustrations in Part I. For Germany, Holland, France, Belgium and Italy the attempt has been made to outline the background and the historic development of the practice of the respective courts. To this end the arrangement of the cases is in general chronological, although cases on similar issues have been grouped, that the attitude in regard to a given point might be more easily and clearly kept in mind. To this end also, certain constitutional and other public-law considerations have been dealt with, both because a complete understanding of the trend of judicial opinion is impossible without it, and because it is the contention of the author that much of the difficulty in regard to the position of foreign states before

national courts is due to the inadequacy of national rather than international provisions. Whereas it would be fatuous to hope that every case arising in these states had been found, the aim was to give a complete résumé of all the decisions. As to the countries grouped under the heading "Other States," such is not the case. In these countries, the position of foreign states before the courts does not appear to have been of sufficiently vital importance in the juridical life of the country to warrant intensive research. The material readily available has been used, to illustrate by way of corroboration or differentiation the principles enunciated by the courts of other countries. Sometimes the cases are of great—even of paramount—importance for the subject, but the subject has not afforded sufficient material for the basis of a more extensive treatment.

In tracing the trend of judicial opinion in different countries, no attempt has been made to observe any chronological or historico-geographic limitations. Thus, so long as there has been reasonable continuity of identity in any of the component parts of the state under consideration, the historical development of the doctrine of immunity in that land has been extended as far back as it seems to serve a useful purpose, notwithstanding the fact that the territory in question may at that time have formed part of a different political entity. So Prussia has been considered as distinctly German while it was yet a member of the Holy Roman Empire dominated by Austria, and the word "German" has been applied variously to the Confederation of the Rhine, the German Confederation, the North German Confederation, and to the German Reich, both empire and republic. As to the Low Countries likewise, the French domination of the former Austrian provinces, the establishment of the Kingdom of the Netherlands and the subsequent emergence of a portion of that state as the Kingdom of Belgium have been disregarded for the purpose of this study.

The references are so far as possible to official sources, and, failing these, to authoritative publications in the language of origin. Exceptions have been made where, as in the case of decisions of lower tribunals, no reports of unappealed decisions are available in the regular reports. Frequently more than one place is referred to where the text of the decision may be

found. It is hoped that this arrangement may prove advantageous to those not having large library facilities at hand. Mention of the more important treatises and articles on the subject is made in the bibliography, but reference to such material in the text has been confined for the most part to instances where they are helpful to the understanding of a specific decision.

Some liberties have been taken with methods of citation traditional with Anglo-American lawyers. This is in response to the oft-repeated complaints of foreigners that they are utterly unable to decipher our cryptic references. Not only have the citations been expanded, but the dates of the decisions have been added. A certain lack of uniformity in the method of citation is attributable to the fact that the chapters on German, French and Belgian practice appeared as separate studies some years ago, and as it is necessary to use the old plates, the incorporation of considered improvements elsewhere was possible only at the expense of consistency.

Confusion in the dates attributed to certain decisions is so common that alternate dates have been given where it seems impossible to put the inaccuracy down to a mere printer's error.

The bibliography has been divided into two parts. Part I contains a list of the more important treatises and articles dealing with the general subject or some individual phase of it. Their pertinence is not always apparent from the titles. Part II attempts to give the complete titles, dates and places of publication of the non-Anglo-American collections of laws, reports, periodicals, *etc.*, to which reference is made in the notes.

It is hoped that this study, based upon the actual practice of the courts, may throw some light upon the problems that must be faced and solved if greater uniformity is to be achieved regarding the position of foreign states before national courts, and that it may stimulate the working out of some system more equitable than that which at present exists for dealing with the modern state which is invading further and further fields hitherto reserved for private enterprise, and doing so as a privileged competitor.

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# PART I

# GENERAL ANALYSIS

# CHAPTER I

## FUNDAMENTAL CONCEPTIONS REGARDING IMMUNITY

Scope

AN analysis of the position of foreign states before national courts starts with the general proposition that they are immune from suit, and proceeds to define and qualify this statement. Such an analysis involves an investigation of the connotations of the term "state." What entities may successfully claim the immunity, and under what circumstances? Can the plea be availed of by states comprising the units of federal republics, dominions of the British Empire, protected states, states under mandate, or those with unrecognized governments? Does the immunity apply only in time of peace, or does it obtain in periods of broken diplomatic relations or even of war between the respondent state and that of the forum? The analysis must also probe the exceptions to the general rule. Are there some matters so closely involving the political economy of the state of the forum that even the usual immunity of the foreign state must give way before this superior interest? Is the exemption founded upon lack of competence on the part of the courts, or upon an immunity which attaches to the sovereign entity? Assuming that it is technically an immunity, must it be pleaded by the respondent state? May it be waived? If so, how? Must it be done *coram judice*, or is a general statement of intention to waive sufficient? Should willingness to submit to the local jurisdiction be evidenced by contract between the parties, or incorporated in a treaty between the states involved? If it be agreed that the submission need not be express, from what sort of acts is it to be implied? If a state itself brings suit in the courts of another, is that fact evidence of a willingness to abide by the rules of the court regarding surety, costs, discovery, *etc.*, and to submit to counterclaim? Shall submission be seen in the fact that a state acts not in the character of a

sovereign but as one engaged in a commercial enterprise? If so, what criterion is to be applied for determining this aspect of state activity? Does submission to suit, however evidenced, involve submission to execution of the judgment upon state property? Finally, such an analysis as that in hand must not omit a consideration of the position of foreign sovereigns before the courts, for if, on the one hand, the importance of personal sovereigns in international intercourse may be waning, the duality of the character of the man, as sovereign and individual, is capable of involving legal niceties of much interest, and it is undoubtedly this dual personality of the sovereign which has served as the prototype for the modern distinction which is attempted between the state undertaking acts *jure imperii* and *jure gestionis*.

No attempt will be made in this part to give general categorical answers to the questions raised above. The intention is simply to indicate what answers have in fact been given at various times by various courts. A more or less chronological treatment of the development of judicial practice in the different countries, as well as a detailed exposition of the individual cases will be made in subsequent chapters.

**Entities Claiming Immunity**

The immunity from the jurisdiction of local courts enjoyed by foreign states, which is usually based on the mutual equality and independence of states, has proved an alluring enticement to many foreign juristic persons. With varying degrees of success they have put forward claims to this consideration.

**Cities**

The Prussian municipality of Lyck [1] and the city of Cologne [2] were unsuccessful in their pretensions before Dutch courts, as was the city of Geneva before the French.[3] The Department of Antioquia of the Colombian Republic was refused immunity from suit in France.[4] Saxony was accorded the immu-

[1] Crooy and Co. *v.* (1) de gemeente Lyck (2) den Staat het Duitsche Rijk, Arrondissements-rechtbank, The Hague, March 1, 1917, Nederlandsche Jurisprudentie, 1917, p. 389.

[2] Hanzebank *v.* de Stad Köln, Arrondissements-rechtbank, The Hague, December 11, 1923, Weekblad van het Recht, [1924] 11238, 6:3.

[3] Ville de Genève *v.* Consorts de Civry, Court of Cassation, France, July 1, 1895, Dalloz, Pér., 1895-I-344.

[4] Crédit foncier d'Algérie et de Tunisie *v.* Département d'Antioquia, Civil Tribunal, Seine, December 11, 1922, Gazette du Palais, 1923-I-439.

nity of a foreign state before the courts of Czechoslovakia.[4a] The state of Yucatan in Mexico was declared by a New Jersey court to have no independent existence as a state as to its external relations,[5] and the state of Ceará, one of the states comprising the Federal Republic of the United States of Brazil was denied immunity before French courts,[6] whereas the sister states of Bahia [7] and São Paulo [8] were assimilated to internationally competent states by the courts of Belgium and Italy respectively. The Union of South Africa was held to be a mere colony of Great Britain, and as such not entitled to immunity from suit in Holland,[9] whereas, in the United States, the Commonwealth of Australia has been held to be a foreign government against which no affirmative judgment can be rendered.[10] The Maltese Order of the Knights of Saint John unsuccessfully claimed immunity as a sovereign entity before the courts of Austria.[11] Sometimes political reasons may be suspected for according sovereign privileges to certain international entities, for instance, the short-lived Congo Free State in Belgium,[12] Hungary under the Compromise of 1867

States

[4a] X. *v.* Saxon Railway *fiscus,* Supreme Court, Czechoslovakia, August 31, 1920. RI 337/20. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), p. 481.

[5] Molina *v.* Comision Reguladora, Supreme Court, New Jersey, March 4, 1918, 103 Atlantic Reporter, 397.

[6] État de Céara *v.* Dorr, Court of Appeal, Colmar, June 27, 1928, Gazette du Palais, 1928-II-614.

[7] Feldman *v.* État de Bahia, Court of Appeal, Brussels, November 22, 1907, Pasicrisie, 1908-2-55.

[8] Somigli *v.* Stato San Paulo, Civil Tribunal, Florence, June 8, 1906, Rivista di Diritto Internazionale, II (1907), p. 379.

[9] De Unie van Zuid-Africa *v.* Herman Grote, Arrondissements-rechtbank, Amsterdam, July 14, 1921, Nederlandsche Jurisprudentie, 1921, p. 849.

[10] In re Patterson-MacDonald Shipbuilding Co. McLean *v.* Commonwealth of Australia, Circuit Court of Appeals, Ninth Circuit, October 29, 1923, 293 Federal 192.

[11] X. *v.* Johanniter- (Malteser-) Ordens, Supreme Court, Austria, March 7, 1888, Entscheidungen des k. k. obersten Gerichtshofes in Civilsachen, III (1888 [1889]), p. 128, pt. III, no. 56. *Cf.* Dame de Latude et autres *v.* S. S. Léon XIII, Civil Tribunal, Montdidier, February 4, 1892, Gazette du Palais, 1892, I, p. 231 where the Papacy was assimilated with foreign states.

[12] De Bock *v.* l'État Indépendant du Congo, Court of Appeal, Brussels, July 1, 1891, Pasicrisie, 1891-2-419; Boshart *v.* État Indépendant du Congo, Civil Tribunal, Brussels, February 5, 1898, *ibid.,* 1898-3-305;

**Mandates and Protectorates**

in Austria,[13] the Kelantan Protectorate in England,[14] the Protectorate of Morocco in France,[15] and France itself in Lebanon.[16] Of more interest from the international point of view are the cases where the state claiming the immunity is under a general rather than a special incapacity, or where, although it be special, the claim is made before the courts of a country not involved in the particular relationship. At a time when Belgium, together with other Powers, enjoyed consular jurisdiction in the Ottoman Empire, the latter was held immune from the jurisdiction of Belgian courts; [17] in France in 1847 a case against the Egyptian government was dismissed for want of jurisdiction,[18] and Italian courts refused to decide whether Tunis was independent or under the suzerainty of Turkey or the protection of France, treating it just as they treated any sovereign state.[19] The League of Nations appeared before the Court of Appeal of Geneva as an "international organism" enjoying privileges and immunities exempting it from the jurisdiction of local courts.[20]

**Recognition**

Not only must the courts determine who is a proper party to claim the immunity of a sovereign state from suit, but they must also decide whether the foundation of the immunity is comity, or a more basic principle of international law, whether it presupposes recognition by the state of the forum of the

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Croenenbergh *v.* Strauch, Civil Tribunal, Brussels, December 9, 1893, *ibid.*, 1896-3-32; Tilkens *v.* État Indépendant du Congo, Civil Tribunal, Référé, Brussels, April 20, 1903, *ibid.*, 1903-3-180.

[13] A. und C. *v.* (1) das. k. k. österreichische Aerar, (2) das königlich ungarische Aerar, (3) das k. und k. österreichisch-ungarische gemeinsame Aerar, Supreme Court, Austria, August 17, 1887, Zeitschrift für Internationales Privat- und Strafrecht, I (1891), p. 703.

[14] Duff Development Co. *v.* Kelantan Government, House of Lords, April 10, 1924, [1924] A. C. 797.

[15] Gouvernement du Maroc *v.* Laurans, Court of Appeal, Aix, December 30, 1929, Gazette du Palais, 1930-I-245.

[16] C. *v.* Chemin de fer Damas Hama, Civil Tribunal, Beirut, May 6, 1925, Journal du Droit International, LIV (1927), p. 156.

[17] Gouvernement Ottoman *v.* la Société Sclessin, Civil Tribunal, Antwerp, November 11, 1876, Pasicrisie, 1877-3-28.

[18] Solon *v.* Gouvernement Égyptien, Civil Tribunal, Seine, April 16, 1847, Dalloz, Pér., 1849-1-7, note 1-2, § 5.

[19] Hamspohn *v.* Bey di Tunisi, Court of Appeal, Lucca, March 14, 1887, Foro Italiano, 1887-I-474.

[20] Schmidlin *v.* Société des Nations, Court of Appeal, Geneva, February 6, 1925, Revue de Droit International Privé, XXI (1926), p. 103.

government of the state claiming the immunity, and the maintenance of diplomatic relations, in an era of peace and good feeling, or whether all these conditions are superficial beside the fundamental issues of sovereignty and independence. Recognition seems to play but a small rôle. A New York court said of the Omsk All Russian Government that it was either a band of robbers, or a *de facto* government. The latter view was evidently espoused by the court, which, despite the lack of *de jure* recognition, held it immune from suit for the recovery of the value of certain automobiles requisitioned by it, on the score of its sovereign character.[21] Similarly, the Russian Socialist Federated Soviet Republic,[22] and the Union of Socialist Soviet Republics [23] whose governments had not been recognized, were held immune from suit for acts of confiscation perpetrated in Russia. Estonia, recognized provisionally by the British Foreign Office, was accorded immunity as a *de facto* independent state,[24] but a motion to have set aside a warrant of arrest against two vessels requisitioned by the "Provisional Government of Northern Russia" was dismissed, as the government had not been recognized, and the court was not satisfied that the vessels were in the possession of the government.[25] In Germany immunity was accorded to Poland although, at the time of the seizure complained of, ratification of the Treaty of Versailles, by which the independence of the Polish state was recognized, had not yet been accomplished.[26]

Not only may the general problem be affected by the non-recognition of a government, or a state, but it is influenced by the discontinuance of friendly relations. Thus immunity was

[21] Nankivel *v.* Omsk All Russian Government, Court of Appeals, New York, December 4, 1923, 237 N. Y. 150.

[22] Wulfsohn *v.* R. S. F. S. R., Court of Appeals, New York, January 9, 1923, 234 N. Y. 372; Luther *v.* Sagor, King's Bench, May 12, 1921, [1921] 3 K. B. 532.

[23] National Navigation Co. of Egypt *v.* Tavoularidis et Cie., Civil Tribunal, Référé, Alexandria, November 9, 1927, Gazette des Tribunaux Mixtes d'Égypte, XIX (1928-29), p. 251.

[24] The *"Gagara,"* Court of Appeal, February 14, 1919, [1919] P. 95.

[25] The *"Annette"* and the *"Dora,"* Admiralty, February 26, 1919, [1919] P. 105.

[26] W. *v.* den Polnischen Fiskus, Court of Conflicts, Prussia, December 4, 1920, Juristische Wochenschrift, L (1921), II, p. 1478, 1485.

denied the Ottoman Empire in the United States on the ground that diplomatic relations had been broken off,[27] but in Germany, although war was actually in progress between the state of the forum and the respondent Russian state, the court felt that general principles of international law, like sovereignty and independence, were so axiomatic as to be unaffected by war, and dismissed the suit against the enemy state.[28] The same idea was implicit in a decision which accorded immunity to the United States, technically at war with Germany, as no treaty of peace had been concluded, although active hostilities had ceased.[29]

**War**

**State Instrumentalities**

Not only states themselves, but governmental agencies and instrumentalities claim the immunity and are sometimes successful. When the action is brought against the "Treasury" of state X., it usually turns out to be against the "*fiscus*" of the state, not the Treasury Department, but the state in its corporate, economic aspect, rather than in its political character, and the case is handled as though the state were the defendant of record. But it has sometimes happened that a financial instrumentality of a foreign state has been sued and has been accorded the immunity of the state itself.[30] Even domestic banks have been held to enjoy this immunity vicariously when they have acted as financial agents for foreign states in the

[27] The *"Gul Djemal,"* District Court, Southern District, New York, December 22, 1920 and January 7, 1922, 296 Federal 563, 567. *Cf.* however the *"Exchange,"* Supreme Court, United States, February 24, 1812, 7 Cranch 116, where despite the exceedingly strained relations between the United States and France, immunity was accorded the latter for what amounted practically to an act of war. In a different connection, it was held in Belgium that severance of diplomatic relations with the Papacy could not serve to divest the Pope of his character of a foreign sovereign. (Le Ministère Public *v.* van Steenkiste, Tribunal Correctionnel, Ghent, January 15, 1884, Pasicrisie, 1884-3-39.)

[28] X. *v.* Russian *fiscus,* Superior Court, Dresden, April 26, 1915, Rechtsprechung der Oberlandesgerichte, XXXI (1915), p. 175.

[29] The *"Ice King,"* Reichsgericht, Germany, December 10, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), p. 274.

[30] X. *v.* die Polnische Landesdarlehnskasse, Court of Conflicts, Prussia, March 12, 1921, Juristische Wochenschrift, L (1921), II, p. 1481 and December 15, 1923, *ibid.,* LIII (1924), II, p. 1388. Banque ottomane et Société financière d'Orient *v.* Philippe, Civil Tribunal, Référé, Seine, December 30, 1930, Journal du Droit International, LVIII (1931), p. 1040.

issue of government loans.[31] The Military Liquidation Commission of the Austro-Hungarian Monarchy was regarded as a public organ of a sovereign state, and was granted corresponding immunity from suit in Holland.[32] So, too, the Belgian State Railroad,[33] the Imperial Railway of Alsace-Lorraine,[34] the Intercolonial Railway of Canada,[35] the Finnish State Railway [36] and the Saxon State Railway [37] have all been considered proper subjects of immunity. Likewise the Russian Sovtorgflot,[38] the Lloyd Brasileiro,[39] the Transportes Maritimos do Estado of Portugal [40] and the United States Shipping Board [41] have all been accorded immunity before various courts.

[31] Bernet et autres *v.* Herran, Dreyfus-Scheyer et autres, Cassation, France, April 21, 1886, Dalloz, Pér., 1886-I-393.

[32] N. V. Bergverksaktiebolaget Kosmai *v.* het Militär Liquidirungsamt, Arrondissements-rechtbank, Amsterdam, June 9, 1922, Weekblad van het Recht, [1922] 10928, 3:2.

[33] Bardorf *v.* Belgischen Staats- und Eisenbahnfiskus, Reichsgericht, Germany, December 12, 1905, Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), p. 165.

[34] Vve. Carntier-Terrasson *v.* Direction générale des Chemins de fer d'Alsace-Lorraine, Court of Cassation, France, May 5, 1885, Dalloz, Per., 1885-I-341.

[35] Mason *v.* Intercolonial Railway of Canada, Supreme Judicial Court, Massachusetts, February 26, 1908, 197 Mass. 349.

[36] Gehrckens *v.* Järnvagstyrelsen, Oberlandesgericht, Hamburg, October 14, 1925, Rechtsprechung der Oberlandesgerichte, XLV (1926), p. 94.

[37] X. *v.* Saxon Railway *fiscus,* Supreme Court, Czechoslovakia, August 31, 1920, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), p. 481.

[38] Rizaeff Frères *v.* Flotte Marchande Soviétique, Provisional Court, Shanghai, September 30, 1927, Journal du Droit International, LV (1928), p. 1104.

[39] Henry Burnay and Co. *v.* Lloyd Brasileiro, Supreme Court, Portugal, December 14, 1923, Gazeta da Relação de Lisboa, XXXVIII (1924-25), p. 88.

The *"Campos."* Capitaine Figueirido *v.* Chargeurs Réunis, Commercial Tribunal, Havre, May 9, 1919, Recueil du Havre, LXII (1918-19), I, p. 28.

[40] De Howorth *v.* S. S. *"India,"* Supreme Court, South Africa, April 5, 1921, South African Law Reports, [1921] C. P. D. Pt. III, p. 451. The *"Lima"* and the *"Pangim,"* Court of Appeals, Brussels, June 27, 1921, Pasicrisie, 1922-2-53.

[41] The *"Avensdaw,"* Commercial Tribunal, Rouen, January 20, 1922, Revue Internationale du Droit Maritime, XXXIV (1922), p. 1074. The *"Ice King,"* Reichsgericht, Germany, December 10, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), p. 274.

**Vessels**

Where the action is specifically directed against a vessel owned by a foreign state, the attitude of the courts is the same as though the state itself were sued. Indeed in England, a suit *in rem* against a vessel has been expressly held indirectly to implead the owner,[42] and where the suit *in rem* is unknown, the defendant of record is the owner,[43] or *armateur*,[44] or the captain as such,[45] who is then regarded as acting as an agent for the government.[46]

**Sovereign Acts Abroad**

It is frequently maintained by the courts that if a foreign state commits any act abroad, it must be in the exercise of its purely private rights, since acts of sovereignty necessarily can take place only at home, *princeps in alterius territorio privatus*. Whereas this may be true as a general proposition, not a few interesting cases have arisen where the state was exercising unquestionably sovereign rights on the soil of an independent foreign state. Thus the Government of the Congo Free State was established in Brussels, yet Belgian courts accorded immunity to it.[47] During the World War the seat of the Belgian government was established in France at Havre, and its members were deemed to enjoy extraterritoriality,[48] although a window at a post office reserved for the use of Belgian mail service, effected by means of Belgian postage stamps,

[42] The *"Parlement Belge,"* Court of Appeal, February 27, 1880, 5 P. D. 197, 217.

[43] F. Advokaat *v.* den Belgischen Staat, Arrondissements-rechtbank, Dordrecht, July 11, 1923, Weekblad van het Recht, [1923] 11088, 5:2. The *"Avensdaw,"* Commercial Tribunal, Rouen, January 20, 1922, Revue Internationale du Droit Maritime, XXXIV (1922), p. 1074.

[44] The *"Ice King,"* Reichsgericht, Germany, December 10, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), p. 274.

[45] Capitaine Hall, Commandant du vapeur *"Sumatra"* *v.* Capitaine Zacarias Bengoa, Commandant du vapeur *"Mercédès,"* Court of Appeal, Alexandria, November 24, 1920, Gazette des Tribunaux Mixtes d'Égypte, XI (1920-21), p. 23.

[46] The *"Hungerford,"* Court of Appeal, Rennes, March 19, 1919, Revue Internationale du Droit Maritime, XXXII (1920-21), p. 345.

[47] De Bock *v.* l'État Indépendant du Congo, Court of Appeal, Brussels, July 1, 1891, Pasicrisie, 1891-2-419; Boshart *v.* État Indépendant du Congo, Civil Tribunal, Brussels, February 5, 1898, *ibid.*, 1898-3-305; Croenenbergh *v.* Strauch, Civil Tribunal, Brussels, December 9, 1893, *ibid.*, 1896-3-32; Tilkens *v.* État Indépendant du Congo, Civil Tribunal, Référé, Brussels, April 20, 1903, *ibid.*, 1903-3-180.

[48] Critchley Evans et Cie, *v.* Charron, Civil Tribunal, Référé, Havre, April 13, 1915, Dalloz, Pér., 1915-5-3.

was within French jurisdiction."[49] In the course of the World War, coöperating armies performed many acts *jure imperii* on foreign soil—notably requisition—and occasioned many accidents to the civilian population through the use of military equipment. In France, where troops of eight foreign countries were operating, arrangements were made to substitute the French government for the real respondent when litigation resulted,[50] but in other countries, actions were brought against the offending state, and for the most part, dismissed for lack of jurisdiction.[51] Sometimes the exercise of sovereign rights in the territory of another state is provided for by treaty. Thus by the treaty of November 18, 1903 between the United States and Panama, the Canal Zone authorities might employ their forces, assigned for the protection of the Canal, to assure the security, operation and sanitation of the same. While so engaged, an American soldier, driving a military ambulance at a high rate of speed through the Panama city of Colon, struck and killed an individual. He was indicted for manslaughter, but the Supreme Court of Panama refused to assume jurisdiction, holding that forces acting in the name of the United States government were subject only to the jurisdiction to which they belonged and not to that of Panama.[52]

**Basis of Immunity**

The generally recognized inability of a private citizen to sue a foreign sovereign state in the courts of his own country may be conceived of as a lack of competence on the part of the courts,[53] or as a personal immunity attaching to the

[49] X. *v.* D., Tribunal Correctionnel, Havre, November 15, 1915, Journal du Droit International, XLIII (1916), p. 164.

[50] *Cf.* Agreement of December 18, 1915 between the British and French governments, Archives du Service Historique du Ministère de la Guerre, M. 505. Parker-Ignace Agreement between the United States and France, December 1, 1919, Final Report of U. S. Liquidation Commission, War Department, p. 179.

[51] Supreme Court, Czechoslovakia, October 19, 1920, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), p. 584. Procureur du Roi *v.* Toebinte, Theuns, le Gouvernement des États-Unis, Court of Appeal, Brussels, June 24, 1920, Pasicrisie, 1920-2-122.

[52] The Republic of Panama *v.* Schwartzfiger, Supreme Court of Justice, Panama, August 11, 1925, Annual Digest, 1927-28, p. 180, Case 114.

[53] Among the subjects "sufficiently ripe for codification" as reported to the Council in June, 1928, by the League of Nations Committee for

foreign state. If the courts of a country look to a code or other statute for the determination of their competence, they may or may not find express provisions regarding issues of international law. In Austria there is statutory sanction for the extension of the rules regarding judicial competence to cover justiciable issues made subject to the local courts by treaties or admitted by international law to be thus subject, and for their extention to persons who enjoy extraterritoriality, if and when they voluntarily submit, or the litigation has for its object real property in Austria.[54] In Holland, the competence of the courts instead of being *extended* to international-law issues, is "limited by the exceptions recognized in international law," [55] while in Germany, the recognized rules of international law are taken over into German federal law.[56] Any of these formulæ is effective for a double purpose: to provide a basis upon which to assume jurisdiction over litigation outside the domain of purely civil law, and to confine that exercise of jurisdiction within the limits prescribed by international law.[57] If, however, the statutes outlining their competence contain no mention of international law, the courts are faced with the alternative of construing the omission as tantamount to an absolute denial of competence, a matter of *ordre public,* such that no effective renunciation can be made by the entity enjoying the immunity, or of proceeding to apply the rules laid down in the code of civil procedure to any and all litigation instituted before them, unless or until the pertinence of international-law rules becomes apparent. There are at least four ways that the dictates of international law

**Statutory**

**Non-Statutory**

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the Progressive Codification of International Law was "Competence of the Courts with regard to Foreign States." Publications of the League of Nations, 1928. V. 4. A. 15. 1928. V.

[54] Einführungsgesetz zur Jurisdiktionsnorm (August 1, 1895), Art. IX, §§ 1, 2.

[55] Wet houdende Algemeene Bepalingen der Wetgeving van het Koninkrijk, May 15, 1829, Article 13a, Staatsblad, 1917, no. 303; Wetboek van Strafrecht, Article 8.

[56] Constitution of 1919, Article 4.

[57] For a somewhat similar provision vesting original jurisdiction in the Bundesgericht over "crimes and felonies against the law of nations," see Article 112 § 2 of the Swiss Constitution.

may be brought to bear: (1) The court may itself take judicial notice of its precepts forbidding the exercise of jurisdiction over a foreign sovereign state.[58] When the respondent state fails to take any notice of the proceedings instituted against it, the courts not infrequently thus decline to entertain the action *d'office*. (2) Provisions may exist that in cases of doubt as to the propriety of exercising jurisdiction in a given instance, the courts should apply to the Minister of Foreign Affairs or of Justice for his view on the matter. This opinion is then binding upon the court.[59] (3) A designated official may be authorized to raise the issue of conflict of competence, whereupon the sole issue of the jurisdiction of the court before which the case is pending is submitted to a special tribunal for determination.[60] This may be done at any time during the proceedings, but must take place before the decision in the case has become absolute.[61] Strictly speaking this procedure is provided for the purpose of determining whether a given action is appropriate to be brought before the judicial or the administrative courts, but it frequently finds application to questions involving immunity from suit in international law, where there is properly no conflict of competence, but rather a lack of competence.[62] (4) The respondent state may enter a plea to the jurisdiction. This may be done at any time before the state has committed itself to submission to the jurisdiction. If it appears before the trial court, it should

[58] X. *v.* Sultan of Turkey, Areios Pagos, —1907, Decision No. 41, Themis, 1907-08, p. 547.

[59] *Cf.* the Austrian Einführungsgesetz zur Jurisdiktionsnorm (August 1, 1895), Article IX, § 3; Allgemeine Geritchsordnung für die Preussischen Staaten, (188), Pt. I, tit. 29, § 90, annex 202; Italian Law of July 15, 1926, no. 1263, converting into law Regio Decreto-Legge no. 1621 of August 30, 1925, Raccolta Ufficiale, 1926, III, 2930; Czechoslovakian Law of January 19, 1928, Article IV, § 2, Sammlung der Gesetze und Verordnungen des Čechoslovakischen Staates, 1928, p. 123, no. 23.

[60] *Cf.* Prussian Verordnung betreffend die Kompetenzkonflickte zwischen den Gerichten und dem Verwaltungsbehörden, August 1, 1879, Die Gesetze und Verordnungen für den preussischen Staat und das deutsche Reich, 1876-79, p. 587.

[61] X. *v.* die Polnische Landesdarlehnskasse, Court of Conflicts, Prussia, March 12, 1921, Juristische Wochenschrift, L (1921), II, p. 1481.

[62] *Cf.* Halig v. den Polnischen Staat, Court of Conflicts, Prussia, March 10, 1928, Zeitschrift für Völkerrecht, XV (1930), p. 271.

make the plea before answering to the merits, or simultaneously, where an answer in the alternative is permitted,[63] but if the decision of the lower court has been rendered against it in default, it may enter its plea before the higher courts, provided, apparently, that the decision of the lower court has not become *res judicata*,[64] although it has also been held that a decision rendered without competence against a foreign state is such a nullity that, even though payment has been made upon the judgment, the principle of *res judicata* can have no application to prevent an appeal and a plea to the jurisdiction.[65]

The basis for the application of the rules of international law by national courts, is a distinct problem with its own ample literature. It need only be mentioned here that sometimes international law is conceived as being part of the law of the land, and sometimes as an independent legal system, but one with whose rules the provisions of domestic legislation cannot have been intended to conflict.

[63] Monnoyer et Bernard *v.* État Français, Civil Tribunal, Charleroi, April 8, 1927, Pasicrisie, 1927-III-129.

[64] X. *v.* Fisc des Chemins de Fer allemands, Supreme Court, Saar Territory, February 12, 1924, Revue de Droit International Privé, XXI (1926), p. 69.

[65] Stato di Grecia *v.* Di Capone, Court of Appeal, Naples, July 16, 1926, Rivista di Diritto Internazionale, XIX (1927), p. 102.

# CHAPTER II

## INAPPLICABILITY OF IMMUNITY

It is usually said that there are two general exceptions to the doctrine of the immunity of a foreign state from suit in the courts of another country: when the action concerns real property located in the country of the forum, and when the respondent state renounces the immunity. It is submitted, however, that the latter is properly no exception to the rule, but rather an evidence of it, inasmuch as the state must enjoy the right in order to be able to renounce it. Hence the case of renunciation is regarded not as an exception to the rule of immunity, but as an additional instance of the inapplicability of the rule.

**Real Property**

The single forthright exception to the doctrine of immunity from suit, but one upon which there appear to be very few decisions in point, is that of actions concerning real property situated in the state of the forum. Even here a distinction is usually made between "real" actions affecting the immovable property, where the jurisdiction is absolute, and those only incidentally concerned therewith, where jurisdiction may or may not be assumed, according to the general policy of the courts regarding public and private acts of a foreign state.[1] The Department of Cassation of the Ruling Senate in Russia held that local courts were competent in a suit for repossession of land taken without authority from the Russian owner by the Italian government and used by it for a cemetery.[2] The

[1] In Germany, the actions for which the *forum rei sitae* is exclusively competent are enumerated in the Code of Civil Procedure, and include those for the determination of boundaries, partitions and claims to possession (Zivilprozessordnung, Article 24). In Italy they are referred to generally as "real actions," *azioni reali* (Codice di Procedura Civile, Article 93).

[2] Agarkov *v.* Italian Government, Supreme Court, Russia, April 7/20, 1893, Resheniia Grazhdanskago Kassatzionnago Departamenta Pravitel'stvuiushchago Senata, 1893, p. 170.

Mixed Court of Appeal in Egypt, overruling a plea to the jurisdiction in proceedings for succession to property left to the Greek state in Egypt, said that the international-law principle of immunity could not be extended to litigation having as its object immovable property situated in the country of the forum, for each nation possessed and exercised sole and exclusive sovereignty throughout the whole extent of its territory, and to withdraw from it competence in litigations of this nature concerning foreign governments, on the pretext of respecting the latter's sovereignty, would be to disparage its own.[3]

Even when actions involving a foreign sovereign state are admittedly "real," the question may arise whether the exception to immunity based on this ground can be successfully pleaded when the real property is not owned by the foreign state, but merely sublet in part to it.[4]

**Diplomatic Property**

Many actions which at first sight might be thought to be subject to the *forum rei sitae* because involving real property are handled by the courts on a different basis. An action on a contract for the purchase of land upon which to erect a legation building was not affected by the ultimate use envisaged for the property, but was subject to the jurisdiction of the local courts. Competence, however, was assumed not on the score of the inherent connection of the soil with the domain of the state, but because of the purely business nature of the transaction, a purchase and sale.[5] A contract for construction on a legation building was deemed in one case to be an act of *puissance publique*, such that no jurisdiction could be assumed,[6] and in another to be a mere civil transaction, jurisdiction being assumed on this ground alone, without regard to the status of real property.[7] So too the rental of a furnished villa

[3] Dame Marigo Kildani, Veuve Haggar *v.* Fisc Hellénique, Court of Appeal, Alexandria, May 9, 1912, Bulletin de Législation et de Jurisprudence Égyptiennes, XXIV (1911-12), p. 330.

[4] Halig *v.* den Polnischen Staat, Court of Conflicts, Prussia, March 10, 1928, Zeitschrift für Völkerrecht, XV (1930), p. 271.

[5] Perrucchetti *v.* Puig y Casaurano, Civil Tribunal, Rome, June 6, 1928, Foro Italiano, 1928-I-857.

[6] Braive *v.* le Gouvernement Ottoman, Juge de Paix, Brussels, April 28, 1902, Pasicrisie, 1902-3-240.

[7] X. *v.* den Staat O., Supreme Court, Austria, January 5, 1920, Ent-

by a government was a contract of private law, for litigation arising in connection with which local courts were competent.[8] An action in tort to recover for an injury received in a foreign legation building due to inadequate lighting on a stairway was likewise not affected by the real property element, but in this case the circumstances did not involve the foreign state in the juridical life of the community sufficiently for the local court to assume jurisdiction.[9]

The doctrine of the subjection of real property to the jurisdiction of the local courts, to which even the doctrine of extraterritoriality yields,[10] does not supersede that of the inviolability of legation property, or other exteriorization of sovereignty. Thus an attempt to enforce a lien on a foreign embassy building in Vienna was frustrated by the Minister of Justice,[11] and an order of execution on an arbitral award against real property of the Hungarian government in Prague, was vacated when it was discovered that the building in question was used for purposes of the legation.[12] In Germany, the Prussian Court of Conflicts held that the exception to immunity based upon the fact that the suit was directed toward real property could not be invoked when the specific aim of the suit was to require the removal of the official coat of

**Inviolability**

scheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, II (1920), p. 3.

[8] Zaki bey Gabra *v.* Moore, Civil Tribunal, Référé, Cairo, February 14, 1927, Gazette des Tribunaux Mixtes d'Égypte, XVII (1926-27), p. 104.

[9] X. *v.* die Tschechoslowakischen Republik, Supreme Court, Austria, September 11, 1928, Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, X (1928), p. 427.

[10] Ustav Grazhdanskago Sudoproizvodstva, Chast' I, izd. 1892; Gerichtsverfassungsgesetz (Germany), Article 20, in conjunction with Zivilprozessordnung, Article 24. See, however, X. *v.* das Deutsche Reich, Supreme Court, Austria, January 3, 1878, Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes, XVI (1881), p. 2, where the court refused to entertain a suit wherein the claimant alleged that he was deterred from the enjoyment of his property by the construction of an adjacent foreign embassy building.

[11] Y. *v.* das Kaiserreich X., Supreme Court, Austria, March 15, 1921, Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, III (1921), p. 69.

[12] Supreme Court, Czechoslovakia, December 28, 1929, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, XI b (1929), p. 1705.

arms of a foreign state from a building used by it for a consulate.[13]

Mention should be made of the question of the succession of a state to property within the territory of another. As a distinct problem, illustrated by the famous dispute between Greece and Roumania in the Zappa affair,[14] it is not within the limits of the present study. But the situation may easily result in conflicts between the foreign state and the heirs or other beneficiaries, for the determination of which resort may be had to the courts. The question then arises whether there are special grounds under such circumstances for the ordinary immunity of the foreign state to yield to the jurisdiction of the local court. Practically the issue is not of great importance, because, if the property be real, the jurisdiction of the courts is established under the exception just mentioned, and if it be personal, it will be recognized by the courts of many countries as a purely patrimonial interest of the state, and jurisdiction will be assumed on this score. It must be said, however, that in such cases the courts are prone to mention the fact that the settlement of an estate within their jurisdiction is involved as an added justification for their competence.[15]

**Renunciation**

When the lack of jurisdiction over foreign states is conceived of as absolute, not even express consent on the part of the respondent state is sufficient to vest jurisdiction in the courts. It is in this light that the Greek courts[16] and the Mixed Courts of Egypt[17] seem to have regarded it in their earlier

[13] Halig *v.* den Polnischen Staat, Court of Conflicts, Prussia, March 10, 1928, Zeitschrift für Völkerrecht, XV (1930), p. 271.

[14] Streit, *L'Affaire Zappa, conflit greco-roumain*, Paris, 1894.

[15] Statul Sârbesc *v.* Regina Natalia *et al.*, Court of Cassation, Roumania, February 19, 1906, Dreptul, XXXVI (1907), p. 175; Dame Marigo Kildani, Veuve Haggar *v.* Fisc Hellénique, Court of Appeal, Alexandria, May 9, 1912, Bulletin de Législation et de Jurisprudence Égyptiennes, XXIV (1911-12), p. 330; Guttieres *v.* Elmilik, Court of Cassation, Florence, July 25, 1886, Foro Italiano, 1886-I-913; Hamspohn *v.* Bey de Tunisi, Court of Appeal, Lucca, March 14, 1887, Foro Italiano, 1887-I-474.

[16] X. *v.* Sultan of Turkey, Areios Pagos, —1907, Decision No. 41, Themis, XVIII (1907-08), p. 547; X. *v.* Consul-General of Paraguay, Areios Pagos, —1924, Decision No. 196, *ibid.*, XXXVI (1925-26), p. 49.

[17] Jean Vassanis *v.* Dame Marie Seka, Civil Tribunal, Alexandria, January 10, 1893, Bulletin de Législation et de Jurisprudence Égyptiennes, V (1892-93), p. 294; see, however, Dame Marigo Kildani, Veuve

decisions. The more usual view, however, is that the competence of the courts is fundamentally vested, and becomes operative the moment the bar of immunity is raised by renunciation on the part of the state.[18] In certain countries, there are special requirements for this renunciation. Thus Japan, with an eye no doubt to the possibility of international political complications, prescribes that the renunciation to be effective must be made by agreement *between the two states,* it being insufficient that the foreign state covenant with a citizen of Japan to submit to the jurisdiction of the courts of the latter.[19] Ordinarily, however, the renunciation need not follow any definite rule; so long as it is certain, it will be admitted. There are two sorts of voluntary submission, express and implied. The express submission may in turn be made in a specific instance to cover a given case only, or it may be made in general terms, usually between states. The most conclusive sort of submission evidences itself when a foreign state asks to be substituted for the defendant of record, as did Poland before the Obergericht of Danzig,[20] and the United States, through the Shipping Board, before the Court of Appeal of Genoa.[21] Another very definite form of submission is that illustrated in the "Roombek" case in Holland, where the United States appeared and made an express declaration of voluntary submission to the jurisdiction of the Dutch court for the issue involved.[22] Similarly, the League of Nations appeared before the Court of Appeal of Geneva, expressly declaring that it enjoyed the privilege of immunity

Express

Haggar, *v.* Fisc Hellénique, Court of Appeal, Alexandria, May 9, 1912, *ibid.,* XXIV (1911-12), p. 330, and subsequent decisions.

[18] *Cf.* differentiation between *"Unzulässigkeit des Rechtsweges"* and *"Unzuständigkeit des Gerichtes"* made by the Reichsgericht in a decision of June 4, 1930, Niemeyers Zeitschrift für Internationales Recht, XLIII (1930-31), p. 395.

[19] Matsuyama and Sano *v.* The Republic of China, Supreme Court, Japan, —1928, Annual Digest, 1927-28, p. 168, Case 107.

[20] X. *v.* die Republik Polen, Obergericht, Danzig, May 26, 1923, Juristische Wochenschrift, LIII (1924), I, p. 710.

[21] The *"Capillo,"* Court of Appeal, Genoa, March 27, 1925, Giurisprudenza Italiana, 1925-I-2-271.

[22] De Spinnerij "Roombeek" *v.* de Vereenigde Staten van Noord-Amerika, Arrondissements-rechtbank, Rotterdam, March 15, 1922, Weekblad van het Recht, [1922] 10884, 3:1.

from the jurisdiction of the local courts, but made a voluntary appearance for the case at bar only.[23]

Although it has been held by English judges that the submission to be effective, must be made *coram judice*,[24] an engagement to submit is not ordinarily distinguished from submission itself.[25] The English doctrine seems much more logical, since willingness to be sued can be determined only by the state of mind at the moment of the litigation, and there is no more reason why the agreement to submit should not be voidable than the contract sued upon. However, this particular obligation seems to be enforceable even against the will of the state, for the natural corollary to recognition of a renunciation made in advance is that such renunciation is irrevocable. And the courts so hold.[26] This agreement may be made after the beginning of judicial proceedings, as in the case of the *"Coimbra,"* where the Portuguese government, in order to secure the release of its vessel from attachment in Germany, agreed to submit to the jurisdiction of the English courts for the decision of claims arising from a collision.[27] It is more usually made beforehand, and is frequently contained in the contract sued upon.[28]

**Treaty**

Another type of express submission is that made by states with one another, covering some phase of commercial activity. The International Railway Convention of Bern of October 14, 1890, provided that in the case of joint liability of two or more railroads (including those owned by the state) action might be brought at the election of the plaintiff before the

[23] Schmidlin *v.* Société des Nations, Court of Appeal, Geneva, February 6, 1925, Revue de Droit International Privé, XXI (1926), p. 103.

[24] Mighell *v.* Sultan of Johore, Court of Appeal, November 29, 1893, [1894] 1 Q. B. 149.

[25] See, however, Duff Development Co. *v.* Kelantan Government, House of Lords, April 10, 1924, [1924] A. C. 797.

[26] X. *v.* die Republik Polen, Obergericht, Danzig, May 26, 1923, Juristische Wochenschrift, LIII (1924), I, p. 710; Rochaïd-Dahdah *v.* Gouvernement Tunisien, Civil Tribunal, Seine, April 10, 1888, Journal du Droit International Privé, XV (1888), p. 670.

[27] Cadbury Brothers *v.* Captain Cardozo of the *"Coimbra,"* Superior Court, Hamburg, May 30, 1923, Hanseatische Gerichtszeitung, XLIV (1923), I, p. 178.

[28] X. *v.* das Türkische Reich, Reichsgericht, Germany, January 26, 1926, Juristische Wochenschrift, LV (1926), I, p. 804.

courts of the "domicile" of either or any of the railroads.[29] By the Treaty of Versailles, the German government agreed that if it engaged in international trade it should not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty.[30] The unratified Brussels Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels, of April 10, 1926, provides in general that ships owned by the state and used for commercial purposes shall be subject to the jurisdiction of the local courts.[31] The Union of Socialist Soviet Republics has entered into numerous treaties whereby it agrees that the legal acts of its Commercial Delegations shall be subject to the jurisdiction of the courts of the other contracting party.[32] There are also treaties more limited in their scope, such as that between the Grand Duchy of Luxemburg and the German Empire, of November 11, 1902, whereby the General Imperial Direction of Railways in Alsace-Lorraine agreed to submit to the courts of Luxemburg all claims against it on the score of its operation of lines in the Grand Duchy,[33] and that of March 18, 1829, between Austria-Hungary and Bavaria, whereby the Landgericht of Salzburg was admitted to be competent for all controversies arising out of the administration of the forests owned by Bavaria in the Duchy of Salzburg.[33a]

[29] Article 53.

[30] Article 281. *Cf.* Treaty of St. Germain, Article 233; Treaty of Trianon, Article 216; and Treaty of Neuilly, Article 181. The courts however do not always seem to consider such a treaty sufficient to vest competence. See decision of the Supreme Court, Czechoslovakia, October 12, 1920, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), p. 575.

[31] United States Department of State Treaty Information Bulletin, No. 18 (March, 1931), p. 67.

[32] Economic Agreement annexed to Treaty between Germany and the U. S. S. R. signed at Moscow, October 12, 1925, League of Nations Treaty Series, LIII, p. 85. *Cf.* Article 5, § 1 of the Agreement of November 5, 1922, between the R. S. F. S. R. and Germany. Sbornik deistvuiushchikh dogovorov, soglasheniĭ i konventsiĭ, zakliuchennykh s inostrannymi gosudarstvami, v. I [1924], No. 9.

[33] Article 3. See Société anonyme du Guillaume-Luxembourg *v.* Direction Générale Impériale des Chemins de fer d'Alsace-Lorraine, Court of Appeals, Luxemburg, June 3, 1927, Pasicrisie Luxembourgeoise, XI (1921-29), p. 350.

[33a] Article 36; Martens Nouveau Recueil de Traités, IX [1827-31], p. 124.

**Announcement**

Another general method of renouncing immunity is that adopted by the United States in sending a circular, March 22, 1923, to the various Foreign Offices abroad, stating that the United States would not 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 which were generally accorded to public vessels of a foreign nation.

**Implied Consent**

The question of implied consent to the jurisdiction of local courts is fraught with many difficulties. The limits between a conclusive implied renunciation of immunity and a mere presumption are hard to define. A general appearance and plea to the merits of the issue is clearly an implied submission, and one that cannot subsequently be withdrawn,[34] while a special appearance to enter a plea to the jurisdiction or to apply for the vacating of an attachment is as clearly no submission at all.[35] But between the two extremes there are many shades of variation. The Bavarian Court of Conflicts found submission in the fact that the Austrian state, in taking over a private railroad, expressly assumed the position of legal successor to the company.[36] Submission to arbitration in France has been held to be a renunciation of the privilege of invoking immunity from the jurisdiction of French courts in all that concerned the arbitration or the ensuing execution of the award,[37] and the Supreme Court of Czechoslovakia held that

[34] The *"Saõ Vicente"*; Transportes Maritimos do Estado *v.* Scott, United States Circuit Court of Appeals, Third Circuit, January 9, 1924, 295 Federal 829. Handelsinrichtingen Poortershaven *v.* het Koninkrijk Rumenië, Arrondissements-rechtbank, Rotterdam, April 4, 1910, Weekblad van het Recht, [1910] 9076, 3:2; X. *v.* Fisc des Chemins de fer de l'Empire allemand, Supreme Court, Saar Territory, February 12, 1924, Revue de Droit International Privé, XXI (1926), p. 69; Direction générale impériale des chemins de fer d'Alsace-Lorraine *v.* Grosch, Court of Cassation, Luxemburg, June 19, 1908, Revue de Droit Internationale Privée, VIII (1912), p. 504.

[35] The *"Youlan,"* Commercial Tribunal, Antwerp, February 9, 1920, Pasicrisie, 1922-3-3; Vavasseur *v.* Krupp, Chancery, July 3, 1878, [1878] 9 Ch. 351.

[36] X. *v.* den österreichischen Staat, Court of Conflicts, Bavaria, March 5, 1885, Annalen des Deutschen Reichs, 1885, p. 325.

[37] Héritiers Ben Aïad *v.* le Bey de Tunis, Civil Tribunal, Seine, June 30, 1891, Journal du Droit International Privé, XIX (1892), p. 952.

in an action on an arbitral award against the Hungarian government, attachment against real property of the foreign state might issue.[38] On the other hand, in the case of the Compañía Mercantil Argentina *v.* the United States Shipping Board, the English judge said that it required a great deal more than a submission to arbitration to amount to a waiver of immunity of a sovereign when he was sued in a court of law *in personam,*[39] and in Belgium it was held that an agreement to submit to arbitration, subsequently altered to an agreement "to proceed before the ordinary jurisdiction," could not be interpreted as an expression of willingness on the part of a contracting state to submit to a jurisdiction other than that of its own courts.[40] It was held by the Supreme Court of Czechoslovakia that voluntary submission was not to be presumed from the acceptance of an invoice containing a provision that the respondent was to be deemed to consent to the jurisdiction of the courts of the co-contractant unless it expressly declined within a specified period.[41] A similar conclusion was reached by the Supreme Court of Austria.[42] In Italy it has been held that the provision in a contract of sale providing for the registration of the same, should that be necessary in case of judicial action for breach, amounted to a submission to be sued in tort for an accident which occurred in connection with the fulfillment of the contract.[43] The Supreme Court of Switzerland considered itself competent to entertain an action against the Austrian government for the repayment of bonds held by Swiss nationals, being part of an issue floated in Switzerland, to be repaid there in Swiss currency. The competence was

[38] Supreme Court, Czechoslovakia, April 26, 1928, Rozhodnutí nevyššího soudu československé republiky ve věcech občanských, X a (1928), p. 632.

[39] Compañía Mercantil Argentina *v.* U. S. S. B., Court of Appeal, March 25, 1924, 40 Times Law Reports 601.

[40] Gouvernement Ottoman *v.* la Société de Sclessin, Civil Tribunal, Antwerp, November 11, 1876, Pasicrisie, 1877-3-28.

[41] Supreme Court, Czechoslovakia, October 12, 1920, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), p. 575.

[42] X. *v.* Czech Fiscus, Supreme Court, Austria, January 20, 1926, Zentralblatt für die Juristische Praxis, XLIV (1926), p. 382

[43] Governo Francese *v.* Serra, Court of Appeal, Genoa, May 4, 1925, Giurisprudenza Italiana, 1925-I-2-440.

based rather on the fact that the whole transaction took place and was to be performed in Switzerland, than on an agreement on the part of the Austrian government.[44] As regarded certain bonds of the government of Morocco issued in France, however, it was held that submission of the government of Morocco to the courts of France could not be presumed merely from the disorganized condition of the former country in general and of its courts in particular at the time the loan was floated.[45] No certain renunciation of immunity was seen in a mere amicable agreement, before any suit had been instituted, to put up security to prevent the attachment of a vessel involved in a collision.[46]

**Foreign State as Plaintiff**

By far the most important categories of implied renunciation of immunity concern the foreign state as plaintiff and as *entrepreneur*. The fact that a foreign state appears before local courts to prosecute its claims is everywhere regarded as a waiver of its immunity, whereas the courts do not evince the same unanimity as to the effect of commercial activities undertaken by the state. In this connection, the question of the ability of a foreign state to appear as a plaintiff before local courts becomes a basic one. In those countries where the incompetence of the courts is regarded as a matter of *ordre public*, as is suggested by the early decisions of the Mixed Courts of Egypt and the Supreme Court of Greece, the courts are "radically incompetent to decide either in favor of or against foreign governments."[47] In general it may be said, however, that the courts of a country are open to friendly foreign states. This may be the result of a gradual growth, or may be deduced from provisions of the codes. In England, as late as 1797, Lord Loughborough wished "it to be considered, whether any foreign sovereign under any

[44] K. k. Oesterreich. Finanzministerium *v.* Dreyfus, Bundesgericht, Switzerland, March 13, 1918, Entscheidungen des Schweizerischen Bundesgerichtes, XLIV (1918), I, p. 49.

[45] Gouvernement du Maroc *v.* Laurans, Court of Appeal, Aix, December 30, 1929, Gazette du Palais, 1930-I-245.

[46] The *"Hungerford,"* Court of Appeal, Rennes, March 19, 1919, Revue Internationale du Droit Maritime, XXXII (1920-21), p. 345.

[47] Jean Vassanis *v.* Dame Marie Seka, Civil Tribunal, Alexandria, January 10, 1893, Bulletin de Législation et de Jurisprudence Égyptiennes, V (1892-93), p. 294.

denomination can sue in a municipal court in this country; whether it is not a matter of application from state to state. I do not think it easy to find in the old cases any direct and plain authority."[48] Yet the case of the Spanish Ambassador *v.* Pountes,[49] decided Easter Term, 1628, has been referred to as authority for a foreign state suing in equity.[50] In certain countries, the capacity to sue seems to be deduced from the capacity of foreigners—juristic persons as well as individuals—to use the courts. Thus in Italy, it is said that a recognized foreign state is a "subject of law," for recognition of its juridical personality is inherent in its recognition in the international sense as a sovereign political power,[51] and as a "foreigner" it enjoys all the rights of a citizen.[52]

**Recognition**

If the juristic personality is derived from international recognition, it becomes pertinent to consider whether states can sue in the courts of countries which have not recognized their governments. This question has been variously answered. In Italy the unrecognized government of the U. S. S. R. was permitted to bring an independent cross action,[53] while in the United States, capacity to sue was denied the unrecognized government of the Russian Socialist Federated Soviet Republics [54] and expressly made contingent upon recognition in the case of the Republic of China.[55]

**Nature of Action**

Not all actions brought by foreign sovereign states will be entertained by the courts. Thus the collection of taxes for the benefit of a foreign state has been refused,[56] and it has been

[48] Barclay *v.* Russell, Chancery, June 27, 1797, 3 Vesey Jr. 423, 430a.

[49] Rolle's Abridgement, title "Court de Admiraltie," E. 3.

[50] United States of America *v.* Wagner, March 6, 1867, 3 Equity 724, 729.

[51] Storelli *v.* Governo della Repubblica Francese, Civil Tribunal, Rome, February 13, 1924, Giurisprudenza Italiana, 1924-I-2-206.

[52] Article 3, Codice di Procedura Civile.

[53] Rappresentanza Commerciale dell'Unione Repubbliche Sovieticte *v.* Ditta Tesini e Malvezzi, Court of Cassation, Rome, June 12, 1925, Giurisprudenza Italiana, 1925-I-1-1024.

[54] R. S. F. S. R. *v.* Cibrario, Court of Appeals, New York, March 6, 1923, 235 N. Y. 255.

[55] Republic of China *v.* Merchants' Fire Assurance Corp. of New York, Circuit Court of Appeals, Ninth Circuit, January 14, 1929, 30 Federal (2nd) 278.

[56] H. M. The Queen of Holland (Married Woman) *v.* Drukker, Chancery Division, June 29, 1928, [1928] Ch. 877; X. *v.* Y., Kam-

intimated that if the suit were instituted for the support of the political power and prerogatives of the foreign sovereign, or for any alleged wrong sanctioned by the government of the country of the forum, the suit could not be maintained.[57] In an unusual case in Poland, the lower court, subsequently reversed, refused to permit a claimant state to bring action, fearing that the latter would prevent justice being done by refusing to submit to the counterclaim which the court anticipated.[58]

The foreign state, in applying to the local courts for the enforcement of its rights is of course bound by the usual rules of the forum in regard to the institution or continuation of such proceedings. Security for costs,[59] interest, damages and cross-claims [60] may be demanded. Answer under oath or a bill of discovery may be required.[61] Costs may be decreed against it, even if the action be dismissed.[62]

Disregarding all theoretical questions as to the position of a foreign state using the courts of another state to prosecute its own claims, there are at least two situations in which it may be deemed actually to submit itself to the jurisdiction of the court by appearing as plaintiff. The first is when a dissatisfied defendant takes an appeal to a higher court. This situation seems to be taken entirely for granted, for although it is constantly occurring, it never gives rise to any discussion.

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mergericht, Prussia, November 19, 1908, Rechtsprechung der Oberlandesgerichte, XX (1910), p. 91.

[57] Emperor of Austria *v.* Day and Kossuth, June 7, 1861, 3 de Gex, Fisher and Jones, English Chancery Reports, 217.

[58] Commercial Representation of the U. S. S. R. *v.* Towarzystwu Przemysłowo-Handlowemu Maurycy Fajans, District Court, Warsaw, May 12, 1927, Orzecznictwo Sądów Polskich, VII (1928), p. 364.

[59] The *"Western Wave,"* Commercial Tribunal, Marseilles, January 11, 1921, Gazette du Palais, 1921-II-112; Het Ottomaansche Keizerrijk *v.* Roselius, Arrondissements-rechtbank, Amsterdam, February 18, 1921, Weekblad van het Recht, [1921] 10707, 4:2.

[60] The *"Newbattle,"* Court of Appeal, January 13, 1885, 10 P. D. 33.

[61] Glyn *v.* Soares, Exchequer, January 19, 1836, 1 Younge and Collyer, 653; Rothschild *v.* Queen of Portugal, Exchequer, June 24, 1839, 3 Younge and Collyer, 594.

[62] Le Gouvernement espagnol *v.* veuve et hérit. Aguado, Court of Appeal, Paris, April 13, 1867, Dalloz, Per., 1867-2-49; H. M. The Queen of Holland (Married Woman) *v.* Drukker, Chancery Division, June 29, 1928. [1928] Ch. 877.

The second is when a counterclaim is brought against it. Here many problems arise.

**Counterclaims**

The theory back of the admission of counterclaims against a foreign state is that if the state chooses to go to law for its rights, justice demands that the respondent be permitted to set up any defense it may have against the claim being prosecuted against it. The idea was incorporated in the Draft Governing the Competence of Courts in Actions against Foreign States, Sovereigns and Chiefs of State, drawn up by the Institute of International Law at Hamburg in 1891.[63] An illustration of how the counterclaim may be an effective means of making good a claim not otherwise actionable against a foreign state is furnished by two Austrian cases. The captain of a freighter alleging a claim for demurrage, brought suit against the Turkish government at Ragusa, and attempted to hold back the balance of a shipment of grain to the account of the Turkish government. The Supreme Court held that the action could not be maintained, nor the grain attached.[64] While this case was still pending, the representative of the government of the Porte ill-advisedly instituted proceedings against the captain for the delivery of the balance of the grain whose attachment the latter was seeking. The captain defended with a counterclaim in which he demanded payment for the demurrage. The Turkish government entered a plea to the jurisdiction, which was allowed by both lower courts. The Supreme Court, however, permitted the counterclaim to be entertained, and it was ultimately decided against the Turkish government.[65]

**Question of Jurisdiction**

Whereas a counterclaim may thus be the means of permitting a court to adjudicate a claim for the benefit of an individual which it would not otherwise have been competent to entertain, it has, of course, no power to invest the court with a jurisdiction which it inherently lacks. Thus when a P. and O.

[63] Article II, § 1, par. 4: ". . . L'État étranger qui lui-même forme une demande devant un tribunal, est réputé avoir reconnu la compétence du tribunal quant à . . . une reconvention résultant de la même affaire qui est le sujet de la demande . . ." Annuaire XI, p. 436.

[64] Supreme Court, Austria, May 22, 1863, Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes, V (1876), p. 567, No. 2694.

[65] Supreme Court, Austria, October 6, 1863, *ibid.*, p. 570, No. 2697.

steamer sank a Japanese cruiser in Japanese territorial waters and the Japanese government brought suit in the British Consular Court in Japan, the Privy Council, to which the case went on appeal, denied that a counterclaim might be brought against the Japanese government for damage suffered by the British steamer in the collision. It held that Japanese courts were alone competent to hear claims against Japan or Japanese subjects, the jurisdiction of the British Consular Courts being strictly limited by the terms of the treaties by which they were established.[66] Similarly it was held that no counterclaim could be set up in an action in the Exchequer Court of Canada where the subject matter of the counterclaim did not fall within the class of causes belonging to admiralty law.[67]

**Relation to Claim**

Not only must the counterclaim fall within the scope of the court's competence *ratione materiae*, but it must bear a definite relation to the original claim. As to just what this relationship must be, the courts differ. Ordinarily the counterclaim must be in the nature of a defense to the proceedings originally instituted. Its form is of lesser importance. In Poland, an independent action permitted by law after an *ex parte* proceeding for execution, was permitted against a foreign state in the nature of a counterclaim.[68] When the United States Shipping Board brought an action in Italy on some insurance policies, a counterclaim for unpaid premiums was allowed, and damages were awarded subject to the counterclaim of the insurance company.[69] When, however, in an action instituted by the Russian government against the German von Hellfeld to establish its right to possession of a vessel and its cargo of arms to be delivered by the latter, a counterclaim was allowed and an affirmative judgment ren-

[66] Japanese Government *v.* Peninsular and Oriental Steam Navigation Co., Privy Council, July 3, 1895, [1895] A. C. 644.

[67] Bow, McLachlan and Co. *v.* the *"Camosun,"* Exchequer Court, July 7, 1906, 12 British Columbia Reports 283.

[68] Commercial Representation of the U. S. S. R. *v.* Towarzystwu Przemysłowo-Handlowemu Maurycy Fajans, Supreme Court, Warsaw, February 10, 1928, Orzecznictwo Sądów Polskich, VII (1928), p. 364.

[69] Società riunite di Assicurazione e riassicurazione *v.* United States Shipping Board, Court of Appeal, Naples, December 2, 1925, Monitore dei Tribunali, LXVII (1926), p. 336.

dered against the claimant state based upon a contract for the supply of arms dating from the beginning of the previous year, the Prussian Minister of Foreign Affairs intervened and denied that this was a proper counterclaim to which the claimant state should be considered to have voluntarily submitted by itself bringing suit.[70] Likewise, when the South African Republic sued for the appointment of a new trustee—to fill a vacancy caused by death—to hold jointly with a trustee of the defendant a fund arising from debentures issued by the defendant and guaranteed by the plaintiff, so much of a counterclaim as referred to damages for an alleged libelous letter was ordered struck out.[71] The counterclaim must furthermore be aimed at the question placed in issue by the claimant state. In the above case, a counterclaim for damages for an alleged breach of the terms of the concession, which, if proved, would not have been a charge upon the fund in question, was not admitted.[72] Similarly, when the French Republic sued for the recognition of certain "old" rights as a stockholder in a German corporation, it being admitted that "new" rights were enjoyed by the plaintiff, a counterclaim going to the basic issue as to whether the Republic was a stockholder at all was not admitted.[73]

**Affirmative Judgment**

Although the counterclaim must be in the *nature* of a defense, courts differ as to whether it must be so in its *extent,* in other words, whether an affirmative judgment is possible on a counterclaim against a foreign state. In Holland, on a counterclaim brought for an amount in excess of the original claim, the Dutch court refused to assume jurisdiction, pointing out that a state privileged to claim immunity did not lose it by recognizing the jurisdiction of a foreign court for an-

[70] von Hellfeld *v.* den Fiskus des Russischen Reichs, Court of Conflicts, Prussia, June 25, 1910, Deutsche Juristen-Zeitung, XV (1910), col. 808.

[71] South African Republic *v.* Cie. Franco-Belge, Chancery, August 4, 1897, [1897] 2 Ch. 487. *Cf.,* however, the *"Siren,"* Supreme Court, United States, December — 1868, 7 Wallace 152, where damages resulting from a collision after capture were allowed as a set-off in proceedings for condemnation in prize.

[72] South African Republic *v.* Cie. Franco-Belge, Chancery, November 24, 1897, [1898] 1 Ch. 190.

[73] Französische Republik *v.* X., Court of Conflicts, Prussia, March 10, 1928, Juristische Wochenschrift, LIX (1930), I, p. 213.

other suit, and that the situation was not changed by the fact that the two suits instead of being brought separately, were combined as claim and counterclaim.[74] In the United States, one court permits so much of a demand as may serve as a defense and which is sufficient to liquidate the whole or any part of plaintiff's demand to be set up by the defendant, but no affirmative judgment to be sustained upon a counterclaim against a sovereign whereby the latter shall be adjudged to pay money or any other thing of value.[75] Another court, however, on grounds of the "substantive requirements of law and justice" saw no reason why the court should not do "complete justice" by determining "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."[76] The courts of Belgium,[77] Germany[78] and France[79] have carried this principle one step further, admitting the counterclaim, and granting an affirmative judgment not only when its amount was in excess of the original claim, but when the original claim was dismissed by the court.

**State acting "jure gestionis"**

Renunciation of its immunity may also be seen in the fact that a state has acted not in its essentially sovereign capacity but as a private person. This distinction is expressed in various ways. Grotius spoke of *"actus regis qua regis"* and *"actus qui a rege, sed ut a quovis alio fiant."*[80] "Public" and "private" acts, "public" and "patrimonial" interests, acts undertaken *"jure imperii"* and *"jure gestionis"* are other terms often resorted to to indicate this antithesis. Sometimes the word

[74] De Belgische Staat *v.* de Badts, Arrondissements-rechtbank, Rotterdam, November 24, 1922, Weekblad van het Recht, [1923] 10978, 2:1.

[75] French Republic *v.* Inland Navigation Co., District Court, Eastern District, Missouri, February 21, 1920, 263 Federal 410.

[76] The *"Gloria,"* the *"Thekla,"* the *"F. J. Luckenbach";* Kingdom of Norway *v.* Federal Sugar Refining Co., District Court, Southern District, New York, January 15, 1923, 286 Federal 188, 193.

[77] L'État du Pérou *v.* Kreglinger, Court of Appeal, Brussels, August 13, 1857, Pasicrisie, 1857-2-348.

[78] Portugiesischer Staat *v.* Deutsches Reich, Reichsgericht, Germany, October 13, 1925, Entscheidungen des Reichsgerichts in Zivilsachen, CXI (1926), p. 375.

[79] Letort *v.* Gouvernement Ottoman, Civil Tribunal, Seine, April 21, 1914, Revue Juridique Internationale de la Locomotion Aérienne, V (1914), p. 142.

[80] De Jure Belli ac Pacis, Lib. II, Cap. XIV, VI, 2.

*"fiscus"* is employed to designate the economic aspect of the state. Irrespective of the terms used, the courts of Belgium, Italy, Switzerland, Egypt and Roumania, and latterly those of France, Austria and Greece, which recognize this form of submission, are under the necessity of differentiating between these two categories of acts. The criterion usually chosen for the determination of those for which the courts are competent is an act possible of performance by a private citizen, such as a contract, and the surprising result is achieved of holding that a state is acting in a private capacity when it contracts for the supply of bullets for its army,[81] of shoes for its soldiers,[82] for the erection of fortifications for its defense,[83] for the equipment of a military aviation field during war time,[84] the dismantling of a war vessel,[85] or the sale of war booty.[86] The issue of Treasury bonds,[87] provision for the care of a needy subject abroad,[88] the purchase of ground for an embassy,[89] and the rental of a furnished villa for a like purpose [90] have all been held "private" acts, for litigation concerning which local courts are competent.

**Conduct of Enterprise**

When a state engages within a foreign state in a business enterprise, or does an act there in connection with such an en-

[81] Société pour la Fabrication des Cartouches *v.* Ministre de la Guerre de Bulgarie, Civil Tribunal, Brussels, December 29, 1888, Pasicrisie, 1889-3-62.

[82] Governo Rumeno *v.* Trutta, Court of Cassation, Rome, March 13, 1926, Giurisprudenza Italiana, 1926-I-1-774.

[83] Fisola *v.* Governo Austriaco, Court of Cassation, Rome, October 12, 1893, Giurisprudenza Italiana, 1893-I-1-1213.

[84] Storelli *v.* Governo della Repubblica Francese, Civil Tribunal, Rome, February 13, 1924, Giurisprudenza Italiana, 1924-I-2-206.

[85] Governo Francese *v.* Serra, Court of Appeal, Genoa, May 4, 1925, Giurisprudenza Italiana, 1925-I-2-440.

[86] Société le Syndicat France-Belgique, *v.* l'État Anglais, Court of Appeal, Brussels, April 3, 1923, Pasicrisie, 1923-2-89; Syndicat France-Belgique "Société Lemoine et Cie.," *v.* État Belge et État Brittanique, Civil Tribunal, Brussels, October 12, 1925, Pasicrisie, 1926-3-121.

[87] Hamspohn *v.* Bey di Tunisi, Court of Appeal, Lucca, March 14, 1887, Foro Italiano, 1887-I-474.

[88] Typaldos *v.* Manicomio di Aversa, Court of Cassation, Naples, March 16, 1886, Giurisprudenza Italiana, 1886-I-1-228.

[89] Perrucchetti *v.* Puig y Casaurano, Civil Tribunal, Rome, June 6, 1928, Foro Italiano, 1928-I-857.

[90] Zaki bey Gabra *v.* Moore, Civil Tribunal, Référé, Cairo, February 14, 1927, Gazette des Tribunaux Mixtes d'Égypte, XVII (1926-27), p. 104

terprise, conducted there or elsewhere, there would seem to be more reason for denying it immunity from suit in the courts of another state.[91] The operation of a shipping line, the management of a railway,[92] the conduct of a monopoly [93] and the operation of a national bank [94] have been regarded in this light. The hiring of an agent may or may not be an act of sovereignty, according to whether he is engaged in a public or private function of the state. This is brought out in actions at law by the agents for salaries or damages for untimely dismissal. Hiring an agent to help establish a claim to a legacy,[95] retaining an agent already in the employ of a private industry taken over as a government monopoly,[96] and maintaining an agent for negotiating a loan abroad [97] have all been held private acts, while the employment of a "civil" agent, acting as a functionary of the state,[98] and of a "captain of the public

Hire of Agent

[91] *Cf.* Article 11 of Draft Convention "Competence of Courts in Regard to Foreign States," Research in International Law, Harvard Law School, Cambridge, 1932.

[92] Ferrovie Federali Svizzere *v.* Comune di Tronzano, Court of Appeal, Milan, June 4, 1929, Foro Italiano, 1929-I-1145; Chemin de fer Liégeois-Luxembourgeois *v.* État néerlandais, Court of Cassation, Belgium, June 11, 1903, Pasicrisie, 1903-I-294; Palestine Railways *v.* Nicolas Moussouris, Civil Tribunal, Mansourah, December 11, 1923, Gazette des Tribunaux Mixtes d'Égypte, XV (1924-25), p. 93.

[93] Rau, Vanden Abeele et Cie. *v.* Duruty, Court of Appeal, Ghent, March 14, 1879, Pasicrisie, 1879-2-175, 177; Monopole des Tabacs de Turquie *v.* Régie co-intéressée des Tabacs de Turquie, Court of Appeal, Alexandria, January 22, 1930, Bulletin de Législation et de Jurisprudence Égyptiennes, XLII (1929-30), p. 212;; Banca Română de Comerț din Praga *v.* Statul Polon, Commercial Tribunal, Ilfov, October 18, 1920 [1921], Dreptul, XLIX (1921), p. 46.

[94] Giovanni Borg *v.* Caisse Nationale d'Epargne Française, Civil Tribunal, Alexandria, November 29, 1924, Gazette des Tribunaux Mixtes d'Égypte, XVI (1925-26), p. 123. X. *v.* die Polnische Landesdarlehnskasse, Court of Conflicts, Prussia, December 15, 1923. Juristische Wochenschrift, LIII (1924), II, p. 1388.

[95] Guttieres *v.* Elmilik, Court of Cassation, Florence, July 25, 1886, Foro Italiano, 1886-I-913.

[96] Monopole des Tabacs de Turquie *v.* Régie co-intéressée des Tabacs de Turquie, Court of Appeal, Alexandria, January 22, 1930, Bulletin de Législation et de Jurisprudence Égyptiennes, XLII (1929-30), p. 212.

[97] De Croonenbergh *v.* L'État Indépendant du Congo, Civil Tribunal, Brussels, January 4, 1896, Pasicrisie, 1896-3-252.

[98] De Bock *v.* l'État Indépendant du Congo, Court of Appeal, Brussels, July 1, 1891, Pasicrisie, 1891-2-419.

forces" [99] have been considered sovereign acts. The occasions where the foreign state is held by courts recognizing the distinction to have been acting in a sovereign capacity are thus reduced to a minimum; as examples may be mentioned the judicial condemnation of a vessel seized by force of arms,[100] the act of a soldier driving a military truck,[101] the promise to restore lands to exiled subjects,[102] a decree of naturalization,[103] and a contract for repairs on a legation building.[104]

Whereas the attempt to make the competence of national courts over foreign states depend upon the nature of the act giving rise to the litigation may have most unfortunate results, it must be conceded that the principles of international law have frequently been violated by the courts of countries where this doctrine has failed to find acceptance as too liable to infringe upon the sovereign prerogatives of a state. In France vessels recognized as not subject to seizure or interference by the courts have frequently been subjected to temporary attachment.[105] In Holland there has been more than one instance of an attempt to seize foreign war vessels,[106] and it was there too that jurisdiction was assumed over an act of

[99] Boshart *v.* État Indépendant du Congo, Civil Tribunal, Brussels, February 5, 1898, Pasicrisie, 1898-3-305.

[100] The National Navigation Co. of Egypt *v.* Tavoularidis, Civil Tribunal, Référé, Alexandria, November 9, 1927, Gazette des Tribunaux Mixtes d'Égypte, XIX (1928-29), p. 251.

[101] Procureur du Roi *v.* Toebinte, Theuns, le Gouvernement des États-Unis d'Amérique, Court of Appeals, Brussels, June 24, 1920, Pasicrisie, 1920-2-122.

[102] Stat o di Grecia *v.* Di Capone, Court of Appeal, Naples, July 16, 1926, Rivista de Diritto Internazionale, XIX (1927), p. 102.

[103] Alexandre de Zogheb *v.* Michel A. de Zogheb, Court of Appeal, Alexandria, June 3, 1924, Bulletin de Législation et de Jurisprudence Égyptiennes, XXXVI (1923-24), p. 413.

[104] Braive *v.* le Gouvernement Ottoman, Juge de Paix, Brussels, April 28, 1902, Pasicrisie, 1902-3-240.

[105] The *"Campos."* Capitaine Figueirido *v.* Chargeurs Réunis, Commercial Tribunal, Havre, May 9, 1919, Recueil du Havre, LXII (1918-19), I, p. 28; the *"Balosaro,"* Commercial Tribunal, Havre, September 17, 1919, *ibid.*, LXII (1918-19), I, p. 31; the *"Englewood,"* Civil Tribunal, Bordeaux, Référé, April 27, 1920, Gazette des Tribunaux, 1920-2-367; the *"Glenridge,"* Commercial Tribunal, Havre, July 17, 1920. Revue Internationale du Droit Maritime, XXXII (1920-21), p. 599.

[106] *Cf.* Bynkershoek, De Foro Legatorum, Chap. 4, edition of 1721, p. 26, and Weekblad van het Recht (1909) 8921, 8:1.

war perpetrated by a neighboring state in a foreign land under hostile military occupation, and execution issued against property of this state in Holland.[107] A counterclaim against a foreign state having no connection with the original claim, was entertained by a German court, and execution was ordered against its property in Germany.[108] This situation suggests the existence of domestic difficulties in the application of international law, as well as the evils of an attempted unilateral alteration of its rules by the courts of individual countries.

**Operation of Vessels**

Suits brought against foreign states in connection with the operation of vessels involve problems *sui generis*, not usually inherent in the attempted distinction between acts *jure imperii* and *jure gestionis*. War vessels, public vessels not part of the military or naval forces of the state, or government-owned merchant vessels may be involved. The war vessel may or may not be commissioned, it may or may not be dismantled, it may or may not be engaged in its normal function. The public vessels may be used for conveying mails or training pilots, or they may be engaged in carrying freight. Merchant vessels may be owned by the foreign government, or merely requisitioned; in the latter case they may be operated directly by the foreign state, which is then at least morally responsible for them, or they may be operated by the owner with a crew paid by him, and simply under the direction of the state, so that only the owner could be responsible for their navigation. Furthermore, there is the probability of the requisition coming to an end, and giving rise to the question whether liens may have attached during the period of government use and revive later.

**War Vessels**

Suits against war vessels engaged in their essential occupation are seldom brought, as it is known that the courts would probably not entertain them.[109] Three vessels of war of the

[107] De Booij *v.* het Duitsche Rijk, Arrondissements-rechtbank, Rotterdam, September 25, 1916, Weekblad van het Recht [1916] 10022, 3:3.

[108] Von Hellfeld *v.* den Fiskus des Russischen Reichs, Court of Conflicts, Prussia, June 25, 1910, Deutsche Juristen-Zeitung, XV (1910), col. 808.

[109] Two possible methods adapted to avoid such suits are illustrated in the matter of the Mexican gunboat *"Independencia"* which ran down an American schooner, (See United States Foreign Relations, 1884, p. 343), and that of the *"Foscolia,"* a British steamship sunk in collision

King of Spain were involved in a collision in the port of Flushing in 1668, and were seized on behalf of certain Dutch subjects who had rendered them assistance. Upon the intervention of the Spanish ambassador, the Estates General passed a resolution demanding that the vessels be released at once, and agreed to write to the Spanish government urging the satisfaction of the claims of these creditors.[110] The next reported instance occurred some hundred and fifty years later, when, during a troubled period between the United States and France, a vessel belonging to United States citizens was seized by Napoleon and commissioned as a French ship of war. Upon entering a port of the United States this armed vessel in the possession of French naval officers was libelled by United States citizens who claimed that they were the true owners, and that the vessel had been wrongfully taken from them and converted into an armed vessel, and that they were entitled to have it restored to them through a proceeding in admiralty. Chief Justice Marshall, in dismissing the libel, said that "national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[111] In 1891 it was sought to attach the Chilean war vessel *"Presidente Pinto"* for a debt arising from the supply of bunker coal in Hamburg, but the court refused to permit its arrest.[112] In 1909 an attempt was made to seize a Swedish submarine lying in Dutch waters as security for the payment of a claim arising from salvage assistance rendered the submarine. The Minister of Justice intervened, and the affair was subsequently amicably settled.[113]

The immunity applies not only to battleships, but to all vessels commanded by an officer of the navy, and flying the naval ensign. When proceedings were instituted against the

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with the United States cruiser *"Columbia."* (See United States Statutes at Large, 57th Congress, XXXII (1902-1903), Pt. 1, p. 242.)

[110] Bynkershoek, De Foro Legatorum, edition of 1721, p. 26.

[111] The Schooner *"Exchange" v.* M'Faddon, Supreme Court, United States, February 24, 1812, 7 Cranch 116.

[112] Amtsgericht, Hamburg, September 15, 1891, Zeitschrift für Internationales Privat- und Strafrecht, II (1892), pp. 96, 245.

[113] Weekblad van het Recht [1909] 8921, 8:1.

*"Powhatan,"* a former German vessel, taken over by the United States and added to its war fleet, which was in collision in Brest harbor, the Commercial Tribunal of Saint-Nazaire refused to assume jurisdiction. The vessel was commanded by an officer whose name appeared upon the navy list, and was flying the American flag and the pennant of war vessels.[114]

The United States naval auxiliary *"Alexander"* was proceeding to its anchorage after having coaled a vessel on the Asiatic Station at Hongkong, when it ran down a Chinese junk. Suit for damages was brought *in personam* against the captain, in the Supreme Court of Hongkong, whereupon the United States requested that the proceedings against him be stayed, as the court was without jurisdiction. Despite the fact that the action was one *in personam,* to which the captain of a British vessel would have been liable under like circumstances, Sir Francis Piggot, the Chief Justice, held that the immunity of a foreign naval vessel in public use extended to the captain in charge of her, while he was acting in the performance of his duty, at least when the immunity was claimed on his behalf by his government.[115] So too when it was attempted to hold the British armed ship *"Huntcastle,"* serving as a transport for men and horses, and commanded by officers of the Marine Corps, responsible for the death of a man occasioned by the manœuvres of the vessel in a foreign port, the Court of Appeals of Alexandria declared its lack of competence to investigate the responsibility of the British government, or of its agent, for an alleged error committed by an officer of the ship in the performance of his duty.[116] The vessels may even be dismantled, yet still claim immunity,[117] but they must have

[114] The *"Hermes"* and the *"Powhatan,"* Commercial Tribunal, Saint-Nazaire, May 8, 1918, Revue Internationale du Droit Maritime, XXXII (1920-21), p. 439.

[115] The Owner of the Junk *"Tung On Tai" v.* Gove. The *"Alexander,"* Supreme Court, Hongkong, July 4, 1906, Hongkong Law Reports, I (1905-06), p. 122.

[116] William Stapledon *v.* le Premier Lord de l'Amirauté Britannique, Court of Appeal, Alexandria, June 28, 1923, Gazette des Tribunaux Mixtes d'Égypte, XIV (1923-24), p. 252.

[117] Schönemann *v.* den Ottomanischen Reichsfiskus, Court of Conflicts, Prussia, June 14, 1902, Zeitschrift für Internationales Privat- und Öffentliches Recht, XIII (1903), p. 397.

been commissioned and in the possession and service of the foreign state. Two steam cutters, designed for the public service of Mexico, constructed in New York, had been turned over to two captains for delivery to the Mexican authorities at Vera Cruz. Before leaving the wharf, they were rescued from fire by the plaintiff. They were held subject to a lien for salvage, as it did not clearly appear that property in the vessels had passed to the Mexican government, and if it had passed, they were not in the public service or possession of that government, but in the possession of the captains as bailees.[118]

**Engaged in Commerce**

Disagreement in the attitude of the courts begins when, as sometimes happens, litigation arises over war vessels being temporarily used out of their natural rôle. When the *"Prins Frederik,"* a Dutch ship of war, bringing some eighty tons of spices from Batavia, was salvaged by an English vessel and arrested, Sir William Scott (Lord Stowell) found no precedent upon which to rely. He reserved the question of the jurisdiction of the court until application on behalf of the salvors should have been made to the Netherlands. This was done, and the Dutch government requested Sir William to make an award of the salvage due the plaintiffs. £800 was awarded, and the case was dropped.[119] When the United States frigate *"Constitution,"* while bringing back machinery from the Paris Exposition under a special act of Congress, stranded in English waters and was salvaged, a warrant for her arrest was denied by Lord Phillimore, who said there was no doubt of the general proposition that ships of war of friendly countries were exempt from civil jurisdiction. As the United States refused to waive its privilege of immunity, the case was dismissed.[120] In a similar case, the *"Pampa,"* a vessel enrolled as a ship of the Argentine navy, flying the naval ensign of that

[118] Long *v.* *"Tampico"* and *"Progresso,"* District Court, Southern District, New York, May 22, 1883, 16 Federal 491.

[119] The *"Prins Frederik,"* High Court of Admiralty, November 17, 1820, 2 Dodson 451. This decision has always been considered as supporting the incompetence of national courts to exercise jurisdiction over foreign war vessels. See *"Parlement Belge,"* Court of Appeal, February 27, 1880, 5 P. D. 197, 210.

[120] The *"Constitution,"* Admiralty, January 29, 1879, 4 P. D. 39.

republic, manned by officers and crew belonging to the navy, was held not subject to libel for damages for collision, although carrying a cargo of general merchandise belonging to private persons.[121] The *"Maipo,"* a naval transport of Chile, commanded by officers of the Chilean navy, was chartered to a private individual for a commercial voyage. It was libeled in New York for damage to the cargo, and in tort. In dismissing the tort action, Judge Hough said that personally he felt that when a sovereign state went into business and engaged in the carrying trade, it ought to be subject to the liabilities of private carriers. But to assert that officially and to enforce it would be to define for Chile what it should consider to be a governmental function. If the United States disapproved of its going into the carrying trade and did not wish any longer to accord that respect to the property so engaged as had hitherto been accorded to government property, it should say so through diplomatic channels, and not through the judiciary. The court was without jurisdiction to proceed by process *in rem* against the *"Maipo."* [122]

Whereas the courts of England and the United States agree that a state may employ its war vessels in any way it sees fit without being subject to the jurisdiction of a foreign court on their account, the courts of Egypt adopt a different view. A vessel belonging to the government of the Hedjaz, ordinarily armed and used for the defense of Red Sea ports, but having been disarmed and employed for the conveyance of pilgrims from the Hedjaz to Egypt, was arrested on an alleged debt for expenses connected with the transportation of these pilgrims. The court held that the mere fact that the vessel was the property of a foreign state would not exempt it from the jurisdiction of the Egyptian Mixed Courts, which were competent on the basis of the private character of the alleged indebtedness.[123]

[121] The *"Pampa,"* District Court, Eastern District, New York, August 29, 1917, 245 Federal 137.

[122] The *"Maipo,"* District Court, Southern District, New York, February 21, 1919, 259 Federal 367. Also July 8, 1918, 252 Federal 627.

[123] Commandant Paolo Saglietto *v.* Mohamed Tawill Effendi, Civil Tribunal, Mansourah, January 15, 1924, Gazette des Tribunaux Mixtes d'Égypte, XIV (1923-24), p. 251.

**Public Vessels**

Not only vessels of war used for commercial purposes, but other state-owned ships, employed in public services, raise difficult legal questions. The Supreme Court of Greece refused to allow a vessel requisitioned by the Italian government and used as an auxiliary to its fleet to be attached on a claim for salvage.[124] Even if the vessels are unconnected with naval or military forces they may be accorded this same immunity.

An attempt was made to levy upon a Belgian pilot-training ship, the *"Ville d'Ostende,"* which put into a Dutch port, but neither the local police nor the Minister of Justice would aid the warrant officer in proceeding against this public vessel.[125] The leading case is the English one of the *"Parlement Belge."* This was a mail packet running between Ostend and Dover, the property of the King of the Belgians, and in his possession, flying His Majesty's royal pennant, and officered by the Royal Belgian Navy, but it was not an armed ship of war nor employed as a part of the military forces of the country. It was engaged in carrying passengers, merchandise and luggage for hire. Against the *"Parlement Belge"* proceedings were instituted *in rem* for damages resulting from a collision. The court declined to exercise jurisdiction, denying that the commercial nature of the employment affected the immunity of the ship as a public vessel of state.[126]

**Merchant Vessels**

In the *"Porto Alexandre,"* decided November 10, 1919, a further step was taken. Here a former German merchant vessel, condemned by a Portuguese Prize Court, was employed by a government agency on an ordinary trading voyage, earning freight for the Portuguese government. It was salvaged by English tugs, and a writ *in rem* issued against the owners. The writ was set aside by the Court, the *"Parlement Belge"* being held to control, although that vessel was primarily a mail packet, only incidentally carrying passengers and cargo, whereas this one was being used in ordinary commerce.[127] In

[124] The *"Vinci,"* Areios Pagos, —1919, no. 26, Themis XXX (1919-20), p. 359.

[125] See Weekblad van het Recht, [1904] 8010, 4:1.

[126] The *"Parlement Belge,"* Court of Appeal, February 27, 1880, 5 P. D. 197. *Cf.* dictum *contra* in the *"Charkieh,"* Admiralty, May 7, 1873, 4 A. and E. 59.

[127] The *"Porto Alexandre,"* Court of Appeal, November 10, 1919, [1920] P. 30.

the case of the *"Pesaro,"* decided in the United States, the same principal was applied. Here a vessel owned, possessed and operated by the Italian government, making no pretense of being connected with its naval or military forces, but frankly employed for the carriage of merchandise, was libeled for failure to deliver part of the cargo. The libel was dismissed for want of jurisdiction. The court said, "We think the principles [of immunity] 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." [128]

In Portugal when a lien was claimed by an agent of the Lloyd Brasileiro, upon the *"Curvello"* a vessel of that line, owned by the Republic of Brazil, but engaged in the carriage of merchandise and mail, attachment of the vessel was refused by the Supreme Court on the ground that foreign states were exempt from the jurisdiction of local courts.[129]

If the merchant vessel is owned by the government, but operated by a commercial line, it may be unsuccessful in claiming immunity,[130] and if it is not owned, but merely chartered [131] or requisitioned [132] by the foreign government,

[128] The *"Pesaro,"* Supreme Court, United States, June 7, 1926, 271 U. S. 562, 574.

[129] Henry Burnay & Co. *v.* Lloyd Brasileiro, Supreme Court, Lisbon, December 14, 1923, Gazeta de Relação de Lisboa, XXXVIII (1924-25), p. 88.

[130] Cadbury Brothers *v.* Captain Cardozo of the *"Coimbra,"* Superior Court, Hamburg, May 30, 1923, Hanseatische Gerichtszeitung, XLIV (1923), I, p. 178.

[131] The *"Crimdon,"* Admiralty, November 4, 1918, 35 Times Law Reports 81.

[132] The *"Eolo,"* Admiralty, Ireland, July 5, 1917, Irish [1918] 2 K. B. 78; the *"Messicano,"* Admiralty, May 15, 1916, [1916] 32 Times Law Reports 519.

the immunity is subject to the actual control and operation being in the foreign government.[183] Not only is no arrest possible of a government vessel employed in the carriage of cargo, but no lien can attach which may subsequently be enforced against a new owner.[184]

The threatened results of the broad immunities accorded government-owned merchant vessels were summed up by Lord Justice Scrutton in the *"Porto Alexandre."* He said, " . . . No man can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these Courts. . . . But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, . . . there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiation between Governments, and not by Governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states." [185]

This widespread feeling among judges that something ought to be done, but that they were not the ones to do it, undoubtedly spurred on the various national maritime law associations to urge the drafting of a convention on the subject. The result was the International Convention for the Unification of Cer-

[183] The *"Attualita,"* Circuit Court of Appeals, Fourth Circuit, October 6, 1916, 152 C. C. A. 43; *cf.* however the *"Roseric,"* District Court, District of New Jersey, November 22, 1918, 254 Federal 154.

[184] The *"Tervaete,"* Court of Appeal, July 12, 1922, [1922] P. 259; the *"Western Maid,"* Supreme Court, United States, January 3, 1922, 257 U. S. 419.

[185] The *"Porto Alexandre,"* Court of Appeal, November 10, 1919, [1920] P. 30, 36.

tain Rules Concerning the Immunities of Government Vessels, concluded at Brussels on April 10, 1926,[136] whose aim was materially to limit the immunities enjoyed by government-owned merchant vessels and cargoes. This instrument, although signed by some twenty states, has not yet been ratified by most of them.

**Contrasting Decisions**

As the preliminary assumption of this study was the general immunity of foreign states from suit, it will not be necessary to attempt to classify the instances in which courts that do not recognize the distinction between public and private acts have held states immune, but there are a few cases which bring out the opposition of the two theories so categorically that they may be mentioned. The purchase of shoes for the army, held to be a private act by Italian courts,[136a] was held to be the exercise of "the highest sovereign function of protecting itself against its enemies," in the United States,[137] while in France, the courts refused to assume jurisdiction over a similar contract.[138] Whereas the operation of a merchant shipping line is one of the clearest instances of a "private" act for the courts recognizing such a possibility, Judge Gardiner, of the Supreme Court of South Africa, has 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. By means of revenue obtained from trading, the state is assisted in providing for its army and navy."[139] The Provisional Court of Shanghai, in refusing to entertain a suit against the Soviet Merchant Fleet, said that whereas international morality might perhaps require that a foreign state submit in such a case to the local jurisdiction, the

[136] For text see Appendix.

[136a] Governo Rumeno *v.* Trutta, Court of Cassation, Rome, March 13, 1926, Giurisprudenza Italiana, 1926-I-1-774.

[137] Kingdom of Roumania *v.* Guaranty Trust Co. of New York, Circuit Court of Appeals, Second Circuit, January 11, 1918, 250 Federal 341, 343.

[138] Gouvernement Espanol *v.* Lambège et Pujol, Court of Cassation, France, January 22, 1849, Dalloz, Pér., 1849-I-5. See also Faucon et Cie. *v.* Gouvernement Hellénique, Civil Tribunal, Seine, April 22, 1890, Pandectes Françaises, 1890, V, p. 25.

[139] De Howorth *v.* S. S. *"India,"* Supreme Court, South Africa, April 5, 1921, South African Law Reports, [1921] C. P. D., Pt. III, p. 451.

court was instituted to apply not morality, but law, and law as it was, not as it ought to be.[140] The same antithesis exists as to the operation of railways. Despite the many cases holding that the operation of a railway is a purely private act, there are other decisions which ignore this aspect of the matter, and hold specifically that local courts are incompetent to entertain actions against foreign state railways.[141]

[140] Rizaeff Frères *v.* Flotte Marchande Soviétique, Provisional Court, Shanghai, September 30, 1927, Journal du Droit Internationale, LX (1928), pp. 1104, 1106.

[141] See *supra,* p. 9, notes 33-37.

# CHAPTER III

## PROPERTY

THE considerations which limit the exercise of jurisdiction by national courts over foreign states apply *a fortiori* to interference with their property. The courts consider that the renunciation of the sovereign position of a foreign state, involved in submission to the jurisdiction of national courts, is not so drastic when confined to the judicial determination of the question at issue as when extended to execution upon its property.[1] Hence consent to interference with property cannot be presumed from a willingness to litigate the case.

Foreign state-owned property may be involved before the courts in various ways.[2] (1) The action may be directed against the property itself—an action *in rem* against movable property, a "real" action against immovable property, or an action for the enforcement of a lien. (2) An attachment of property may be sought as security for a debt. (3) An execution may be demanded of a judgment rendered against a foreign state. When the action is against the property itself, most courts will refuse to entertain it, irrespective of the nature of the *res*, unless it is in regard to immovable property situated in the state of the forum, and even then, the possible inviolability of the property itself must be reckoned with.

**Action in rem**

When a libel was brought by United States citizens against an armed vessel in possession of French naval officers, the claim

[1] Von Hellfeld *v.* den Fiskus des Russischen Reichs, Court of Concol. 808. This view is also expressed in the memorial accompanying the draft bill of January 29, 1923, submitted to the Swiss legislature. See Bundesblatt, 1923, p. 419.

[2] Only those germane to the subject in hand are enumerated; others are easily conceivable. *Cf.* for example the case involving the exercise of eminent domain against property of Prince Liechtenstein in Czechoslovakia, Supreme Administrative Court, Czechoslovakia, June 22, 1929, Sbírka nálezů nejvyššího správního soudu ve věcech administrativních, XI b (1929), p. 807, No. 8055.

being that the libellants were the true owners, and that the vessel had been wrongfully taken from them and converted into an armed vessel, and that they were entitled to have it restored to them through a proceeding in admiralty, Chief Justice Marshall refused to assume jurisdiction over a national ship of war which had entered the port of a friendly power, open for its reception.[3] Likewise, when an attempt was made by the former owner to attach in Belgium a vessel of the Finnish Republic, affirmed by it to be used in government service, but alleged by the claimant to be his property, the court refused to entertain an action whose object was to divest a foreign state of property actually in its possession.[4] Similarly, the attachment of two vessels of the Portuguese government for failure to pay for bunker coal, was declared null and void by the Court of Appeal of Brussels, as a measure which prevented the two vessels from prosecuting their employment and deprived a foreign state of the free disposition of its property.[5] An order of attachment against a United States Shipping Board vessel was dismissed by a French court which held that the property of a foreign state was not liable to seizure even when engaged in commercial operations.[6]

When an injunction was sought by an English patentee to prevent the removal of certain shells, belonging to the Mikado *en route* from Germany to Japan, the right to interfere with the property of a foreign sovereign was denied by the Court of Appeal,[7] but the Roumanian Court of Cassation permitted the seizure of property of the Serbian state connected with the settlement of an estate in Roumania.[8]

**Immovable Property**

A suit for the repossession from a foreign state of real property situated in Russia and not protected by diplomatic im-

[3] The Schooner *"Exchange" v.* M'Faddon, Supreme Court, United States, February 24, 1812, 7 Cranch 116.

[4] The *"Joulan,"* Commercial Tribunal, Antwerp, February 9, 1920, Pasicrisie, 1922-3-3.

[5] The *"Lima"* and the *"Pangim,"* Court of Appeal, Brussels, June 27, 1921, Pasicrisie, 1922-2-53.

[6] The *"Glenridge,"* Commercial Tribunal, Havre, July 17, 1920, Revue Internationale du Droit Maritime, XXXII (1920-21), p. 599.

[7] Vavasseur *v.* Krupp, Chancery, July 3, 1878, [1878] 9 Ch. 351.

[8] Statul Sârbesc *v.* Regina Natalia, *et al.*, Court of Cassation, Roumania, February 19, 1906, Dreptul, XXXVI (1907), p. 175.

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munities, was entertained by the Supreme Court of Imperial Russia,[9] but the enforcement of a contractor's lien against real property of the League of Nations was refused by the Supreme Court of Switzerland,[10] and the legality of enforcing a lien against a foreign legation building in Vienna was denied by the Supreme Court of Austria.[11]

**Attachment as Security**

When an attachment is demanded as security, some courts are inclined to permit the attachment if the foreign state has acted in its private capacity, and the property is "owned in the same capacity." Thus the Court of Appeal of Lucca maintained that funds accruing to the Bey of Tunis in Italy from a legacy were patrimonial property, private and alienable, in a different category from tax receipts, as to which, being destined for public use, the state did not have the absolute right of enjoyment and disposition. Such patrimonial property of a foreign state was freely subject to attachment.[12] The Italian Court of Cassation went even further, saying that treasury bonds of the Roumanian government, deposited with a Roman bank in guaranty of payment for certain supplies for the army, were patrimonial property, not destined for the public service, and as such, were subject to attachment.[13]

Of course when jurisdiction to hear the case is denied, the validity of any incidental attachment is out of the question. Thus the Civil Tribunal at Antwerp in denying the competence of Belgian courts to entertain an action against the Ottoman government, vacated the provisionally authorized attachment of certain Krupp cannon, belonging to the Ottoman government, *en route* from Essen to Turkey.[14]

[9] Agrakov *v.* Italian government, Supreme Court, Russia, April 7/20, 1893, Reshenija Grazhdanskago Kassatzionnago Departamenta Pravitel', stvujushchago Senata, 1893, p. 170.

[10] Schmidlin *v.* Société des Nations, Court of Appeal, Geneva, February 6, 1925, Revue de Droit International Privé, XXI (1926), p. 103.

[11] Y. *v.* den Kaiserreich X., Supreme Court, Austria, March 15, 1921, Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, III (1921), p. 69.

[12] Hamspohn *v.* Bey di Tunisi, Court of Appeal, Lucca, March 14, 1887, Foro Italiano, 1887-I-474.

[13] Governo Rumeno *v.* Trutta, Court of Cassation, Rome, March 13, 1926, Giurisprudenza Italiana, 1926-I-1-774.

[14] Gouvernement Ottoman *v.* la Société Sclessin, Civil Tribunal,

**Execution of Judgment**

The question of execution of a judgment may come up when a judgment has been rendered against a foreign state in default, or when the state has submitted to the jurisdiction of the court for the determination of a case on its merits. When the foreign state has completely ignored the proceedings against it, and a judgment has been rendered for the plaintiff, execution has sometimes been attempted against the property of the state. Where the courts have failed to realize that such interference with foreign state property is legally impossible, some other organ of the government has invariably stepped in to prevent it. The attempt to execute a judgment rendered against the German Reich in default by a Dutch court was frustrated by the Minister of Justice, and led ultimately to an amendment of the statutes controlling the jurisdiction of the courts.[15] Where there has been a submission to the jurisdiction of the local court for the purposes of the litigation, the courts usually interpret the submission very strictly as implying a readiness to have the issue receive judicial determination, but not as extending to execution. In a case where the Belgian government had submitted to the jurisdiction of Dutch courts,[16] an attempt to seize a pilot-training vessel in execution of a judgment against the Belgian state was frustrated by the government.[17] Likewise, the seizure of rolling stock of the German Imperial Railway in execution of a judgment rendered against it in France was refused by the Court of Cassation, despite the fact that the German government had voluntarily submitted to the jurisdiction of the court.[18]

**Default**

**Submission to Jurisdiction**

Even where the courts imply the submission from an act

Antwerp, November 11, 1876, Pasicrisie, 1877-3-28. See also N. V. Bergverksaktiebolaget Kosmai *v.* het Militär Liquidirungsamt, Gerechtshof, Amsterdam, April 29, 1921, Weekblad van het Recht, [1921] 10750, 2:1.

[15] De Booij *v.* het Duitsche Rijk, Arrondissements-rechtbank, Rotterdam, September 25, 1916, Weekblad van het Recht, [1916] 10022, 3:3, and *infra*, p. 110.

[16] De Belgische Staat *v.* Société du Chemin de Fer International, Hooge Raad, The Hague, February 27, 1903, Weekblad van het Recht, [1903] 7888, 1:1.

[17] See Weekblad van het Recht, [1904] 8010, 4:1.

[18] Vve. Caratier-Terrasson *v.* Direction générale des Chemins de Fer d'Alsace-Lorraine, Court of Cassation, France, May 5, 1885, Dalloz, Pér., 1885-I-341.

*jure gestionis*, or from the fact that the state itself appears as plaintiff, the same principle holds. In the leading Belgian case, decided by the Court of Cassation on June 11, 1903,[19] jurisdiction was assumed over the Dutch state as operator of the state railways with a full understanding that no execution of the judgment would be possible. This circumstance was discussed at length by the Court. The execution of a judgment rendered against the government of the Porte on a counterclaim was refused by the Supreme Court of Austria, despite the fact that it was held that the government of the Porte, by bringing the original action had voluntarily submitted to the jurisdiction of the court for the determination of the legal issue.[20] In Germany the attempt to seize property of the Russian state in execution of a judgment rendered against it on a counterclaim caused the intervention of the Minister of Foreign Affairs, and in its decision denying the possibility of such a seizure the Prussian Court of Conflicts found it unnecessary to determine whether or not the Russian government had submitted to the jurisdiction of the court as regarded the counterclaim brought against it, since such submission, were it established, would not be tantamount to an expression of willingness to permit the execution of the judgment.[21]

**Foreign Judgments**

Execution on awards or judgments rendered by arbitral tribunals or by foreign courts is however sometimes issued. In France a suit against the Tunisian government brought on an arbitral award handed down by Napoleon III thirty-five years before was entertained by the court, on the ground that the Bey had renounced the privilege of invoking the immunities attached to his sovereignty by requesting the arbitration of the issue in France.[22] Similarly execution on a judgment obtained in England against the Russian Volunteer Fleet

[19] Chemin de Fer Liégois-Luxembourgeois *v.* État néerlandais, Court of Cassation, Belgium, June 11, 1903, Pasicrisie, 1903-1-294.

[20] Supreme Court, Austria, September 5, 1866, Sammlung von Civilrechtlichen Entscheidungen des k. k. Obersten Gerichthofes, V (1876), p. 570, No. 2697.

[21] Von Hellfeld *v.* den Fiskus des russischen Reiches, Court of Conflicts, Prussia, June 25, 1910, Zeitschrift für Internationales Recht, XX (1910), p. 416, 430.

[22] Héritiers Ben Aïad *v.* le Bey de Tunisi, Civil Tribunal, Seine, June 30, 1891, Journal du Droit International Privé, XIX (1892), p. 952.

was ordered against the Union of Socialist Soviet Republics by the same court on March 5, 1930.[23] In Czechoslovakia, the court in permitting execution upon real property of a foreign state, as the result of an arbitral award, distinguished between properties of different natures, holding that execution was possible providing the property itself were not extraterritorial.[24] In Germany an attempt was made to seize a dismantled war vessel of the Ottoman Empire in execution of a judgment rendered against the Turkish government by a commercial court at Constantinople. In refusing to permit the seizure, the lower court emphasized the extraterritorial character of a foreign war vessel, but the court of appeal contented itself with observing that property of a foreign state was not liable to seizure in Germany.[25]

**Submission to Execution**

Occasionally a state is held to have submitted even to execution against its property. When, after judgment had been rendered by a Bavarian court against a private Austrian railroad, and execution had been ordered against its property, the Austrian government took over the railroad, expressly assuming the position of legal successor to the company as regarded this case, then pending, submission to execution of the judgment was deemed to have been made.[26]

A foreign state may also be held to have submitted to execution upon its property when that property is a special fund definitely held out as being deposited with a bank in the country of the forum as security for nationals furnishing credit to the foreign government.[27]

[23] Herzfeld *v.* Dobroflotte (État Soviétique), Civil Tribunal, Seine, March 5, 1930, Journal du Droit International, LVII (1930), p. 692. See, however, decision of Court of Appeal, Paris, February 19, 1931, *ibid.*, 1931, p. 393.

[24] Supreme Court, Czechoslovakia, April 26, 1928, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, X a (1928), p. 632, and December 28, 1929, *ibid.*, XI b (1929), p. 1705.

[25] Schönemann *v.* den Ottomanischen Reichsfiskus, Landgericht, Kiel, August 1, 1901, and Oberlandesgericht, Kiel, August 15, 1901, Zeitschrift für Internationales Privat- und Öffentliches Recht, XIII (1903), p. 397.

[26] X. *v.* den österreichischen Staat, Court of Conflicts, Bavaria, March 5, 1885, Annalen des Deutschen Reichs, 1885, p. 325.

[27] X. *v.* den Kaiserlich Türkischen Militärfiskus, Court of Conflicts, Prussia, May 29, 1920, No. 2714, Juristische Wochenschrift, L (1921), II, p. 773; X. *v.* das Türkische Reich, Court of Conflicts, Prussia, November 13, 1920, *ibid.*, p. 1478.

# CHAPTER IV

## FOREIGN SOVEREIGNS

In general what has been said of the immunities of foreign states before national courts applies likewise to foreign sovereigns. So long as they act in their public capacity as representatives of the nations of which they are the head, the courts have no jurisdiction to entertain any complaint against them.[1] In determining who are sovereigns, and when they are acting officially, the courts encounter the same difficulty as when dealing with states. In the *"Charkieh,"* Lord Phillimore held that Ismail Pacha, Khedive of Egypt, had not been recognized as a reigning sovereign of the state of Egypt, and hence could not claim immunity for the vessel owned by him but engaged in trade.[2] The Sultan of Johore [3] and the Gaekwar of Baroda [4] were held by English courts to be sovereign rulers who acknowledged no other law than the law of nations, and in France, in 1884, the Pope was held to be a "foreign sovereign." [5]

As to sovereigns, there is the added complication that the immunity applies only to acts consummated while the sovereign is actually reigning.[6] In a suit brought against Isabella of Bourbon, ex-queen of Spain, for a debt for jewels purchased in part while she was still reigning and in part after her deposition by revolution, the Court of Appeal of Paris assumed

[1] De Haber *v.* Queen of Portugal, Queen's Bench, May 28, 1851, 17 Q. B. 171, 196.

[2] The *"Charkieh,"* Admiralty, May 7, 1873, 4 A. and E. 59.

[3] Mighell *v.* Sultan of Johore, Court of Appeal, November 29, 1893, [1894] 1 Q. B. 149.

[4] Statham *v.* Statham and Gaekwar of Baroda, Divorce, December 21, 1911, [1912] P. 92.

[5] Le Ministère Public *v.* Steenkiste, Tribunal Correctionnel, Ghent, January 15, 1884, Pasicrisie, 1884-3-39.

[6] *Cf.* Article III § 2 of Resolution of Institute of International Law, Hamburg, 1891, concerning competence of courts.

jurisdiction on the ground that part of the order was not delivered until after the deposition, and none of the gems were destined for crown jewels of the Spanish Treasury, but for wedding presents for the Queen's daughter.[7] An action was instituted in Italy against the Austrian Crown Prince for the alleged breach of a civil obligation, and was decided against the Prince. The latter, become Emperor Charles I, appealed. Subsequently, as ex-Emperor, he took the case to the Court of Cassation, claiming that upon his assumption of the throne he had become invested with privileges and immunities such that he was not subject to the jurisdiction of a foreign court even for the continuance of a suit already instituted against him. The court held, however, that the assumption of jurisdiction was justified because of the patrimonial nature of the act giving rise to the litigation.[8]

**Private Acts**

Naturally enough an action brought against the Queen of Portugal as reigning sovereign and supreme head of the nation of Portugal for money paid over to the Portuguese government could not be maintained,[9] nor an action against the Queen of Spain for interest on bonds issued by the Queen regent in the name of her daughter,[10] but the possible extent of the immunities accorded foreign sovereigns is shown in two decisions of English courts, in one of which the exemption was granted for such a very non-official matter as a breach of promise to marry, made by a visiting Prince while traveling incognito,[11] and in the other to a foreign potentate named co-respondent in a suit for dissolution of marriage.[12] Yet even English courts are occasionally obliged to consider for what acts an acknowledged monarch may claim immunity. The King of Hanover was born in England, and was an English

[7] Mellerio *v.* Isabel de Bourbon, Court of Appeal, Paris, June 3, 1872, Journal du Palais, 1872, p. 1185.

[8] Carlo d'Austria Este *v.* Nobili, Court of Cassation, Rome, March 11, 1921, Giurisprudenza Italiana, 1921-I-1-471.

[9] De Haber *v.* Queen of Portugal, Queen's Bench, May 28, 1851, 17 Q. B. 171, 196.

[10] Wadsworth *v.* Queen of Spain, Queen's Bench, May 28, 1851, 17 Q. B. 171.

[11] Mighell *v.* Sultan of Johore, Court of Appeal, November 29, 1893, [1894] 1 Q. B. 149.

[12] Statham *v.* Statham and Gaekwar of Baroda, Divorce, December 21, 1911, [1912] P. 92.

Peer. After his accession to the throne of Hanover, he renewed his oath of allegiance to the Queen of England and claimed his rights as a Peer. While temporarily domiciled in England, suit was instituted against him by the Duke of Brunswick in connection with some property alleged to be wrongfully retained by him under an instrument of guardianship. The question was whether the immunities of a King prevailed over the liabilities of an English subject. The court held that the benefit of the doubt should accrue to the King. As every act complained of had been undertaken after he had become King of Hanover, and as none had been done in Great Britain, the presumption was not rebutted, and the court declared itself not competent.[13]

The usual distinction between acts of *puissance publique* and private acts is made in the decisions of the Continental courts,[14] and the usual difficulties in making the differentiation are encountered. Placing an order for military decorations was held by a French court of appeal to be an exercise of public authority,[15] and the Supreme Court of Hungary refused to entertain a suit for the recovery of fees due for professional legal services,[16] yet the Civil Tribunal of the Seine did not hesitate to assume jurisdiction over an action for fees for medical services.[17]

**Conclusion**

The eminently unsatisfactory status of the position of foreign states and sovereigns before domestic courts is apparent from the above résumé of the cases. The principle still subsists: *par in parem non habet imperium*, but it has become so distorted as to be hardly recognizable. Should it be done away with entirely, or should the methods of application be revamped and unified so as to make a consistent usuage pos-

[13] Brunswick *v.* Hanover, Rolls Court, January 13, 1844, 6 Beavan 1.

[14] Introvini Cesare *v.* S. A. R. il Principe Danilo Petrovich Niegiosch del Montenegro, Civil Tribunal, Milan, July 20, 1905, Monitore dei Tribunali, XLVI (1905), p. 776.

[15] Héritiers de l'Empereur Maximilien *v.* Lemaître, Court of Appeal, Paris, March 15, 1872, Dalloz, Pér., 1873-2-24.

[16] X. *v.* Prince Lippe-Schaumburg, Supreme Court, Hungary, October 6, 1875, Döntvénytár; Magyar Kir. Curia semmitöszéki és Legfőbb Itélöszéki osztályának elvi jelentöségü Határozatai, XIV (1876), I, p. 25, No. 73.

[17] Aff. Wiercinski *v.* Seyyid Ali Ben Hamond, Civil Tribunal, Seine, July 25, 1916, Journal du Droit International, XLIV (1917), p. 1465.

sible? The chief step taken toward making the old adage conform to the modern economic situation has been that of distinguishing between the public and private acts of the state. While it is admitted that this has led to many anomalies, it should not be forgotten that it was not in a country whose courts assume jurisdiction over private acts of the state, but in one according a very extensive immunity that a foreign state was sued for an act of war performed in a territory under hostile military occupation,[18] and in another such country that a court issued execution against property of a foreign state upon a judgment rendered on a counterclaim.[19] The occurrence of such direct violations of the commonest principles of international law, suggest that part of the difficulty of the present situation may be attributed to the failure of the constitutional machinery of the respective states to cope with an illegal action on the part of their own courts. This fact should be borne in mind if any attempt is contemplated to obviate by international convention the present confusion regarding the Position of Foreign States before National Courts.

[18] See the de Booij case, *infra*, p. 110.
[19] See the Hellfeld case, *infra*, p. 76.

# PART II

# ANALYSIS BY COUNTRIES

# THE POSITION OF FOREIGN STATES BEFORE GERMAN COURTS

## CHAPTER I

### HISTORICAL DEVELOPMENT

THE generally recognized principle of international law that a sovereign state may not be subjected against its will to the jurisdiction of a foreign court, and that its property is not liable to be attached or to be taken on execution has received very broad application in Germany. Although it owes its more liberal interpretation to recent times, the principle itself has found frequent expression not only under the Empire, but before that in the original German states.

**Prussian Doctrine of Immunity**

The development of the doctrine may well be traced through the medium of Prussian laws and decisions. The General Statute Governing the Administration of Justice in the Prussian States,[1] July 6, 1793, dealt at length with arrest and attachment,[2] and provided (§ 76) that when personal arrest was exercised upon a foreigner of rank, the Department of Foreign Affairs must be notified.

**General Statute 1793**

**Order in Council 1795**

An order in council of April 14, 1795, specifically stated that princes of the German Reich were not subject to arrest, and that other princes might not be arrested without the previous decision of the cabinet ministers on the point.[3]

**Declaration 1798**

The Declaration of September 24, 1798, in elucidation of such rules of the above-mentioned General Statute as applied to the relations of Prussia with foreign powers was more explicit. It reiterated the immunity from arrest enjoyed by ruling German princes of the Reich, but stated specifically

[1] Allgemeine Gerichtsordnung für die Preussischen Staaten.
[2] *Idem*, Pt. I, Tit. 29.
[3] Kabinetsordre, April 14, 1795, Sammlung Preussischer Gesetze (Rabe) III, 50, 52.

that other—foreign—princes were subject to arrest.[4] This had been implied in the previous provisions, but it found here its first categorical expression.

General Statute 1815

In 1815 it became necessary to reënact the General Statute, both on account of the recovery of former German provinces, and because of the many changes and new interpretations given the act since 1793.[5] The new version contained more specific provision on the subject. Foreign princes were again expressly declared to be subject to arrest. Now, however, it was the Minister of Justice who must previously be informed of such an intention, and who must confer with the Minister of Foreign Affairs before giving his opinion on the propriety of the proceeding.[6]

It is obvious that these regulations of Prussia, while proclaiming the liability of foreign potentates to personal arrest and attachment of property,[7] at the same time withdraw that liability from judicial cognizance. It was the Minister of Foreign Affairs, the man most competent in questions of international law, who virtually decided the issue. The Minister of Justice communicated this decision to the court seized with the question, and the latter might be constrained to renounce a most potent agency in seeing justice done.

In view of the disinclination specifically to include in a

[4] Declaration, September 24, 1798, Pt. XI, § 5. *Ibid.*, V, 212.

[5] Patent zur Publikation, February 4, 1815, Allgemeine Geritchsordnung für die Preussischen Staaten, Berlin, 1885, Pt. I, p. iii; Gesetz-Sammlung für die Königlich-Preussische Staaten, 1815, No. 5.

[6] Allgemeine Gerichtsordnung für die Preussischen Staaten, Berlin, 1885, Pt. I, Tit. 29, § 90, Annex 202.

[7] The provisions regarding the "arrest" of foreign princes were applied by the courts to the attachment of property as well. See for instance the decision of the Prussian Court of Conflicts, January 14, 1882. (Zeitschrift für Internationales Privat- und Oeffentliches Recht, XVI [1906], 262, 273). For further discussion of the meaning and significance of these provisions, see *idem*, June 25, 1910. (Zeitschrift für Internationales Recht, XX [1910], 416, 440.) Fischer in his opinion on the Hellfeld Affair (Abhandlungen aus dem Staats- und Verwaltungsrecht, Heft 23, p. 87), holds these provisions applicable to seizure on execution as well as to attachment. Fleischmann, on the other hand, more logically concludes from the position of the text in the Statute, that its application is restricted to attachments. He admits that the word "prince" in the original may be applied to the modern "state," and apparently assumes that it refers to the "arrest" of property as well as of the person. (*Ibid.*, p. 119.)

national enactment principles recognized by the law of nations, which has been evidenced more recently, it seems at least doubtful whether the original omission of any mention of immunity for foreign princes was intended to be interpreted as though the converse had been stipulated. However this may be, whereas the method outlined was followed in practice, the *principle* seems not to have been influenced by the assertion of the statutes, but to have been decided on the basis of international law, and with a result quite contrary to the implication of the domestic enactments.

**Decision of Prussian Court 1819**

In 1819, on the demand of a German merchant, the Kreis Court in Saarbrüken, in the Rhenish Provinces, ordered the garnishment of certain funds of the Government of Nassau, which were in the hands of a third party. The court requested the Minister of Foreign Affairs to notify the Government of Nassau of the attachment. This he refused to do, writing to the Minister of Justice that he would take no hand in the matter. He said it was questionable whether the courts had the power to attach the property of foreign governments on the demand of a private citizen. In the provinces where the law of the realm and the General Statute applied, no court would think of so doing. The principle of immunity was a general one. It formed a part of international law and hence was applicable alike to Prussia and to the Rhenish Provinces.

Thereupon, the Minister of Justice, on October 5, 1819, wrote to the Advocate-General of the Court of Appeal in Cologne that whereas the exercise of jurisdiction over foreign governments was not consonant with international-law maxims as they had developed; and whereas the Prussian government would not brook such an action against itself, thereby recognizing it as in contradiction with the law of nations; and whereas the consistent application of a contrary principle might lead to many conflicts and much confusion, he was instructed to cause the property to be released, and to see to it that it be involved in no further judicial process. Furthermore, he was to intimate to the authorities in the Rhenish Provinces that in future no such attachments were to be permitted where foreign governments were involved, nor was any

jurisdiction to be exercised in such cases. If the courts were applied to for relief, the Minister of Justice was to be communicated with.[8]

**Decision of Prussian Court 1832**

An interesting question arose as to the effect of this procedure upon the character of the claim. Did it cease to be a private claim when it ceased being justiciable? In 1832 a claim for damages was brought against the Russian Government by a Prussian merchant, and seizure of Russian Government property in Thorn was demanded as security. A minority of the Superior Court before which the case was argued was of the opinion that the matter should be dismissed for want of jurisdiction. It was submitted that inasmuch as a decision in favor of the plaintiff could not be executed, the claim ceased to be a judicial matter and became an affair of state, such that the plaintiff could only pursue his claim through diplomatic channels. The majority held that the question was of a judicial nature, but its settlement was subservient to political policy.

The Minister of Justice, appealed to for advice, reported March 15, 1832, that as the result of his conference with the Minister of Foreign Affairs, it appeared that the claim could not be considered for want of jurisdiction. No property of a foreign sovereign government, whatever the reason for its being in the country, could be attached except under special circumstances recognized by international law. In case the merchant failed through his own efforts to get at least compensation for his actual damages, the Minister of Foreign Affairs stood ready to take the matter up diplomatically with the foreign government.[9]

**Prussian Order in Council 1835**

A few years later, the act of the Superior Court in Paderborn in seizing funds belonging to the government of the Electorate of Hesse, resulted in the promulgation of an order in council of April 9, 1835, to the effect that such action of the Superior Court would not be permissible even by way of retaliation. The basis of the suit was a claim for damages resulting from an act of the Elector of Hesse in his public

[8] Droop, Gruchots Beiträge zur Erläuterung des Deutschen Rechts, XXVI (1882), 289, 292.

[9] *Ibid.*, XXVI (1882), 293.

capacity. The acts of a sovereign when exercising his powers as such were not subject to review or judgment by courts of a foreign state, for the reason that the sovereign could not recognize the authority of the foreign court, and could only regard its interference as an act of force or as indicating a state of war. The illegality of the procedure of the Oberlandesgericht in Paderborn was obvious from this statement of facts.

From these examples, it appears that it was a well-established principle that the property of foreign sovereigns and governments was not subject to judicial attachment in Prussia, despite the apparent license contained in its General Statute Governing the Administration of Justice.[10]

Imperial Legislation 1879

On October 1, 1879, the imperial legislation came into force —the Organic Law for the Judiciary [11] of January 27, 1877, and the Code for Civil Procedure [12] of January 30, 1877. The general question of arrest and attachment, dealt with in title 29 of Part I of the Prussian General Statute, was covered by § 5 of Book VIII of the Code for Civil Procedure of the Reich.

Diplomatic Immunities

As in the original version of the Prussian Law, no specific mention was made of the liability to judicial process of foreign sovereigns or governments. Furthermore, in the imperial law, no suggestion was made as to the course to be followed when it was desired to practise "arrest" against a foreign sovereign.

On the other hand, the Organic Law enumerated certain classes of persons who were not subject to the jurisdiction of domestic courts. Thus, except in civil litigation over real property, members of foreign diplomatic missions accredited to the German Reich or to its component states enjoyed immunity from the jurisdiction of the courts of the country to which they were accredited. Members of the family and the

[10] See statement of de Paepe, Études sur la Compétence Civile (1894), p. 49; Kohler, Zeitschrift für Völkerrecht, IV (1904), 314. The same principle seems to have obtained in other German states. See, for instance, *Pfeiffer* v. *Fürsten zu Waldeck,* Oberappellationsgericht zu Cassel, January 17, 1818, Strippelmann, Entscheidungen, III(1), 368; *Blocksche Erbe* v. *Waldecksche Rentkammer zu Arolsen, idem,* June 16, 1841, *ibid.,* III(1), 369.

[11] Gerichtsverfassungsgesetz.

[12] Zivilprozessordnung.

personnel of such missions, in so far as they were not German, shared the same treatment.[13]

Acting under these new provisions, and apparently impressed with the exclusive character of the enumeration of the exemptions, to which interpretation color was given by the "motives" to the Organic Law,[14] German courts were called upon to decide claims which involved the determination of the question of their own competence. As the courts themselves had never been the agency through which this competence had been denied, and as the advisory opinion of the ministers was no longer prescribed, it is not surprising that the lower courts even of Prussia should now arrogate to themselves this competence.

In March, 1881, an engineer in Berlin, by the name of Ziemer, who held obligations of the Roumanian state railway, in connection with which he was bringing claim against the Roumanian Government, applied to the local court for a decree of attachment against certain funds of that Government in two banking houses in Berlin as security for the execution of the judgment if in his favor. This decree was issued, but was later vacated upon the suggestion of the garnishees that the attachment of foreign government property was not permissible.

**Application of German Code to Foreign Government**

Ziemer, thereupon, appealed to the Landgericht. On March 29, 1881, the attachment of the funds was again ordered, the court relying upon the provision of the Code for Civil Procedure which permitted persons having no domicile in Germany to be cited before the court in whose jurisdiction one of the latter's creditors might reside. This provision was held to apply to all juridical persons including foreign governments; moreover, the laws regulating judicial procedure were held to extend to foreign sovereigns and states, since the latter were not exempted by § 18 of the Organic Law for the Judiciary.

Against this decision, the directors of the banks in question made protest, but before the issue could be taken up by the

[13] Gerichtsverfassungsgesetz, §§ 18-20.

[14] Entwurf eines Gerichts-Verfassungs-Gesetzes für das Deutsche Reich mit Motiven und Anlagen, § 9.

court, Bismarck, as Prussian Minister of Foreign Affairs, interposed, and raised the question of the competence of the court. This case of conflict of jurisdiction—between the judicial courts and the administrative authorities—was brought before the Court of Conflicts in Berlin.

Prussian Court of Conflicts 1882

In a decision of January 14, 1882, this court held that the question to be decided by it was whether the courts were competent for the vindication of such a claim against a foreign government involving the attachment of movable property, or whether the relief sought could be granted not through the courts, but only through administrative means, *i.e.* diplomatic channels. The Minister of Foreign Affairs had contended that a foreign government could not be sued in Germany, and that the only domestic authority which could take up a claim against such a government was his Ministry. He based this contention upon international theory and practice, particularly the three Prussian decisions dealt with above. In other words, the Minister claimed that the courts had trespassed upon his domain, he being the head of the administrative authorities.

The court held that this was sufficient ground for raising the issue of conflict of competence, but it went on record as saying that the justification for so doing was not conditioned upon the right of the minister raising it to decide upon the facts of the original case. The effect of raising this issue was simply to remove from the ordinary courts the right of deciding on the admissibility of the judicial process, and to transfer the case to the Court of Conflicts for the decision of this point alone.

The Court of Conflicts decided, in conformity with the contention of the Minister of Foreign Affairs, that it was a fixed principle of international law that a foreign state was not subject to the courts of another country. This principle, deduced from the theory of the mutual independence of states and necessitated by considerations of international intercourse, had recently attained general recognition among the states of the family of nations. Despite certain exceptions to immunity from foreign jurisdiction, there were no exceptions to the immunity of property from seizure. In view of the position uniformly assumed by the Prussian authorities, the conclusion was inevitable that the principle recognized in other countries

held for Prussia, too, although not incorporated in any positive rule of law.

As for the rules of domestic law which were relied on to prove the contrary, they had no application to foreign *states.* The provision that legal claims might be brought against the government of Prussia or of other German states in no wise implied that similar actions were permissible against non-German states especially when its application would involve a conflict with well-established principles of international law.

Nor were the omissions in the law more significant. The express exemption prescribed for ambassadors was an exception to the general rule that all *persons* in Germany were subject to German courts. It by no means implied the subjection of foreign states and their governments. There was no need for an explicit rule of municipal law that general principles of international law were not to be infringed; they were axiomatic. The decree of attachment was declared inadmissible. The claimant could look only to the Minister of Foreign Affairs.[15]

**Bavarian Court of Conflicts 1885**

In a somewhat similar case in Munich, the Bavarian Court of Conflicts, in a judgment of March 4, 1885, held that there was no ground for raising the issue of conflict of competence. It decided that whereas, in general, property of a foreign government was not subject to seizure, a state might voluntarily submit to the jurisdiction of foreign courts, particularly in matters arising from quasi-private relationships. In this case, rolling stock of an Austrian railway had been ordered seized in execution of a judgment of a commercial tribunal directing payment of interest on bonds issued by the company, due to a German national. In the meantime, the Austrian government had purchased the railway, and the Minister of Foreign Affairs raised the question of the competence of the tribunal. The court of conflicts held that in purchasing the railway, and *in expressly assuming the position of legal successor to the company as regarded this case, then pending,*

[15] Text in Stenographische Berichten über die Verhandlungen des Reichstags, 1884/1885, Vol. VII, Appendix, p. 1925 *et seq;* Justiz-Ministerial Blatt, 1905, p. 202; Loening, Gerichtsbarkeit, p. 35; Droop, Gruchots Beitfäge, XXVI (1882), 294-303; de Paepe, Études (1894), p. 49.

the government had voluntarily submitted to the jurisdiction of the foreign court in so far as the company itself was subject thereto. And it was well known that such voluntary submission on the part of the state was admissible as regarded its private relationships.[16] This case is variously held to support and to run counter to the case decided by the Prussian Court of Conflicts above.[17] The significance of the case as apparently permitting a seizure on execution as distinguished from an attachment is nullified by the fact that the court evidently assumed that the voluntary submission of the state covered the execution, because in this case the judgment had been delivered and the plaintiff had become entitled to execution before the state succeeded to the position of the railway company.

**Reichsgericht 1884**

On April 30, 1884, the Reichsgericht had occasion to decide on appeal a case involving the attachment of real property of the Republic of Peru. This order of attachment had issued from the Landgericht of Hamburg, but was later vacated upon the suggestion of the Consul-General of Peru, as not being permissible against property of a foreign state. An appeal before the Superior Court failed, but the right of the Consul-General of Peru to represent his country being denied by the Reichsgericht, in view of the peculiar circumstances of the case, the decision of the court below was reversed.[18]

**Proposed Amendment to Judiciary Act, 1885**

Thus in the space of five years, after the coming into force of the new law, property of Roumania, Austria, and Peru had been seized by order of German courts. These states made representations to the German Foreign Office on this score,[19] with the result that the Government was anxious to settle the matter once for all, in such a way as to leave no doubt as to its position. On January 18, 1885, the Federal Council presented to the Reichstag an amendment to the Judiciary Act—§ 17a—in the form of a bill denying to German courts all jurisdiction over foreign states or sovereigns.

[16] Text in Gesetz- und Verordnungs-Blatt für das Königreich Bayern, 1885, Beilage I; Annalen des Deutschen Reichs, 1885, p. 325.

[17] See de Paepe, Études (1894), p. 50; Loening, Gerichtsbarkeit, p. 39.

[18] Entscheidungen des Reichsgerichts in Zivilsachen, XIV (1884), 430.

[19] Loening, Gerichtsbarkeit, p. 40.

Article 1 of this bill was to the effect that "States, not belonging to the German Empire, and the heads of these states, are not subject to the jurisdiction of German courts. This disposition applies to members of sovereign families as long as they reside within the German Empire in the suite of their chief. It applies also to persons in the suite of the head of a foreign state, and to his servants, in so far as they are not German." Article 2 expressly stated that the immunities provided for were subservient to the rule of the Code of Civil Procedure [20] whereby in claims arising in connection with real property, the court of the place in which the property was situated, had exclusive jurisdiction.[21]

The Reichstag nominated a committee of fourteen members to study and report upon this proposed amendment. A primary point to be considered was whether or not the suggestion was in conformity with the law of nations. Secondly, was the distinction attempted by the Bavarian Court of Conflicts (*supra*) between acts of a state undertaken as a sovereign authority, and those involving a quasi-private relationship to be considered in the application of the contemplated exemption? Finally, the question of the advisability of a new law was discussed. Admitting in general the desirability of legislative enactment on the subject, why should Germany take the initiative? It would commit her to a point of view which other states might not share. Moreover, even granting that the proposition reflected the present state of international law, what certainty was there that it would continue to do so? Was it not likely that the doctrine would be affected by the ever-increasing quasi-private relationships into which states were entering? Would it be wise to incorporate such a provision into a national law?

On the other hand, it was maintained that the number of cases where German courts had ignored the principle of the law of nations had increased lately and caused protests from foreign states, and that a rejection of the proposal might lead the courts to misinterpret the law of nations, especially as the "motives" to the Organic Law expressly said that no other

[20] Zivilprozessordnung, § 25.

[21] According to von Bar, Clunet (1885), 650.

exceptions than those mentioned were recognized by the law of the realm.[23]

Several amendments were proposed, one of them recognizing the possibility of a state voluntarily submitting to the jurisdiction of German courts. A government member in charge of the bill answering a question put to him in the House, said that the proposed law was not intended to exclude the possibility of such voluntary submission, but only to prevent a foreign state being subjected to such jurisdiction. It has been questioned whether such a contention could be maintained, in view of the categorical terms of the text.[24]

**Rejection of Amendment**

Actuated by such considerations as these, the committee to who the bill had been confided, rejected it nine to four.[24] It is believed that this action did not amount to a denial of the principle of international law that foreign states are in general not subject to the jurisdiction of domestic courts.[25] The principle was admitted, but a municipal law incorporating it was deemed unnecessary, and the actual text proposed unwise.

**Constitution of 1919**

It was not until the appearance of the new Constitution of 1919 that any provision was incorporated into German law covering the status of foreign states. At this time it was done in terms which avoided the difficulties inherent in the proposal of 1884. On the other hand, it placed much more responsibility upon the courts, for it became necessary for them to interpret the law of nations. Article 4 of the Constitution for the German Reich provided that the generally recognized rules of international law have the force of constituent elements of German imperial law.[26]

[23] See Entwurf eines Gerichts-Verfassungs-Gesetzes für das Deutsche Reich mit Motiven und Anlagen, 1874, § 9.

[24] See von Bar, Clunet (1885), 650.

[24] Clunet (1885), 654.

[25] Decision of Prussian Court of Conflicts, June 14, 1902, Zeitschrift für Internationales Privat- und Oeffentliches Recht, XIII (1903), 397, 400; *Idem*, June 25, 1910, Zeitschrift für Internationales Recht, XX (1910), 416, 436; Deutsche Juristen-Zeitung, XV (1910), 808, 810; Loening, Gerichtsbarkeit, p. 43.

[26] Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts. Verfassung des deutschen Reiches [Giese], 8th ed., 1931.

**Historical Development of Immunity In Practice.**

Historically, then, immunity from personal arrest was the first privilege accorded by statute in Germany to foreign princes. This provision of the Prussian Gerichtsordnung was applied by the courts to the attachment of the property as well as to the arrest of the person of the prince, and to foreign states as well as to sovereigns. In all the early cases the attempted seizure was for security only, not in execution of a judgment already rendered. Strictly speaking, Prussian legislation made no provision whatever regarding the levy of an execution upon foreign state-owned property. It was neither authorized nor forbidden.

**Attachment**

**Taking on Execution**

This question, like that of jurisdiction to hear a suit, was dealt with under the precepts of international law. As jurisdiction was in general not recognized, there could be no question of the execution of a judgment against a foreign state except under exceptional circumstances,—when the state had voluntarily submitted or had had a counter-claim brought against it in a suit which it had instituted as plaintiff. For the courts to recognize voluntary submission to seizure of property, it must be clear that the submission was intended to extend to interference with the property of the sovereign and not merely to the determination of rights against it. This was the point of the decision of the Bavarian Tribunal of Conflicts of March 4, 1885.[27] The Austrian government in purchasing a private railroad against which a judgment had been rendered upon which the plaintiff was then entitled to execution, expressly assumed the liabilities of the company in this cause. In permitting the execution of the decision on property of Austria, the court interpreted the submission of that government as intended to include just such a possibility. The decision may be wrong in point of fact, but it is not a precedent for the actual levy of execution against the will of a defendant state.

The adequacy and self-sufficiency of the plea of the immunity of the property itself is well illustrated by the case of *"L'Assari Tewfik,"* [28] where, despite the fact that the com-

[27] Annalen des Deutschen Reichs, 1885, p. 325.

[28] Zeitschrift für Internationales Privat- und Oeffentliches Recht, XIII (1903), 397, and *infra,* p. 26.

petence of the court that rendered the decision was not questioned, and notwithstanding the existence of other adequate grounds for ordering the release of machinery of a foreign war vessel, the superior court preferred to base its decree on the impossibility of legally seizing any property of a foreign state.

When the jurisdiction of the court to hear the suit is also in question—as in the case of a doubtful counter-claim—the issues may be confused although they are still properly distinct in law, the invalidity of the levy upon execution being quite different from the validity of the judgment.[29]

**Freedom from Suit**

The immunity of a foreign state from suit in Germany rested purely upon generally recognized principles of international law until the promulgation of the Constitution of 1919, the attempt to pass a specific enactment to this effect in 1885 having proved abortive. This precept found frequent expression even in the earliest cases—those referring to attachment or sequestration. The Minister appealed to, usually asserted in general terms this limitation of the jurisdiction of domestic courts. Later the courts themselves vacated orders of attachment on the ground that they had no jurisdiction over foreign states. The assertion of this immunity was not limited to occasions involving sequestration of property, but served to protect a sovereign power from being sued. Thus on June 21, 1888, the Reichsgericht declared in a case concerning foreign loans, that a foreign state could not be subjected to the jurisdiction of domestic courts,[30] and on December 8, 1893, the Kammergericht in Berlin in an appeal from the Amtsgericht, confirmed the latter in its dismissal of a suit brought against the Russian Government, on the ground that it had no jurisdiction over the defendant, a foreign state. The Superior Court said that this was in accordance with international law, was a well-known reason for refusing jurisdiction, and was to the point in the case at bar.[31]

[29] See the Hellfeld Case, Zeitschrift für Internationales Recht, XX (1910), 416; Deutsche Juristen-Zeitung, XV (1910), col. 808; American Journal of International Law, V (1911), 490, and *infra*, p. 18. See, too, decisions of the Prussian Court of Conflicts of May 29 and November 13, 1920, Juristische Wochenschrift, L (1921), II, pp. 773, 1478.

[30] Entscheidungen des Reichsgerichts in Zivilsachen, XXII (1889), 19.

[31] Seufferts Archiv, L (1895), 97.

# CHAPTER II

## ANALYSIS OF THE DOCTRINE OF IMMUNITY

In so far as immunity from suit and attachment of property is based not upon domestic enactment but directly upon international law, it is usually considered to result from the mutual independence and equality of sovereign states.[1] However fundamental such a conception may be, as a rule of law to apply to actual cases it has proved somewhat indefinite, with the result that a body of custom and precedent has grown up defining and modifying the application of the general principle in specific instances.

**Exceptions**

In the matter of jurisdiction, certain exceptions are commonly recognized.[2] In view of the intimate incorporation of real property with the domain of the state, due to its immovable nature, jurisdiction *in rem* over such property, *i.e.*, over questions of ownership, boundaries, partitions, possession, etc., is exclusively within the competence of the *forum rei sitae*.[3] Logically, the use of the word "exclusive" could be explained as limiting the choice of jurisdiction afforded the claimant.[4] It has, however, been projected into the realm of international relations. Thus § 20 of the Judiciary Act of 1877 specifically subjects the immunity of foreign ambassadors to the operation of this clause, and it is held that this provision is likewise controlling in suits involving foreign states.[5]

**Real Property**

[1] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 167; Prussian Court of Conflicts, June 25, 1910, Deutsche Juristen-Zeitung, XV (1910), col. 810; Kammergericht, February 19, 1919, Rechtsprechung der Oberlandesgericht, XXXVIII (1919), 227.

[2] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 167.

[3] Zivilprozessordnung, § 25.

[4] *Idem*, § 24.

[5] Prussian Court of Conflicts, January 14, 1882, Droop, Gruchots Beiträge, XXVI, 300; Reichsgericht, December 12, 1905, Entscheidungen des Reichsgefichts in Zivilsachen, LXII, 167; Prussian Court of Conflicts, June 25, 1910, Zeitschrift für Internationales Recht, XX (1910),

An interesting case involving this general issue was decided by the Prussian Court of Conflicts on March 10, 1928.[6] The complainant owned an apartment house and had rented certain rooms to a German corporation, which in turn had sublet them to the Polish state for use as a Consulate. This had been done with the consent of the claimant. In the entrance hallway, to the right and left, were spaces with uniform frames within which the tenants might display signs and business advertisements, and thus avoid disfiguring the exterior of the building. The interests of neatness demanded that these be essentially uniform, but the Polish state, although having the regulation space available, had, contrary to the will of the claimant, selected a different place and format for its sign, and had set up a round metal coat of arms over the outside doorway. Requests for its removal and for restoration of the plastered wall were unheeded. Proceedings were instituted on two grounds, disturbance in possession and damage to property. Notice of the suit was not served on the Polish government, because the Foreign Office had refused to forward it. But notification was effected through the Polish vice consul at Stettin. Before the oral proceedings had taken place, however, the Prussian "Ministerpräsident"[7] raised the issue of Conflict of Competence, explaining that the suit violated a recognized principle of international law, dealing as it did with a demand directed against a foreign state, without its having subjected itself to the jurisdiction of German courts for the issue involved. It was not permissible to make the

438; Prussian Kammergericht, February 19, 1919, Rechtsprechung der Oberlandesgerichte, XXXVIII (1919), 227; Reichsgericht, December 10, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), 277; Zeitschrift für Internationales Privat- und Strafrecht, III (1893), pp. 117 *et seq.*, 275 *et seq.*; Wilmowski and Levy, Civilprozessordnung mit Kommentar in Anmerkungen (1895), I, note 7 before § 12.

[6] Halig *v.* den Polnischen Staat, Prussian Court of Conflicts, March 10, 1928, Zeitschrift für Völkerrecht, XV (1930), p. 271; Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, II (1931), II, p. 101.

[7] This official succeeded to the Minister of Foreign Affairs as to this function. See Verordnung betreffend die Kompetenzkonflikte zwischen den Gerichten und den Verwaltungsbehorden, August 1, 1879, § 5, par. 1, in conjunction with the Beschlussfassung des preussischen Staatsministeriums of April 19, 1919.

property of a foreign state the subject of a claim, sequestration or seizure on execution against its will. The subject of the suit was the international-law issue of the exercise of sovereignty, for the evaluation of which civil litigation was not admissible. Its admissibility could not be deduced from the lease entered into between the parties, for the conclusion of the lease did not in itself amount to submission of the Polish state to the local jurisdiction. The claimant responded by saying that a foreign state subjected itself to German jurisdiction by signing a lease in Germany, and that in the instant case the Polish state had become a party to the lease entered into by the claimant and the above-mentioned German corporation.

The court pointed out that according to international law, a foreign state was immune from suit, unless it consented, except when it was proceeded against in an action relating to immovable property. It further admitted that this request for an injunction against disturbance in possession constituted a real action in respect to immovable property for which the *forum rei sitæ* was competent in accordance with § 24 of the Code of Civil Procedure. But it questioned whether this situation coincided with that envisaged by the above-mentioned principle of international law. Did not the latter refer to the situation where immovable property of a foreign state, situated within the country, was involved, and where the foreign state was proceeded against as owner of the property? In any event, the determination of this query was beside the point, for the admitted international-law exception could have no application to the case at bar, because the claim was aimed at the removal of a shield bearing the coat of arms of the Polish state, its insignia of sovereignty. The display of its coat of arms by a foreign state was an act of sovereignty, and for such an act, a foreign state could never be subjected to the jurisdiction of local courts. The independence and equality of sovereign states, recognized in international intercourse, did not admit of subjection to the jurisdiction of another state in respect to acts of sovereignty. For the same reason, the action was inadmissible in so far as the complaint was based on damage to property, for the damage complained of was marring the plaster over the entrance by the erection of the coat of

arms. Even aside from this, the suit would be inadmissible on this count of the complaint. For here there was surely no basis for exception from immunity on the international-law ground of a real action against immovable property, nor was there any voluntary submission of the Polish state. In vain the claimant insisted that there was such submission to be deduced from the existence of a lease between her and the Polish state, which contained stipulations regarding the signs. The court held that even had such a lease been concluded, it would not evidence willingness on the part of the Polish state to submit to the jurisdiction of German courts for the enforcement of claims of the lessor under the lease, nor constitute an obligation to be bound by such decisions. As no other evidence of voluntary submission to the jurisdiction of German courts was adduced by the claimant, the court dismissed the suit for want of jurisdiction.

**Voluntary Submission**

Another exception to the general immunity from domestic jurisdiction commonly admitted is the situation arising from the voluntary submission of a foreign state. Here there can be no question of any infringement of sovereign prerogative, since the foreign state acts of its own volition and does not have any jurisdiction imposed upon it from without. Although strictly such voluntary submission to the jurisdiction cannot take place until the jurisdiction is invoked, the expression of an intention to submit may be made in general terms to cover future contingencies, by announcement or by treaty,[8] or it may be made for a specific case with the parties to the litigation.[9] A general appearance in a pending suit without objection to the jurisdiction is equivalent to such submission.[10]

[8] *Cf.* the statement of the United States in regard to submission to the jurisdiction of foreign courts in suits *in rem* against Shipping Board vessels, *infra*, p. 96; the Russo-German treaty of May 6, 1921, by which the Russian Government agreed to submit to the jurisdiction of German courts in certain matters concerning the Russian nationalized merchant fleet (Reichsgesetzblatt, 1921, 929); the Austro-Bavarian treaty of March 18, 1829, by which Austrian courts were given competence for claims of Austrian subjects against the Bavarian state regarding the Bavarian forests in Salzburg, Martens Nouv. Rec. IX [1827-31], p. 124.

[9] *Cf.* the agreement made by the Portuguese Government with Cadbury Bros. in the *Coimbra, infra*, p. 97; also Reichsgericht, January 26, 1926, Juristische Wochenschrift, LV (1926), I, p. 804.

[10] Loening, Gerichtsbarkeit, p. 128.

**Interpretation of Submission**

The courts interpret such submission strictly in favor of the foreign state. Thus in a contract of May 1, 1918, entered into by the Turkish Government with a German citizen for the supply of ice machines for a hospital, it was provided that the Amtsgericht in Berlin should be competent for all claims arising from this contract. In a decision of February 19, 1919, the Kammergericht in Berlin decided that the submission therein expressed did not extend to seizure, although this was demanded merely to secure fulfillment of the judgment.[11]

A decision of the Prussian Court of Conflicts of November 13, 1920, was to the same effect.[12] An attempt was made to attach certain accounts of the Turkish government in Berlin banks to secure the payment of a claim alleged to be due on a transaction entered into between the claimant and the Turkish government during the war, for the supply of military uniforms. The court held that even were the allegation of the plaintiff true that the Government had expressly agreed that a certain court in Berlin should be competent for litigation arising from the transaction, Prussian courts would not thereby acquire the right to attach its property or to employ other measures of compulsion.

On the other hand, the court found an express submission to the use of such measures in the fact that the Turkish purchasing agents in Berlin, to dispel any doubt as to their principal's capacity or willingness to pay, had deposited large sums in local banks which they told the dealers were specifically set aside for their security.[13]

**Foreign State as Plaintiff**

Voluntary submission to foreign jurisdiction is usually seen in the fact that a foreign state comes into a domestic tribunal as plaintiff in a suit. It has not unreasonably been remarked, however, that in such a case there is properly no question of any *submission,* the foreign state is rather *making use* of the local courts to further its own interests.[14]

**Counterclaims**

This question assumes importance in connection with the admissability of counterclaims against a plaintiff state. For

[11] Rechtsprechung der Oberlandesgerichte, XXXVIII (1919), 225; Niemeyers Zeitschrift für Internationales Recht, XXX (1923), 269.

[12] Juristische Wochenschrift, L (1921), II, p. 1478.

[13] See also X. *v.* den Türkischen Militärfiskus, Prussian Court of Conflicts, May 29, 1920, Juristische Wochenschrift, L (1921), II, p. 773.

[14] Kohler, Zeitschrift für Völkerrecht, IV (1910), 320 and 323.

those who hold that commencing a suit involves no voluntary submission to the court, there can be no competence to hear counterclaims, since jurisdiction can only be acquired by a renunciation of the protective immunity. It is pointed out that such a situation is by no means anomalous, since it is entirely possible even in civil law that a court may be competent to hear a claim, but be incompetent to take cognizance of a counterclam. This may happen for instance, if the latter is of a class concerning which exclusive jurisdiction has been given to a court other than the one in which the original suit is brought. If, therefore, a counterclaim may be thrown out because the wrong court is invoked, it must inevitably fail if the judiciary lacks competence entirely.[15]

It is possible, however, to interpret the fact that a foreign state brings suit in domestic courts, as a renunciation of immunity and a subjection to the jurisdiction of those courts. If this be granted, the question of the admissibility of counterclaims at once arises. Loening assumes that the state has voluntarily submitted itself to the jurisdiction of the foreign court, but that it is to be held to have done so only to the extent indicated, which naturally does not include any claims which may be made against it. So-called counterclaims are to him independent actions, and not simply an added means of defense placed at the disposal of the defendant. Proof of this is the fact that in counterclaims an effort is made, not to dispose of the claim of the plaintiff, but to make good a different claim against him.[16]

Neither of these two doctrines which disallow counterclaims is meant to exclude the defendant from any legitimate measure of defense, or to preclude the judgment of costs against an unsuccessful plaintiff state,[17] nor does it contemplate the separation of two parts of a transaction to the detriment of the defendant, such as would be involved in an examination of the fulfillment of an obligation to deliver goods without an investigation of the corresponding duty of payment.[18] On the

[15] Kohler, Zeitschrift für Völkerrecht, IV (1910), 320-324.

[16] Loening, Gerichtsbarkeit, pp. 124, 128-130.

[17] Kohler, Zeitschrift für Völkerrecht, IV (1910), 322; Leoning, Gerichtsbarkeit, pp. 125, 128, 129.

[18] Kohler, Zeitschrift für Völkerrecht, IV (1910), 321, 324.

other hand, they both denounce the point of view which permits a private claimant to take advantage of the voluntary presence of a foreign state before the courts of his country to prefer a claim which he would not otherwise be able to bring there.

From another point of view, however, if the use of a court by a foreign state amounts to a subjection to its jurisdiction, a submission to counterclaims is implied,[19] but the question of what constitutes a counterclaim has proved a difficulty. What relation must it have to the original claim in order to be admissible?

**Hellfeld Case 1910**

This point was involved in a famous case, known as the Hellfeld affair. The trial of this case by various imperial courts and the attempted execution of the judgment by a Prussian court[20] caused a great stir, and resulted in extensive comment.[21]

During the Russo-Japanese war, in 1905, negotiations were entered into by the Russian Government with a German named Hellfeld for the delivery of certain guns by vessel to Port Arthur. In the meantime, Port Arthur fell, and the vessel proceeded to Tsingtau. Here certain difficulties having arisen about the delivery of the vessel and cargo, the Russian Government brought about the arrest of the vessel. In a suit in the imperial German court of Kiaochow in Tsingtau, claim for possession and ownership of the vessel and cargo was made. Thereupon, Hellfeld raised a counterclaim amounting to several million marks, based upon a contract for the supply of arms dating from the beginning of the year 1904.

This counterclaim was dismissed on November 22, 1906,

[19] *Cf.* Portugiesischer Staat *v.* Deutsches Reich, Reichsgericht, October 13, 1925, Entscheidungen des Reichsgerichts in Zivilsachen, CXI (1926), p. 375, where it was held that a claim might be preferred by way of counterclaim even though not based on a private-law contract, and though it was recognized that a foreign state would not otherwise be subject to the jurisdiction of German courts even for its private acts. Distinguish Französische Republik *v.* X., Prussian Court of Conflicts, March 10, 1928, Juristische Wochenschrift, LIX (1930), I, p. 213, which held that no counterclaim could be based upon a point admitted by both parties.

[20] Deutsche Juristen-Zeitung, XV (1910), col. 808; Zeitschrift für Internationales Recht, XX (1910), 416; American Journal of International Law, V (1911), 490.

[21] Zeitschrift für Völkerrecht, IV (1910), 309-488.

for lack of jurisdiction in a case brought against a foreign government. On April 9, 1907, in an interlocutory decision, the German Consular Court at Shanghai reversed this opinion, and despite the formal objection of the Russian Government held that German courts were competent to hear this claim, on the ground that the Russian Government had submitted this entire transaction to the German courts by itself bringing suit in the matter. It remanded the claim for reconsideration and decision to the Kiaochow court.

After hearing the case on its merits the court of first instance rendered a decision on October 28, 1907, against the defendant in his counterclaim. This was based on certain irregularities in the matter of evidence.

From this decision appeal was taken to the Superior Court of Kiaochow, which, on July 7, 1909, annulled a certain decree regarding the admissibility of evidence, and reversed the foregoing decision. The matter was then returned to the court of first instance.

Before the resumption of the process, the Russian Government renewed its protest against the jurisdiction of a German court in the matter of the counterclaim, declaring that the Russian Government would consider any such decision in this matter as null and void. Notwithstanding this, on September 27, 1909, the court rendered a decision on the counterclaim against the Russian Government, and Hellfeld was later provided with a certificate empowering him to proceed to the execution of the judgment.

In consequence of this, Hellfeld got from the Amtsgericht in Berlin, on December 15, 1909, a decree of attachment against funds of the Russian Government in a banking house in Berlin. Thereupon, on the complaint of the Russian Government, the Prussian Minister of Foreign Affairs raised the issue of a conflict of competence. On December 29, 1909, he set forth in an official statement the following:

The court at Tsingtau had jurisdiction only if and so far as Russia had voluntarily submitted. In bringing a claim before domestic courts, a foreign government did not subject itself to any counterclaim that might be allowed by municipal law, but only to such as were purely in the nature of a defense against the original claim. When, on the contrary, independ-

ent claims of the defendant against the plaintiff were involved, they were to be dealt with in the same way as though they were the object of a separate process.

As regards the execution of this judgment in Berlin, the Minister pointed out that, granting that the decision of the Tsingtau court was binding so far as the Berlin court was concerned, the latter was itself violating the principle of international law which forbade the judicial attachment of property of a foreign state within the national domain. Even in cases where claims against a foreign state were established by a judicial decision rendered under circumstances which admitted of such cognizance in international law, the creditor could not resort to a Prussian court for execution of the judgment in his favor. He could only apply to the Minister of Foreign Affairs, whose business it was to take up such claims against a foreign state.

In its decision of June 25, 1910,[22] the Prussian Court of Conflicts found it unnecessary to decide whether or not the Russian Government intended to submit to a counterclaim when it brought its suit against Hellfeld, and whether or not its subsequent conduct amounted to such a submission. Such submission, were it established, would not be tantamount to an expression of willingness to permit the execution of the decision, since this involved a far greater renunciation of sovereign prerogative. Nor was there, according to German law, any inseparable connection between a judgment and the execution thereof, such that the latter must follow upon the rendering of the former.

The court thus adopted the point of view of the Minister of Foreign Affairs that the execution of a judgment against a foreign state would still be illegal even if the decision itself were legal.[23] As there was no evidence of an express submission to the execution of the decision in the counter-claim, as on the contrary the Russian government had expressly protested against it, the order of attachment of the Amtsgericht was vacated.

The Russian government requested an opinion of the inter-

[22] Zeitschrift für Internationales Recht, XX (1910), 430; Deutsche Juristen-Zeitung, XV (1910), col. 808; American Journal of International Law, V (1911), 490.

[23] *Contra,* Loening, Gerichtsbarkeit, pp. 92, *et seq.*

national-law questions involved from several German jurists.[24] The opinions present a very thorough discussion of the general principle of immunity, and of the exceptions to this principle ordinarily recognized. The specific question of the admissibility of counterclaims among these exceptions is dealt with exhaustively and the conclusion seems to be that the counterclaim, to be admitted, must bear a very close relation to the claim itself. As regards the seizure of property of a foreign state, any such proceeding is contrary to international law unless the foreign state has expressly assented not only to the jurisdiction of the court to hear the suit, but to the seizure as well.

**Attempted Extension of Exceptions**

The general principle of immunity being so firmly established, the efforts of persons with a claim against a foreign state have been directed in recent years to attempts to have further exceptions admitted. The higher courts, however, have held to the exceptions outlined above, and have not recognized special pleas whether of a nature applicable solely to the case under consideration, or of a more general character tending to exempt whole categories of cases from their time-honored immunity.

**Dresden 1915**

An interesting case involving an attempt of the former variety was decided by the Superior Court in Dresden, April 26, 1915.[25] Here, too, the Russian Government was concerned, and war furnished the background, but the problem was very different from the Hellfeld case. In the summer of 1914, there was held at Leipzig an international exposition. As the result of some work executed for the Russian Government in connection with its exhibit at this fair, the plaintiff in the present case brought a claim of some 11,400 marks against the Russian Government. The Landgericht at Leipzig held that German courts were not open to a plaintiff pursuing private claims against the Russian Government.

[24] See Gutachten of Meili, Laband, Zorn, Hatschek, Fischer, Fleischmann, v. Stengel, Brie, Triepel, Kohler, v. Seuffert, Bornhak, Freund, and Weiss in Dynovsky, Unzulässigkeit einer Zwangsvollstreckung gegen ausländische Staaten; of Kohler, Laband, Meili and v. Seuffert in Zeitschrift für Völkerrecht, IV (1910), 309-448; of Brie, Fischer and Fleischmann in Abhandlungen aus dem Staats- und Verwaltungsrecht, Heft 23: Zwangsvollstreckung gegen fremde Staaten und Kompetenzkonflikt, im Anschluss an den Fall Hellfeld.

[25] Rechtsprechung der Oberlandesgerichte, XXXI (1915), 175.

**Effect of War on Immunity**

The question as it appeared before the Superior Court in Dresden was whether the state of war then existing between Germany and Russia affected the Russian government's right to immunity. Did the existence of war, and certain alleged illegal acts of Russia in connection with the war relieve German courts from the observance of this general international-law principle? The German claimant contended that no rule of international law was binding on a state against whose interests a foreign state had violated rules of that law. The court held, however, that although it might be true that the outbreak of war suspended or otherwise limited the application of treaties not containing provisions to the contrary, such was not the case with general principles, like sovereignty, which rested on bases so axiomatic and so unaffected by war that they needed no substantiation by treaty to have binding force. The origin and the connotations of the legal principle of independence proved that the outbreak of war could not *ipso facto* abolish it. Nor did illegal acts of the enemy, such as were common knowledge in the present instance, absolve one from duties arising from international law. Even if the law were violated, it was not thereby annulled. The decision of the Leipzig court was therefore affirmed.

**Effect of Treaty of Versailles**

A peculiar turn was given the problem by the coming into force of the Treaty of Versailles, January 10, 1920, whereby former portions of Germany became foreign states as regarded the Reich.[26] In Germany, claims may be preferred by private citizens against the state. On March 7, 1920, the Prussian Minister of Interior issued a decree relative to such litigation pending in the courts of districts which had become non-German.[27] It was to the following effect: It is a principle of international law, which was considered binding up to the outbreak of the War, that no state can be forced into the courts of a foreign country, except in regard to immovable property, or when the state itself brings a suit and so submits to the jurisdiction of foreign courts. This principle has been recognized by German courts. Subject to these exceptions,

[26] See two decisions of the Prussian Court of Conflicts relative to Poland of December 4, 1920, and March 12, 1921, respectively, Juristische Wochenschrift, L (1921), II, pp. 1485, 1481.

[27] Juristische Wochenschrift, XLIX (1920), 1011.

litigation against the German Government, now pending in courts which have become non-German, therefore, cannot proceed. Government agents are instructed to bring this newly acquired incompetence to the attention of the courts in question. Although according to the German laws governing judicial procedure, still in force in these districts, the courts themselves should declare their incompetence, based upon international law, yet it is better not to rely upon their so doing. Hence agents are instructed at least to submit a memorandum on the subject.

In the case of an action by a German company against the German Government originally brought in Danzig, and appealed to the proper court in Prussia before Danzig ceased to be a part of Prussia, the Imperial Court held that the court of second instance was competent to decide the appeal despite the intervening detachment of Danzig from the Reich. It was observed that to send the case to the court of appeal for Danzig—a foreign court—would be impossible as contrary to international law.[88]

**Acts jure gestionis**

In addition to special exemptions contended for under special circumstances, a well-organized and growing sentiment in Germany, as well as elsewhere, has favored the exemption of certain classes of litigation, which have become increasingly numerous in recent years. These are claims against a foreign state which arise in connection with a specific act or a general enterprise, undertaken by the state not in its exclusively sovereign capacity. Such acts are variously characterized as private acts, acts involving a relationship in private rather than public law, or acts which might have been done by a private individual. The essence of the attempted distinction seems clear, but definitions are unsatisfactory. It is difficult to conceive of a state as appearing in anything but its sovereign capacity. Even if it engages in business—acquires a monopoly, for instance—it does so with a public purpose. A contract of purchase may be a relationship of private law, but if a state contracts for the construction of a war vessel, or the purchase of arms, is it not acting in its public capacity?

[88] Decision July 1, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CII (1921), 304-305.

However difficult the definitions or confused the distinction, it is a fact that the last fifty years have seen states entering into fields of endeavor not necessarily or traditionally connected with statecraft. Among these, the most important in its international effects has been the ownership of means of communication and transit. State railways and government-owned merchant fleets have assumed increasing importance in international relations.

There is a strong sentiment among writers, that there is no sound reason for withdrawing from the ordinary jurisdiction of the courts the vast numbers of claims which arise in connection with such enterprises.[39] Not only is an injustice done the claimants in such cases, but a mass of claims is diverted to diplomatic channels although they do not properly belong there.

However insistent the writers may be concerning the injustice, unreasonableness, and inexpediency of the exemption of this class of cases from the competence of the courts, German tribunals have refused to recognize any distinctions. When a foreign state or its property has been involved, the courts have refused their assistance to the claimant, whether the plea was based on a "public" or "private" act of the state.

**Reichsgericht 1905**

Perhaps the most famous case decided in this connection was that involving the Belgian State Railroad in which a decision was rendered December 12, 1905, by the Imperial Court.[40] In March, 1902, the Belgian company had contracted with a merchant in Antwerp for the delivery of some railroad ties. Difficulties arose in regard to the execution of this contract, and the plaintiff, a German subject, who had succeeded to the rights of the Belgian merchant, brought suit in the Amtsgericht in Aix to rescind the contract in so far as it remained executory, and to obtain payment for the ties already delivered. The defendant denied the jurisdiction of the German courts. This contention was sustained by the court of first instance, and also by the Superior Court in Cologne, both

[39] See Kohler, Zeitschrift für Völkerrecht, II (1908), 33.

[40] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 165; Journal des Tribunaux (Belges), 1906, 855.

of which dismissed the suit for lack of jurisdiction. The decision was affirmed on appeal by the Imperial Court.

After agreeing with the court below that the question of immunity was regulated not by German law, but by international law, the court reviewed the whole doctrine. It pointed out that there was general agreement in the literature on the subject that when acts of a foreign state were in question, the courts had no jurisdiction if the acts were undertaken in the exercise of sovereignty. No such agreement prevailed, however, when the state had acted only as a juridical person in the domain of private law.

On the other hand, the higher courts not only in Germany, but in the United States, England, Austria and France had almost without exception held that even in private-law matters, foreign states were immune from the jurisdiction of domestic courts. This resulted from the mutual independence and equality of sovereign states upon which international law was based. In affirming these decisions, the Reichsgericht remarked that if the foreign state could be compelled, even in private matters, to take justice from domestic courts, it would be subjected to the political authority of the national state, and would suffer the loss of its international independence.

The Court, while maintaining its lack of jurisdiction over a foreign state even in quasi-private relationships, made reference to the two usual exceptions to the immunity. In the case in hand, neither of them was applicable. Not only was there no reason to suppose tacit consent on the part of Belgium, since the whole business was located in Belgium, but the latter had immediately protested the jurisdiction. Nor did the court let itself be influenced by the fact that in recent years, Belgian courts had considered themselves competent in cases involving private acts of foreign states.[81]

Thus was the question settled as regarded foreign state-owned railways.

[81] Mention was made of the Limburg Railway case, decided June 11, 1903, Pasicrisie Belge, 1903-1-294; Weekblad van het Recht (1903), 7983, p. 3:2.

## CHAPTER III

### THE APPLICATION OF IMMUNITY TO GOVERNMENT-OWNED VESSELS

At the close of the World War, vast fleets of government-owned or operated vessels began to sail the seas on purely commercial ventures. With their appearance in this guise, all the arguments against immunity for governments or their agencies in carrying on non-political enterprises were renewed and redoubled. The large proportion of shipping claims which would be withdrawn from judicial settlement, the overwhelmingly private character of most claims against such vessels, etc., were pointed out by the advocates of jurisdiction. The courts, however, remained unmoved.

**Status of War Vessels**

Before going into the juridical status of government-owned merchant vessels, it may be well to call attention to the fact that the general principle of immunity from jurisdiction and arrest has always been applied to war vessels.[1] In such vessels is seen exemplified the sovereignty of the state whose flag they fly. Circumstances tending to mitigate this representative character of war vessels have not sufficed to prevent the courts from disclaiming competence. A single illustration will suffice.

**Landgericht Kiel 1901**

On July 18, 1901, the Landgericht at Kiel issued a decree authorizing levy of execution on property of the Turkish Government based on a judgment rendered on a contract of employment by a commercial court in Constantinople. It happened that two vessels of the Turkish Government, the *Ismir* and *L'Assari Tewfik,* were at a shipyard in Kiel harbor, The former was a transport, the latter a war vessel. *L'Assari Tewfik* was entirely dismantled, however, and its machinery had been removed for repairs. An attempt of the judgment creditor to seize this machinery under the above decree was

[1] For the classification of other public vessels and the assimilation of most of them to war vessels as regards immunities of various kinds, see Feine, Die Völkerrechtliche Stellung der Staatschiffe, Berlin, 1922.

frustrated by the court itself. It held that *L'Assari Tewfik*, being a Turkish war vessel, was to be regarded during her stay in German waters as a portion of the Turkish state, and hence not subject to German jurisdiction. That which was true of the vessel was true of its parts, which were only temporarily out of the ship without being permanently withdrawn from their purpose. The Superior Court at Kiel on August 15, 1901, dismissed an appeal against this judgment. While basing its decision upon the ground that the property of a foreign state was not liable to seizure in Germany, it expressly stated that the release of the property was completely justified on the reasoning of the lower court.[2]

The status of government-owned merchant vessels seems not to have been adjudicated in Germany prior to the World War. Indeed, comparatively few such vessels were known. As a result of the war, however, many states had acquired merchant ships by confiscation or condemnation of enemy vessels, or by allocation from the Reparation Commission. In many instances these were quickly disposed of to private owners, but certain states continued to operate merchant lines. Among these were the United States, Portugal and Brazil. When such vessels became involved in litigation, the question was not whether they represented the sovereignty of the state, but whether they were entitled to the privileged treatment of other state property.

**The "Schenectady" 1920**

One of the earlier cases involving this class of vessels was the *Schenectady*.[3] This was a vessel operated by the Strachan Line of Savannah. The plaintiff on December 24, 1919, got a decree of attachment from the Landgericht in Bremen against the Strachan Line as represented by the captain of this steamer. He claimed the value of a hundred bales of cotton which should have been delivered to him as owner, but which the vessel failed to bring.

Under this decree, the vessel was seized. The captain objected that the vessel belonged to the United States of America, and hence was not subject to seizure. Bond having

[2] Zeitschrift für Internationales Privat- und Oeffentliches Recht, XIII (1903), 397.

[3] Hanseatische Gerichtszeitung (1921), com, pt., p. 76.

been given by a local bank, the plaintiffs released the vessel. Subsequently the court ordered that the writ of attachment be vacated as the vessel was not liable to seizure, being "ready to sail." The plaintiffs, interpreting this decree as tantamount to a denial of the legality of the writ of attachment when issued (which might render them liable in damages), appealed to have the writ declared legal from the beginning. This appeal failed. The Strachan Line, however, made no further attempt to have the United States made defendant to the action, and the Superior Court denied that it could do so even should it appear that the United States was the real owner of the vessel. The consequences to the plaintiffs of a writ of attachment against the United States and against the Strachan Line were very different. They no doubt wittingly brought the action against the latter, and the substitution of the United States would be very detrimental to them. According to the judgment of the Reichsgericht of December 12, 1905,[4] foreign states could not be sued in a German court even if they were engaging in commerce or shipping, and it was at least doubtful whether this international-law principle was without application to the case in hand merely because peace had not yet been concluded with the United States.[5]

**The "Ice King" 1921**

The first case in which the issue of the immunity of a government-owned merchant vessel was fairly presented was that of the *Ice King,* a United States Shipping Board vessel against which claims arose in connection with a collision which took place between it and the *Jonas Sell* in Dutch waters in the latter part of August, 1919.

**Landgericht**

The plaintiff brought suit in the Landgericht in Bremen, against the United States Shipping Board as the representative of the owner, the United States. The defendant objected to the jurisdiction of the court on the ground that, as the United States of America was the real defendant, German courts were not competent. The Court dismissed the objection.

[4] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 165.

[5] See decision of Hamburg Oberlandesgericht, February 28, 1921, *infra,* p. 29.

Oberlandesgericht

The Oberlandesgericht at Hamburg in a decision of February 28, 1921,[6] reversed the decision of the lower court and dismissed the claim. Contention was made on the one hand that the United States was the real owner, and, on the other, that the United States had renounced any claim of immunity for such vessels by § 9 of the Shipping Act of 1916 [7] which provided that such vessels while employed solely as merchant vessels should be subject to all laws, regulations and liabilities governing merchant vessels. The court held that this act referred only to the application of American laws to Shipping Board vessels, and that no conclusion could be drawn from it regarding any intended renunciation of immunity abroad. Failing such a voluntary submission, it was established that German courts were not competent even in regard to questions of private law.

In declaring itself incompetent to entertain the suit, the court recognized the justice of the plaintiff's contention that there should be a difference in the treatment accorded vessels of state, used for public service, and those engaged in purely commercial enterprises. But however desirable such a distinction might be, it was not through the courts that its realization should be attempted.

Reichsgericht

The case was decided on appeal by the Imperial Court on December 10, 1921.[8] It affirmed the decision of the Oberlandesgericht. The United States of America was recognized as being the real defendant, represented by the United States Shipping Board. The decision of the Superior Court was admitted to be in conformity with the decision of the Imperial Court of December 12, 1905,[9] to the effect that a foreign state could not as a rule be brought before domestic courts even in matters involving purely private law.

That decision reflected the international law on the subject at that time. The problem therefore resolved itself into one of discovering whether anything had occurred since 1905, in connection with the World War, for instance, to alter the situ-

[6] Hanseatische Gerichtszeitung (1921), com. pt., p. 85; Revue Internationale du Droit Maritime, XXXIII (1922[1]), 868.

[7] 39 Stats. L. 728.

[8] Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), 274.

[9] *Ibid.*, LXIII (1906), 165; *supra*.

ation. The answer was no. The plaintiff contended that when a foreign state established an extensive business in the country, it thereby subjected itself to the domestic courts, at least as concerned this commercial or industrial undertaking and the movable property involved therein. This theory, sometimes maintained by text writers, more rarely in judicial decisions, had not been generally recognized in practice. If the authorities never conceded to merchant vessels extraterritoriality, that was because they were writing at a time when the exclusive use of a "public ship"—*i.e.* one the property of a sovereign state—for private purposes, especially for trading, was almost unknown. Hence, it was not permissible to draw the conclusion from these authorities that immunity was to be granted only to those foreign vessels used in whole or in part for public services. The question of restricting this immunity had been receiving more and more consideration, but it had not yet reached the point where the underlying principle of international law had been changed.

This principle still being that fundamentally, even in private relations, a foreign state was free from the jurisdiction of domestic courts, it only remained to see whether any special circumstance existed to make an exception of this case. As already observed, claims *in rem* for real estate might be brought in domestic courts even against a foreign state. It had been asserted by text writers that by analogy local courts were competent for the claims of a ship's creditor against a foreign state-owned vessel in national waters.

The court emphasized, however, that there was a great difference in the two situations. The soil, and objects inseparably connected therewith, formed an indivisible part of the national domain, against which only the local state was competent to execute a decision. Hence in German law this doctrine took precedence even over that of extraterritoriality as applied to ambassadors, etc. The foreign state acquiring real property in Germany reckoned with this situation of law and fact from the beginning. On the other hand, at least according to German law, neither taking jurisdiction over the claim of a ship's creditor nor executing a judgment in his favor, depended upon the presence of the vessel. Nor did such

a suit need to be merely *in rem;* in most cases the captain was personally liable as well. That is to say, if the plaintiff secured a favorable judgment, he might execute it not only on the vessel involved in the collision which was the subject of the present case, but on any other commercial vessel of the defendant, and that not only in Germany, but, under certain circumstances, outside of Germany as well. From the above, it was apparent that there was a sharp distinction between this sort of claim and that involving real property, which required a differentiation in their treatment as regarded the question of jurisdiction.

It only remained to consider, therefore, whether an exception could be deduced from the fact that the United States had voluntarily subjected itself to the jurisdiction of domestic courts. Despite its character as a sovereign state, the United States had acquired a large number of merchant vessels with which it engaged in international trade. In connection with this shipping business, it made use of special agents who maintained branches, among other places in Germany. Other states, notably Soviet Russia, had followed this example. Thus a new situation had arisen, new in that previously such undertakings were known to international trade only to a very modest degree.

Countless voices had been raised among jurists, merchants, and other interested parties, claiming that the state in carrying on a business of so considerable an extent and of a permanent nature in every way similar to a private enterprise had so far renounced its sovereign rights and placed itself on a parity with a private concern. It had, however, been shown that in general the establishment and maintenance in the country of a business agency by a foreign state was not tantamount to renunciation of sovereign immunity either in respect to controversies arising from this business, or in regard to its movable property. In particular was this true of means of transportation exploited by a foreign state within the country—motor bus lines, railways, and inland steamship lines.

It was not evident why there should be such a difference between undertakings of this sort and those of an ocean-going shipping company that participation in the latter should

be held to be a renunciation of extraterritoriality. Moreover, in the present case, the United States had expressly stated that it did not intend to renounce its sovereign privilege by its participation in international trade. The Suits in Admiralty Act of March 9, 1920, although enacted after the time of the collision giving rise to this case, even after the beginning of the process, was passed in view of the general enterprise here engaged in.[10] In § 7, the proper authorities were expressly directed to claim immunity from local jurisdiction in cases like the present. It was only after this provision for claiming exemption that further procedure before the local court—giving bond, etc.—was dealt with, in which connection it was expressly stated that "nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel . . . from foreign jurisdiction in a proper case."

**Suits in Admiralty Act 1920**

The provision of § 9 of the United States Shipping Act of September 7, 1916, to the effect that "such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels . . ." did not alter the above conclusion. It did not touch the question of extraterritoriality in its application to these vessels.

From all the above it resulted that the principle of international law by which immunity was accorded a foreign state was applicable to the present case. The objection that this constituted patent injustice to legitimate domestic shipping and commercial interests, and was not consonant with the requirements of sound international trade was not true—at least to the extent to which it was maintained. For the state which claimed the privilege of extraterritoriality for its merchant vessels must be prepared to have these vessels experience not only the advantages, but the disadvantages, which might be connected with such immunity. Thus the limitations customarily applied to warships and other vessels employed in strictly public service regarding entrance, length of stay, and traffic in a domestic port might be applied to them. Furthermore, since no state was bound to permit another state to

[10] 41 United States Statutes at Large, 525.

carry on a business upon its territory, it might be prescribed by legislation that the defendant or the United States be expressly subject to the jurisdiction of the local courts in all litigation arising in connection with business in the country. Finally the shipping business, due to its inherent elasticity, could without much difficulty overcome the economic disadvantages of this immunity which threatened national interests. This would probably result in furthering the efforts being made to adapt international law to the needs of international trade by the abolition of immunity for purely commercial vessels.

**Comment on "Ice King"**

This case aroused a great deal of comment. Dr. Gothard Brandis attacked the decision of the Superior Court with great earnestness.[11] He pointed out that if the German courts did not assume jurisdiction in such cases, the interested parties were left without any resource in claiming their rights. There was a theoretical possibility of bringing suit in the United States, but practically this was impossible, due to the enormous expense involved. Not only was the decision inequitable, but it was also wrong from the legal point of view. In § 9 of the Shipping Act of 1916 was to be found an express renunciation of any privilege so far as these vessels were concerned. An attempt was made to draw an analogy from the Brussels Convention of September 23, 1910, relative to assistance at sea, which exempted from the application of its terms, vessels of war and vessels of state used exclusively in public service, thus implying a fundamental distinction between such vessels and all others. Finally, Dr. Brandis adverted to the point that the court relied upon a principle drawn from international "comity". This he said was laughable, in view of the still existing state of war between the United States and Germany, which precluded any idea of "comity".

To this criticism, Dr. Stammann replied.[12] Neither the Shipping Act nor the Brussels Convention could be invoked against the principle relied upon by the court. The Shipping Act was

[11] Hanseatische Gerichtszeitung (1921), com. pt., p. 87; Revue Internationale du Droit Maritime, XXXIII (1922[1]), 871.

[12] *Ibid.*, 872.

merely an American law which made the United States as a shipowner liable as a private shipowner, but did not say how this liability was to be established in a given case. It was the Suits in Admiralty Act of 1920 that gave these details, and, in addition, expressly stated that the United States in no wise renounced its right to claim immunity before foreign courts. It was impossible to construe the United States legislation as intending to renounce the privilege referred to. As for the Brussels Convention, because it limited the application of the rules therein laid down in regard to salvage and collision, it did not imply a renunciation of immunity from the jurisdiction of domestic courts in cases involving collision. States could not be interpreted as renouncing tacitly an immunity derived from their sovereignty.

Dr. Stammann, commenting on the alleged unfairness of the decision, said that if the Imperial Court came to the conclusion, on grounds of law and justice, that there was reason no longer to follow the judgment rendered by it December 12, 1905,[13] that decision would have to be respected, but let there not be invoked decisions based upon opportunism, or upon regard for the momentary interests of a small circle of persons.[14]

**The "West Chatala" 1921**

Before the case of the *Ice King* could be heard on appeal, another case involving a Shipping Board vessel came before the Oberlandesgericht at Hamburg. This was the *West Chatala,* decided April 20, 1921.[15] A grain-importing company of Berlin, alleging a claim for damages against the American Line as owners of the steamer *West Chatala,* secured an order of attachment from the Bremen court on February 22, 1921, and seized the steamer.

**Oberlandesgericht**

The United States, represented by the United States Shipping Board, intervened before the Superior Court at Hamburg, claiming that the vessel in question was not owned by the American Line, but by the United States of America, and could not be seized for an alleged claim against the former.

[13] See *supra,* p. 24.

[14] For a counter reply by Dr. Brandis, see Hanseatische Gerichtszeitung (1921), com. pt., p. 110.

[15] Hanseatische Gerichtszeitung (1921), com. pt., p. 137; Revue Internationale du Droit Maritime, XXXIV (1922[2]), 233.

Furthermore, as property of the United States, it was immune from the jurisdiction of German courts.

The court, while admitting the general principle of the immunity of foreign states from domestic jurisdiction, maintained that in this case that principle was not prejudiced by the attachment of the vessel. In the first place, the seizure was not directed against the United States, but against the American Line as temporary owner in the sense of the German Commercial Code.[16] A further justification for the competence of German courts in the matter was derived from the voluntary submission of the United States. The latter had undertaken an industrial enterprise, consisting in sending grain to Germany, not in its own name, but in that of its agents in Germany, known at its Hamburg branch as the American Line. A state so doing subjected itself *ipso facto* to the jurisdiction of the courts of the country where it exercised its industry. Hence, in the present case, the United States rendered itself answerable before the courts for actions instituted against the vessel by the recipients of the cargo.

Furthermore, an express submission to the jurisdiction of German courts was to be found in § 9 of the Shipping Act of 1916. The tribunal did not agree with the interpretation given this act by another chamber of the same court in the *Ice King*, according to which this enactment had only domestic significance. Nor was it possible to see in the Suits in Admiralty Act a rejection of this submission. For the very provision for furnishing security implied submission to the jurisdiction of the court to determine its amount.

Hence, the judge of first instance was concurred with in holding that the vessel was subject to the jurisdiction of domestic courts in regard to its liability for debts. There remained then to be seen whether the claim was well founded from the point of view of domestic law. The court referred to the provision of the Commercial Code,[17] according to which he who employed a vessel of which he was not the owner in a shipping business for his own account, was to be regarded as

[16] Article 510. [17] *Ibid.*

the owner as against third parties. In such cases the actual owner might not intervene to prevent the enforcement of a proper claim against the vessel.

In order to justify the suit, it was only necessary to establish the fact that the American Line was exploiting the vessel "for its own account" and not as an agent. This the court did, and reached the conclusion that the seizure had been legally made and should be maintained.

**Reichsgericht**

In a judgment rendered on the same day as that in the *Ice King,* December 10, 1921,[18] the Imperial Court reversed this decision. It confined itself, however, to a consideration of the relationship existing between the United States and the American Line. Its conclusion that the latter was merely an agent of the former, and was not employing the vessel for its own account, sufficed to invalidate the decision of the lower court. It was not considered necessary to deal with the question of immunity, because the intervention of the United States was justified on the ground that its vessel had been seized under an order for attachment issued against another party.

In July, 1924, the United States attempted to get damages from the Superior Court at Hamburg against the grain-importing company for the illegal seizure of the *West Chatala.*[19] This was refused. The Court held that the defendant could not be accused of negligence in assuming that the American Line was using the *West Chatala* for its own account, since both it and the court below had shared that view. The lower court was correct in saying that one could not demand from the defendant, whose interests require immediate action, more care than that which had proved sufficient to two courts, after they had heard arguments of fact and of law presented by both sides, in determining that there was no legal obstacle in the way of carrying out the arrest.

**Policy of United States**

The policy adopted by the United States in these cases was not designed to avoid liability incurred in connection with Shipping Board vessels, as is evidenced by the fact that

[18] Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), 280; Revue Internationale du Droit Maritime, XXXIV (1922[2]), 668.

[19] Hanseatische Gerichtszeitung (1924), com. pt., p. 256.

immediately after the decision in the *Ice King,* and the *West Chatala,* the United States attorneys were instructed to adjust the cases on their merits.[20]

**Consular Stipulation**

On May 4, 1922, the London office of the Shipping Board announced that it had carried the first case in Germany to the court of last resort solely for the purpose of establishing the principle of immunity, but that were immunity conceded and consular stipulations accepted for the release of United States vessels, the government would submit to the jurisdiction of German courts in those cases in which jurisdiction could be exercised over private carriers.[21] The "consular stipulation" referred to is an undertaking to appear in any case which may be brought against a Shipping Board vessel and to pay any claim established against it.[22]

This was suggested in lieu of a bank guaranty, usually required of foreign debtors before the release of a vessel can be effected. The advantage of the latter to the creditor is that he can raise money on it; the disadvantage to the United States, that it is a longer process and seems to question the credit of the government.

Whatever the technical grounds for the insistence upon immunity before German courts, and however punctilious the settlement of the issue out of court, the Shipping Board suf-

[20] See letter from Joseph E. Sheedy, Acting Vice-President in Charge of Operation, U.S.S.B.E.F.C., to Freund, July 11, 1922.

[21] Statement by N. A. Smyth, General Counsel U.S.S.B.E.F.C.

[22] Suggested form of stipulation:

In consideration of the release (or refraining from arrest) of the S.S. ....., the U.S.S.B. hereby undertakes to cause an appearance to be entered in the action which has been (or may be) commenced in the courts of ..... in respect of the claim of ..... for ..... And should it be impossible to adjust the claim amicably, the U.S.S.B. hereby undertakes to pay forthwith any claim which may be established against the S.S. ..... by final court judgment.

This guarantee is given unconditionally, but with the express understanding that it is *ex gratis,* and is not to be taken as a precedent should the U.S.S.B. desire to stand on its rights and object to the jurisdiction of the ..... courts in any future case where it is considered proper to do so.

THE UNITED STATES SHIPPING BOARD

By .....

fered much from hesitancy on the part of shippers who naturally believed that the special immunity granted its vessels would complicate claims that might subsequently arise.[23] Therefore there was a desire on all sides for an official statement of the position of the Shipping Board for use in Germany and in other foreign countries.[24] On June 3, 1922, the Shipping Board approved and adopted the following report of Commander Benson: "I recommend that the Board make it broadly known that in lieu of the arrest of the vessel in foreign countries it will concede jurisdiction to the courts there and will furnish bond to meet any final judgment obtained . . . not in excess of the value of the vessel." In October of the same year, A. D. Lasker, Chairman of the Shipping Board, said that the Board was heartily in favor of government-owned ships in commercial work being subject to all the laws that would cover private ownership.[25] Finally, on March 12, 1923, the diplomatic representatives of the United States were instructed substantially to the effect that the United States Shipping Board would not claim that ships operated by or for it, representing the United States of America, when engaged in commercial pursuits, were entitled to immunity from arrest or to other special advantages which were generally accorded to public vessels of a foreign nation. 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. The United States Shipping Board would, however, when occasion arose, continue to ask that foreign courts and tribunals, and other government departments and agencies recognize the application in respect to such vessels, of the provisions of §7 of the Suits in Admiralty Act, approved March 9, 1920.

**Recommendation of Benson**

**Instructions to Diplomatic Agents**

This voluntary submission to the jurisdiction of foreign courts applied only to suits *in rem* and was not applicable

[23] See letter of A. D. Lasker to Assistant Secretary of State Harrison, October 17, 1922.

[24] See statement of N. A. Smyth, General Counsel, U.S.S.B.E.F.C., May 4, 1922.

[25] Communication of Assistant Secretary of State Harrison.

when the Shipping Board or the United States was sued *in personam* in connection with one of its vessels.[26]

The United States had thus aligned itself with the Canadian and Australian governments, which in regard to the liability of their government-owned liners to legal action for the recovery of claims of any nature voluntarily and unreservedly submitted to the ordinary jurisdiction of foreign courts and agreed to be held subject to the ordinary system of writ and arrest in precisely the same manner as any private owner.

**The "Coimbra" 1923**

These were not the only nations that had entered the field of commercial shipping. A case involving a government-owned vessel of Portugal came up before the German courts in May, 1923. The *Coimbra,* a former German vessel, delivered up to the Allies, apportioned to Portugal and owned by it at the time in question, rammed and sank an English vessel. Cadbury Brothers, owners of a cargo of sugar on the English ship, brought suit "against the steamer *Coimbra* represented by Captain Cardozo." March 6, 1923, they procured a decree of attachment from the Landgericht at Hamburg and seized the vessel. Later the designation of the defendant was made to read: "Captain Cardozo as commander of the steamer *Coimbra.*"

The order of attachment was affirmed by the Landgericht March 13, 1923, in conformity with the contention of the plaintiff that the Portuguese government had chartered the vessel to the National Navigation Co. of Lisbon, which was operating the vessel for its own account (in the sense of article 510 of the Commercial Code), and was therefore liable for the claims of ships' creditors.[27]

On April 7, 1923, the plaintiffs notified the court that the "main issue" was settled, for the Portuguese government, as owner of the *Coimbra,* had agreed to submit to the jurisdiction of the English courts for the decision of claims arising from the collision, and had given security for the execution of the

[26] See Compañía Mercantil Argentina *v.* U.S.S.B., 40 (1924), T.L.R., 601.

[27] Revue de Droit Maritime Comparé, IV (1923), 89; Hanseatische Rechtszeitschrift (1923), 376, No. 101.

judgment in England. The plaintiffs had therefore released the *Coimbra.*

The defendant, however, appealed to the Superior Court, whereupon the plaintiff argued that an appeal was not possible under the circumstances. This the court denied. It was obvious that the plaintiffs, in announcing that the "main issue" was settled, could have had reference only to the question of the seizure of the vessel, since the fundamental issue—claims arising from the collision—was to be settled by further process in the English courts. Although the process of attachment might have lost significance for the plaintiffs, since actually the vessel had been released and they had renounced any intention of rearresting it on the same order, nevertheless, the defendants, who had contended against the seizure from the beginning, were entitled to a decision on the legality of the order of attachment, even though at the present time it was no longer valid. For compensation might be claimed for damages arising from an illegal seizure.[28]

The question of the admissibility of the appeal being thus settled, the legality of the attachment was disposed of by the court in an interlocutory decree of May 30, 1923.[29] The ownership and the loss of the cargo were not contested, and it was established that the *Coimbra* was at least partially to blame for the collision, but the defendants claimed that, nevertheless, the seizure was not permissible because the vessel in question was the property of the Portuguese State.

The Court referred to the *Ice King* in which it had recognized the international-law principle that a foreign state could not be subjected to the jurisdiction of domestic courts even in private relations and had applied this rule to the case of a vessel owned by the United States, but engaged in commerce. It took occasion to mention that the criticisms of this decision were based not so much upon a different conception of the international-law principle involved, as upon considerations of opportunism which, however, could only have weight in connection with a future change in legal status. Nor could the court assume as did some that this principle of inter-

[28] Zivilprozessordnung, § 945.

[29] Hanseatische Gerichtszeitung (1923), com. pt., p. 179; Hanseatische Rechtszeitschrift (1923), 498.

national law had been abolished, if it ever existed, by the development of international trade. For international law developed and changed, not according to the wishes of private interests affected by it, but through the unanimous will of the states in the family of nations. Such an expression of will regarding renunciation of immunity for state-owned merchant vessels did not exist; the attitude of the United States in the *Ice King*, and that of Portugal in the present case, was evidence to the contrary. Nor had there been time since the decision in the *Ice King* for a contrary practice to have established itself by custom which could have superseded this principle of international law.

Having thus indicated its position on the international-law point, the Court proceeded to deny that the principle was involved in the present case. It showed a tendency to follow the reasoning in the *West Chatala*. The Portuguese government, on account of the heavy losses it had incurred, had given up the direct operation of the German vessels it had taken. The *Coimbra* was turned over to the National Navigation Company on a bare-boat charter basis for a specified time. The government received only a definite charter rate per day. The company took care of all the equipping and maintenance, and made the freight contracts in its own name and for its own account. The bills of lading bore its name. Hence the company was proved to be the owner *pro hac vice*, in the sense of Article 510 of the Commercial Code.

However, the claim of the plaintiffs to the vessel, in their suit against the company, presupposed the existence of a maritime lien as a result of the collision. As it was not clear that Portuguese law—applicable under the circumstances—admitted such a lien for liability incurred by the captain as a result of a collision, the court granted time for the parties to bring in fresh evidence on this point.

On all the other points the objection to the seizure failed.

In a proceeding against the Roumanian state for damages occasioned a tug by one of its merchant vessels on a commercial voyage, the action was dismissed for want of jurisdiction.[30]

[30] Reichsgericht, June 4, 1930, Niemeyers Zeitschrift für Internationales Recht, XXXIII (1930-31), p. 395.

The *Oituz* was in German waters at Rostock when it found itself in need of towage. It thereupon entered into an agreement with the plaintiff. The latter brought suit for money damages claiming that his tug had been rammed by the fault of the Roumanian vessel. The defendant pleaded lack of jurisdiction in the courts, and lack of competence of the court before which the proceedings were instituted. The local court, in an interlocutory judgment overruled both pleas, but they were sustained on appeal and the action was dismissed. The Reichsgericht altered this decision to the extent of saying that the disability of a court to pronounce judgment against a foreign state was based not upon lack of jurisdiction of the courts, *"Unzulässigkeit des Rechtswegs,"* but upon lack of competence of the court in question, *"Unzuständigkeit des angerufenen Gerichtes."*

**Attitude of German Shipowners**

Whereas the German courts applied the principle of immunity in all its strictness even to government vessels engaged in commerce, since they conceived that such was the existing rule of international law, evidence was not lacking that the judges themselves felt that such a rule no longer corresponded to the needs of the day. Not only did such expressions of opinion emanate from the bench, but they found advocates among merchants and shippers. The result is that Germany is counted among the states that have ratified the International Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels, signed at Brussels on April 10, 1926.[81] The Convention provides in general that the signatory states can not claim any immunity on behalf of their merchant vessels or cargoes.

**Brussels Convention, 1926**

**Conclusion**

The status accorded foreign sovereign princes, states and governments before the courts has been uniform in Germany for over a century and a quarter. Their immunity from jurisdiction has been conceded in practice even when they were especially designated as subject to arrest, as in the interpretation given the old Prussian enactment. In the early days in Prussia the sanctity of the foreign sovereign was declared by the ministers; under the empire, the courts themselves denied

[81] International Maritime Committee, Bulletin No. 91, p. viii. For text see Appendix.

their competence in accordance with the well-recognized rule of international law. Not only did the attempt to provide explicitly for this immunity by an amendment to the Organic Law for the Judiciary fail in 1885, but subsequent events proved it unnecessary. The constitution of the German Republic of 1919 did expressly incorporate this rule of international law—together with all others—into the law of the land, but it has not served to alter the conclusions of the courts.

The principle of immunity has been broadly applied, and only the exceptions ordinarily allowed and prescribed by common sense have been admitted by the courts. Changing circumstances and opportunist demands have failed to move the judiciary. While not contributing to the development of international law on the point, the decisions have strengthened its sanctity. Through all sorts of external changes, the principle is applied to-day as it was a century ago.

# THE POSITION OF FOREIGN STATES BEFORE DUTCH COURTS

## CHAPTER I

### EARLY PRACTICE

A STUDY of the attitude of Dutch courts toward suits involving foreign states has less significance for the international problem than for the domestic. The cases on the whole present clear-cut, familiar issues, the difficulty being that of adjusting the Dutch procedure to fit the requirements of the law of nations. There are few border-line cases, and until quite recently no attempt seems to have been made to differentiate between acts of the state attributable to an exercise of *jus imperii* and those involving *jus gestionis*. The simplicity of the international problem is not reflected in the constitutional one, however. An attempt to condemn a foreign state for an act of war committed in territory under military occupation engaged the judiciary of Holland for eight years, occasioned a legislative amendment, and involved the laity in prolonged and acrimonious criticism of the handling of the affair by the government. In dealing with this case of *de Booij* v. *the German Reich*, where the constitutional issues are so involved with the international-law problem of the amenability of states to the authority of the judiciary of other states, no attempt has been made to differentiate between its two aspects. The case itself has been treated comprehensively, but in tracing its influence upon subsequent decisions regard has been had only for its international implications.

Bynkershoek

Bynkershoek, in his *De Foro Legatorum* [1] observes that one is rendered subject to the jurisdiction of a judge not only by one's physical presence, but by that of one's property as well.

[1] Chapter IV, *Principis bona in alterius Imperio, an per arrestum forum tribuant*, edition of 1721, p. 23.

Therefore, if one's property be attached, one may be summoned to appear in person before the judge:

"Since this rule prevails in civil cases between individuals wherever the practice of 'arrest' obtains, I see no reason why the same should not apply to the property of foreign princes. If we refrain from arresting the Prince himself on account of the sanctity of his person, who will maintain that his property in a foreign state is equally exalted? According to the custom of nations, the property which a Prince . . . possesses in the territory of another sovereign is regarded as on the same footing as that of a private individual and subject to the same charges and taxes. Since the goods themselves are subject to the foreign jurisdiction, they partake in everything of the condition of subjects."

**Seizure of Foreign War Vessels**

Bynkershoek admits however, that in respect to the property of foreign sovereigns opinions differ. He then cites from Aitzema an instance which occurred in 1668 [2] in which three vessels of war of the King of Spain, involved in a collision in the port of Flushing, were seized on behalf of some individuals who had rendered assistance to them, thus making themselves creditors to the King of Spain. The King was thereupon summoned to appear before the judges at Flushing. However, upon the intervention of the Spanish ambassador, the Estates General passed a resolution on December 12, 1668, to the effect that the Province of Zeeland be asked to release the vessels immediately. Lest this action prejudice the rights of the Dutch subjects to compensation and so lead to the possibility of reprisals, they further agreed to write to the Spanish government to urge satisfaction of the claims of the creditors.[3]

In 1889 the Dutch government was involved in difficulties with the Dominican Republic, due to the garnishment of property belonging to the latter by an Amsterdam court. The facts were that the Dominican Republic had employed a representative to arrange for floating a loan in Paris. The loan was actually made subsequently in Amsterdam, and the agent, claiming unpaid commissions and expenses, secured the attachment of funds in the hands of the house that was underwriting the loan. The matter was settled amicably so far as the claimant

[2] *Ibid.*, p. 26.

[3] *Cf.* de Witt Hamer, *"L'exterritorialité des vaisseaux d'état,"* Revue de Droit International et de Législation Comparée, second series, VI (1904), pp. 290-295.

was concerned by the payment of a considerable sum directly by the Dominican government, but the latter complained to the Dutch government that the attachment was contrary to international law. No further measures appear to have been taken in the matter, but in the opinion of one of the experts consulted by the Dutch government, the judge had been right in assuming that whatever force must be accorded the provisions of the law of nations in the face of Dutch written law, the aim of international law could only be to further justice, and not to enable a foreign government to act in ways that could not be regarded by civilized nations as appropriate to a government.[4]

The case of the three Spanish war vessels was called to mind many years later by the seizure, likewise in the port of Flushing, of a Belgian pilot-training ship. The relevant facts were as follows: In connection with an alleged unjustifiable increase in freight rates upon goods transported by a railway operated under concession from the Belgian state, suit was brought against the carrier by a Dutch subject in the Arrondissementsrechtbank at Middelburg, November 7, 1900. Upon being condemned to pay damages to the Dutch subject, the railway in its turn sued the Belgian state, which failed to appear, but which was ordered to indemnify the railway for the payment required from it. On February 12, 1902, the Belgian state brought opposition [5] against this judgment,[6] not arguing lack of jurisdiction on the part of a Dutch court to entertain a suit against it, but pleading directly to the merits of the case. The decision was against its contentions, and it thereupon took the case [7] to the Hooge Raad at The Hague.[8] Here the decision of the lower court was affirmed and a writ of execution was issued. The Belgian government failed to satisfy the judgment, and there was no property in Holland which could be attached under the writ.

In this state of affairs, the *"Ville d'Ostende,"* a vessel belong-

[4] See Heineken, *Ten uitvoerlegging van een vonnis tegen een buitenlandschen staat,* Weekblad van het Recht, [1916] 10028, 4:2-3.

[5] *Derden verzet,* see *infra,* p. 134, 137.

[6] De Belgische Staat *v.* (1) Société du Chemin de Fer International, (2) van IJsselsteijn, Arrondissements-rechtbank, Middelburg, February 12, 1902, Weekblad van het Recht, [1902] 7812, 1:2.

[7] Wetboek van Burgerlijke Regtsvordering, Article 81.

[8] February 27, 1903, Weekblad van het Recht, [1903] 7888, 1:1.

**Seizure of Pilot-Training Ship**

ing to the Belgian state, used as a school ship for training pilots, ran aground off the coast of Zeeland and subsequently put in to Flushing. Here the creditors thought to levy upon it in execution of their unsatisfied judgment. The Belgian commander, however, refused to let the Dutch warrant officer on board, and threatened to use force should he try to proceed with the execution. The warrant officer thereupon appealed to the police in Flushing, but they refused to assist him. The attorney of the successful plaintiffs then approached the Dutch Minister of Justice, but he, too, declined to grant any support to the officer of the Court, with the result that the vessel remained free from arrest.[9] Ultimately funds due the Belgian state were trusteed in the hands of the Dutch Railway Company and the amount due from the Belgian state, together with costs, were recovered.[10]

**Criticism of Government**

Those who opposed the refusal of the Minister of Justice to interfere argued that it was contrary to Dutch law for the ship to escape, inasmuch as all real and personal property of the debtor served as a pledge for his obligations and, accordingly, a creditor with a judgment had a right to execute it upon a vessel owned by his debtor.[11] These laws applied equally to foreigner and Dutch subject. On what score was the immunity granted? Obviously the vessel was not carrying the King of Belgium, or his representative, nor was it a war ship, on either of which grounds the right to immunity would probably have been admitted. It was pointed out that pilotage was not inherently either a right or a duty of the state; hence, neither was the teaching of the art. If the state undertook the instruction of youths, and made them travel during vacation on steamers owned by the state, it could not be maintained that these vessels were fulfilling a function of the state.[12]

Supporters of the Dutch Government's position replied that whereas formerly one connected the idea of immunity from

[9] See articles by de Witt Hamer in Revue de Droit International et de Législation Comparée, second series, VI (1904), pp. 290-295, and Weekblad van het Recht, [1904] 8010, 4:1.

[10] See Struycken, Van Onzen Tijd, XVII (1916-17), pp. 141-142.

[11] See Burgerlijke Wetboek, Article 1177, and Wetboek van Burgerlijke Regtsvordering, Articles 437, 764.

[12] See de Witt Hamer in articles cited above.

jurisdiction with war vessels, it had come to be realized that this immunity depended not on the "murderous character" of the craft, but upon the fact of its public service. Had the vessel been the "private" property of the Belgian State, the execution might have been carried out, but this was forbidden by international law in the present case, because the vessel was engaged in public service, and therefore must be considered "public" property of Belgium. According to this theory, it was the duty of the Government to prevent the arrest of the vessel.[13]

In reply to such views, it was retorted that the Belgian sovereign was not exercising his sovereignty by means of this vessel, and that there was no more logical reason for granting immunity to this vessel than there was for according it to mail packets. It was further implied that the refusal of the Minister of Justice to aid in the execution was based in part upon an assumed assimilation of this vessel to the regular pilot vessels of Belgium on the Scheldt, which were permitted by mutual agreement to be stationed at certain points within the territorial jurisdiction of Holland. Whereas it was true that it would be contrary to this agreement to execute judicial decrees upon such vessels, as the pilot service would thereby be prejudiced, to do so upon a Belgian vessel that was not engaged in pilotage, but was merely training students who might perhaps later perform their services in Holland, was beyond the scope of the guarantee.[14] The final chapter of this journalistic polemic was a consideration of the meaning of extraterritoriality, including immunity from jurisdiction. It was submitted that the old fiction of extraterritoriality had given place to the conception that extraterritoriality was nothing more than freedom to perform public functions undisturbed, without being deterred therein by the law of the land of sojourn. Therefore, the ambassador enjoyed extraterritoriality, whereas the merchant vessel did not, even if reinforced and bristling with arms. A merchant vessel, as such, even if it resembled a floating fortress, performed no public function, and therefore could make no claim to extraterritoriality. A vessel employed by

[13] Article of Bles, Weekblad van het Recht, [1904] 8013, 4:1.
[14] De Witt Hamer, Weekblad van het Recht, [1904] 8017, 3:2-4:1.

the state to train pilots on the other hand had indeed an official task and merited the protection of the government from warrant officers bent on its arrest.[15]

**Seizure of Submarine "Hvalen"**

In 1909 another attempt was made to seize a vessel of a foreign state for the settlement of salvage claims of a private individual. In this case, as in that referred to by Bynkershoek, a foreign war vessel was involved. Again, the attempt was denounced by the government, and the method of diplomacy was resorted to for settlement. The crew of a Dutch lugger obtained permission from the president of the Arrondissements-rechtbank at Haarlem to seize the Swedish submarine *"Hvalen,"* flying the naval flag and lying at anchor at the mouth of the Y, to serve as security for the payment of a claim arising from assistance rendered the submarine. When the warrant officer and the witness went aboard, the commander ordered them to leave immediately. They refused, and high words ensued. Finally, after the commander had satisfied them that the vessel was to remain some time within Dutch waters, they withdrew. In commenting upon this, the Minister of Justice said that he considered the warrant officer and witness had illegally remained on board the war vessel, and that by refusing to leave after being repeatedly ordered to, they had perpetrated an act which amounted to a misdemeanor according to the Dutch Penal Code. However, penal prosecution was made contingent upon a complaint being made by the Swedish Government. The matter was ultimately amicably settled by conference between the two governments.[16]

**Suit against Roumanian Government**

The following year, the Roumanian Government was involved in litigation resulting from the collision of a steamer owned by it with a pier, the property of a Dutch corporation. The latter brought suit for damages to the wharf and loss of goods stored thereon. The Roumanian Government appeared and entered a demurrer. This was overruled and the defendant was given leave to establish by witnesses the prevalence of thick fog and ebb tide, together with the presence of numerous other vessels, which would meet the charge of negligence and establish *force majeure* as the cause of the accident. In

[15] Bles, Weekblad van het Recht, [1904] 8027, 3:3-4:1.

[16] Weekblad van het Recht, [1909] 8921, 8:1.

this case, however, the appearance of the Roumanian government and its failure to claim immunity, prevented the issue of the civil status of a government-owned merchant vessel from being decided here.[17]

[17] Handelsinrichtingen Poortershaven *v.* het Koninkrijk Rumenië, Arrondissements-rechtbank, Rotterdam, April 4, 1910, Weekblad van het Recht [1910] 9076, 3:2. See also comment by van der Flier, *Procédure contre des États étrangers,* Grotius Annuaire, 1923, p. 87, at page 89.

## CHAPTER II

### THE DE BOOIJ CASE

**Rotterdam Decision, Sept. 25, 1916**

THE case which was to leave its mark indelibly upon Dutch jurisprudence, and which acquired fame far beyond the boundaries of Holland as it dragged through various courts during a period of eight years, was that of de Booij *v.* the German Reich.[1] The facts were as follows: de Booij, a Dutch subject, then resident in Antwerp, owned a barge, the *Booij II,* which was sent to Malines laden with coal for an electric power company. The barge was at the company's plant waiting to discharge its cargo on or about October 4, 1914, when the bombardment of Malines began. It was seized by German troops and used to bridge the Malines-Louvain canal. Subsequently, it was sunk, so that nothing remained but a worthless hulk which was to be dynamited. The plaintiff brought suit for damages against the German Reich, alleging that his loss was due to illegal acts for which the defendant was responsible. He submitted that he had fulfilled all the formalities prescribed in civil processes,[2] and had since made repeated attempts to obtain satisfaction, but had always been put off with fair words. Germany made no appearance, and the court gave judgment for the plaintiff in accordance with the rule of Dutch law,[3] which prescribes that judgment shall be entered for the plaintiff (unless his claim appears upon its face unjust or unfounded) when the defendant defaults. Germany was condemned to pay de Booij 24,600 francs damages, plus interest and costs. On October 21, 1916, notice of this decree was served upon the German Reich by a writ delivered into the hands of the representative of the Public Prosecutor of the

**Judgment in Default**

**Notice of Execution**

[1] De Booij *v.* het Duitsche Rijk, Arrondissements-rechtbank, Rotterdam, September 25, 1916, Weekblad van het Recht, [1916] 10022, 3:3.

[2] *Cf.* Wetboek van Burgerlijke Regtsvordering, Article 4, § 8.

[3] Wetboek van Burgerlijke Regtsvordering, Article 76.

court. It was ordered to satisfy the judgment and was further informed that were the order not complied with, the judgment would be executed upon its real and personal property in Holland.[4]

**Interference by the Minister of Justice**

The Minister of Justice, having received a communication from the Foreign Office on the subject, notified the procurator-general at the Court at The Hague that execution of the judgment upon property of the German Reich in the Netherlands was not permissible, and requested that the necessary steps be taken to prevent the execution being undertaken, or, if it were already under way, to cause it to be discontinued. Furthermore, the procurator-general was requested to inform the attorney for the plaintiff that the Dutch Government was of opinion that the execution of the judgment was not permissible, due to considerations of international law, and to further inform the attorney that, with a view to the possibility of geting damages in a friendly way, he should address himself to the Minister of Foreign Affairs. The letter closed as follows:

"I should appreciate it if through your mediation the communication might result in the successful party's desisting from the execution. Should the successful party, on the contrary, make efforts to obtain execution, please acquaint your colleagues with the situation, in order that they may, as far as their jurisdiction extends, take measures to prevent the execution in question." [5]

**Suspension of Execution by Plaintiff**

The latter alternative did not prove necessary in the event, as the plaintiff's attorney, although considering himself professionally unjustified in heeding the above communication, agreed, in a personal interview with the Minister of Justice, to suspend further attempts to secure execution of the judgment for a period of four weeks. Subsequently he appears to have promised to give the Minister twenty-four hours' notice before proceeding to execution. On the other hand, he made known his intention to execute the judgment by trustee process. Thereupon, the Minister of Justice again communicated with the procurator-general at The Hague. It seemed to him

[4] *Antwoord van den Heer Ort, Minister van Justitie, op de Vragen van Mr. Dr. Ter Spill,* Weekblad van het Recht, [1916] 10024, 8:1-2.

[5] *Ibid.*

desirable that the warrant officer in question be informed that the objections against the execution of the judgment under discussion only concerned the actual forcible seizure of property of the German Reich, and did not extend to the garnishment of its goods or debts in the hands of third parties.[6] In this case, it would still require a judicial decision to decide whether forcible seizure of property of a foreign state could legally be consummated in Holland, a point which in the opinion of the Minister of Justice, had not been settled by the mere fact of the condemnation.[7]

**Garnishment Permitted**

**Legal Background**

Such were the facts involved in the first phase of the case. The legal background against which they took place remains to be examined. Neither the codes nor the legislation which regulated civil rights and procedure in Holland contained any express provision that the Dutch judge was bound by the principles of the law of nations. This fact was the more striking because the Penal Code, prepared in 1881 and adopted in 1886, included a provision whereby the application of the articles defining the jurisdiction of the Code was limited by the exceptions recognized in international law.[8] In the official commentary accompanying the original government draft of this article, it was said that no comprehensive delimitation of the extent of the application of Dutch penal law could omit statutory recognition of the international-law principle of extraterritoriality, inasmuch as Article 3 of the General Provisions of May 15, 1829 [9] (applicable alike to civil and penal processes), provided that custom conferred no rights except when referred to by statute. In the opinion of the commission submitting the draft, this provision applied to the customs of international law as well as of national common law, and

**Penal Code Article 8**

**Official Commentary**

[6] *Antwoord van den Heer Ort, Minister van Justitie, op de Vragen van Mr. Dr. Ter Spill,* Weekblad van het Recht, [1916] 10024, 8:1-2.

[7] For a discussion of this point see Struycken, *Processen en Beslagen tegen Vreemde Staten,* Van Onzen Tijd, XVII (1916-17), p. 143; van Praag, *Vonnis en Beslag tegen een Vreemden Staat,* Weekblad van het Recht, [1917] 10036, 3:1-4:1.

[8] Wetboek van Strafrecht, Article 8: *De toepasselijkheid der artikelen 2-7 wordt beperkt door de uitzonderingen in het völkenrecht erkend.*

[9] *Algemeene Bepalingen der Wetgeving van het Koningrijk,* Staatsblad 1829, No. 28.

that no matter how old or how generally recognized they might be. Thus only an express legislative provision could enable a Dutch judge to place limitations, prescribed by customary international law, upon the extent of the territory over which or the persons to which the code applied.[10]

**Decision of Court of Cassation January 12, 1858**

Despite this defense of the necessity of Article 8 in the Penal Code of 1881, before its introduction the courts recognized their competence to apply the generally recognized principles of international law without any special statutory authorization. Thus, on January 12, 1858, the Court of Cassation handed down an opinion involving the question of jurisdiction over crimes committed on board a Dutch merchant vessel on the high seas.[11] One of the issues was whether the provisions of the Dutch code regarding crimes committed outside the territory (*"buiten 's lands"*) applied.[12] It was admitted by the defense that it was a generally recognized principle of international law that for purposes of jurisdiction a merchant vessel was a floating part of the territory of the nation whose flag it flew. The contention was made, however, that this was merely natural, customary law whose force was nullified by the express stipulation in Dutch positive law that custom gave no rights unless recognized by statute. Advocate-general Karseboom refused to subscribe to this doctrine. He said that he very much doubted whether the Dutch legislator intended in the above-mentioned article to do away with international law as customary law by one stroke of the pen. He thought the purpose of the enactment was a different one, namely to provide that customary law in civil and penal matters should have force only when the written law expressly so provided, this being a change from previously accepted legal principles. Had the appellants been condemned for violating a customary right not recognized by statute, then the defense of the article

**Interpretation by Karseboom**

[10] *Memorie van Toelichting: Exterritorialiteit* (Article 8), Smidt, *Geschiedenis van het Wetboek van Strafrecht*, I, p. 135.

[11] Nederlandsche Regtsprach, 1858, pt. 1, p. 27.

[12] Articles 8 and 9 of the Wetboek van Strafvordering (1830), Staatsblad 1830, No. 21. *Cf.* Articles 8 and 9 of Wetboek van Strafrecht voor Nederlandsch-Indië, and the decision of March 10, 1915 of the Hoog-Gerechtshof van Nederlandsch-Indië, Indisch Tijdschrift van het Recht, CX (1918), p. 284.

in question might confidently have been relied upon, but not in the given case.

If this view be accepted, the necessity for Article 8 is not apparent, as there is no conflict between international-law precepts and the letter of Dutch law. Hence a Dutch judge would, of course, be bound to observe the former without being expressly empowered to do so.[13]

**Opinions of Writers**

The absence of an article referring to international law in connection with civil procedure proved misleading in conjunction with Article 3 of the General Provisions. Whether the judge should consider that his decision, based on civil enactments, might lead to international difficulties, and so interpret the rules regarding his civil competence subject to a provision similar to that actually incorporated in the Penal Code, or should leave the relation between civil and international law entirely to the legislator[14] was a question rich in legal interest, to which a serious practical significance was imparted by the decision of the District Court of Rotterdam of September 25, 1916, against the German Reich. The result was to arouse both statesmen and academic thinkers, who expressed themselves at length in print.

**Struycken**

In the mind of Mr. Struycken[15] the international aspects of the case were perfectly clear. One state could in general exercise no jurisdiction over another, and hence a judicial condemnation, and, *a fortiori*, an execution against a foreign state was not permissible. The problem with which the Dutch government was confronted was one of ways and means of fulfilling its acknowledged obligations. The mere fact that Dutch civil law failed to refer expressly to this well-recognized principle of international law was no argument that it sanctioned the condemnation of a foreign state and the seizure of its property. National law must be deemed to be in harmony with international law even when it did not expressly refer to it. The method provided in Dutch law for bringing suit

[13] See Bles, *Eenige Opmerkingen betreffende artikel 8 Wetboek van Strafrecht*, Tijdschrift voor Strafrecht, VII (1893), p. 421.

[14] See Article of Jitta, *Fransche Jurisprudentie*, Rechtsgeleerd Magazijn, I (1882), pp. 93-104.

[15] *Processen en Beslagen tegen Vreemde Staten*, Van Onzen Tijd, XVII (1916-17), pp. 140-145.

against non-residents—which was that resorted to by plaintiffs against foreign states [16]—enabled the government by timely action to prevent a suit from being brought against a foreign state contrary to international law. The procedure was for service to be made upon the Public Prosecutor of the district where the suit was being brought. He made a return upon the original writ and sent a copy to the Department of Foreign Affairs. At this point, the latter department could investigate the circumstances of the suit, discover whether the foreign state chose to appear, and, in the contrary event, notify the prosecutor through the Ministry of Justice. Another provision of the Code of Civil Procedure [17] provided that whenever it seemed necessary to him, the Public Prosecutor might require that information be given him about any pending suit. Struycken suggested that this power should be exercised in every action against a foreign state.

Whereas there was more than one provision of Dutch law which might be relied upon to prevent the institution of a suit against a foreign state, the author pointed out the extreme difficulty of preventing the execution of a judgment once it had been handed down. It was expressly provided in the Code of Civil Procedure [18] that every judgment might be executed throughout Holland, but unfortunately, the promised plan, by which conflicts of competence between the judicial and the administrative branches of the government were to be regulated, had remained abortive.[19] Struycken failed to suggest a concrete measure by which the dilemma thus created could be met, but he was emphatic in saying that the government should not shrink from the most radical measures to prevent a foreign state from being obliged, as the result of a judgment rendered against it in default, to pay compensation for measures taken during war by its administrative or military authorities.

The points raised by Mr. Struycken together with reflections from an independent study of the issue formed the basis for an editorial appearing in the *Weekblad van het Recht,* in

[16] Wetboek van Burgerlijke Regtsvordering, Article 4, § 8.
[17] *Ibid.,* Article 325.
[18] *Ibid.,* Article 430.
[19] Grondwet voor het Koninkrijk der Nederlanden, Article 156 [157].

**Weekblad van het Recht**

which were formulated three questions: [20] (1) Did international law admit of such a suit as that instituted before the court at Rotterdam? (2) In view of the silence of Dutch law, might or should exceptions established in international law be recognized when application was made of national law? (3) What could be done to prevent the execution of a judicial decree not permitted by international law? As to the first, little difference of opinion was considered possible, and the conclusion was necessarily reached that the decision of the Rotterdam court was contrary to the principles of international law. The second question was whether these principles might receive recognition in a national legal system, in which they were not expressly incorporated, and from the general wording of the appropriate legislative provisions of which contrary principles might be deduced. The position taken by van Praag [21] on this point was deemed to be sound. He rejected both the proposition that the rules of international law were to be considered as forming part of national law, and the view that in conflicts between national and international law the latter should prevail. At the same time he shared the opinion of most writers—embodied in many judicial decisions as well—that national law must be interpreted as far as possible in consonance with international law. According to him, one might act upon the assumption that the legislator in his provisions desired to avoid conflict with international law. Sharing this feeling, the writer was of opinion that even such a statement as that contained in Article 3 of the General Provisions could not prevail as an obstacle to the recognition and application of international usage, for the legislation of no single state could ever determine what should be the force of a rule of international law. On the whole, whereas a provision such as Article 8 of the Penal Code was considered well adapted to its purpose, it was felt that the principle which received express recognition therein in respect to penal law might well be accepted and applied to civil law and procedure.

The third question was considered the most difficult of solu-

[20] *Volkenrecht en nationaal recht,* Weekblad van het Recht, [1916] 10029, 4:1-3.

[21] *Juridiction et Droit International Public,* p. 53 *seq.*

tion, for it was certain that under the then existing law, the government had no means of nullifying a judicial sentence pronounced contrary to international law. It was said that the Rotterdam decision could only be vacated if the German state cared to take advantage of the judicial means at its disposal.[22] For to assert that the rules governing the execution of judgments likewise only applied subject to the restrictions imposed by international law, and that a state had no authority to recognize as a final judgment binding on the parties a decision concerning the competence of its courts in a matter involving international law, was not to conclude that the government could legally interfere in the execution of a formally legal decision in a civil suit. In Dutch positive law there was no rule which would prevent such an anomaly as the execution of a decree not binding upon the condemned party. The Minister of Justice had attempted to prevent the execution of the Rotterdam judgment upon property of the German Reich, although not considering attachment in the hands of third parties as entirely precluded. The correctness of this attempted distinction had not improperly been questioned,[23] but the measures taken by the Minister were justified despite the lack of legal provision. For Holland could not be exposed to possibly serious misunderstanding with another state because the government had difficulty in pointing out the legal prescription on which it based a vigorous protest against such an indefensible proceeding as the execution of the Rotterdam decision. In conclusion it was said to be obvious that there was a gap in Dutch legislation which urgently needed to be filled. Proposals to this end would be awaited with interest.

**Views of van Praag**

One of the most careful critiques of the situation created by the Rotterdam decision of September 25, 1916, was that of van Praag.[24] He maintained that the decision was clearly

[22] Apparently a reference to Article 81 of the Code of Civil Procedure, giving the defendant in default a right to appeal against the decree, if done within fourteen days.

[23] See van Praag, *Vonnis en Beslag tegen een Vreemden Staat,* Weekblad van het Recht, [1917] 10036, 3:1-4:1, and *infra,* and Struycken, *Processen en Beslagen tegen Vreemde Staten,* Van Onzen Tijd, XVII (1916-17), p. 143.

[24] *Vonnis en Beslag tegen een Vreemden Staat,* Weekblad van het Recht, [1917] 10036, 3:1-4:1.

contrary to international law. It concerned an act of sovereignty of a foreign state, as to which international law was positive enough in denying the jurisdiction of local courts. Nor was the assumption of jurisdiction countenanced by Dutch law either, for otherwise the latter would not agree with international law. This was clear enough, but the principle then at issue was: could the party that obtained the verdict execute the judgment, or had the government authority to prevent it? The answer to this question depended not upon international but upon local law. If one assumed that Dutch national law should, as far as possible, be construed in conformity with international law, restrictively if need be, one could not maintain that legal provisions couched in general terms should be applied even when such application was contrary to international law. It should rather be assumed that so long as there was no provision clearly at variance with international law, the domestic enactment was always to be construed so that it would be applicable only with the tacit reservation: if international law does not prohibit. But there was no reason for applying this rule only to provisions concerning competence, and not to others, such as those dealing with the authority of final judgments or of executions.

International law did not permit the execution of a judgment delivered by a judge who, in international law, had no competence. For this reason, there was no analogy between the case under consideration and that decided by the court of Middelburg in 1902, whose execution was attempted on the "*Ville d'Ostende,*" for there the Belgian government did not claim lack of jurisdiction, but appealed on the merits against the decision rendered against it in default, and so may be deemed to have voluntarily submitted itself to the Dutch court. Whereas some writers were of the opinion that all execution against a foreign state was prohibited, van Praag thought that this was going too far. If, under an exception to the general principle of immunity, the national court had competence to hear the suit, then the execution of its decision was also permitted. Hence, the execution of the judgment rendered by the Middelburg court in 1902 was not illegal, and

was in fact properly carried out by the garnishment of certain property of the Belgian government. But execution upon the *"Ville d'Ostende"* was forbidden because, as a training school for pilots, it was being employed in the public service of Belgium. In the given case, however, the Rotterdam court did not have jurisdiction by virtue of any exception to the general principle. Hence, its decree was not binding upon Germany, and the successful party had no right to execute it. It could not be tolerated that a foreign state, which was not bound by an *ultra vires* decision, should nevertheless, be treated as though it were so bound. All execution of this judgment was illegal, even that upon property in the hands of third persons.

Since the judgment creditor acquired no right from Dutch law to execute a decree rendered without jurisdiction in international law, the prevention of the execution by the government violated no vested right of the creditor. To maintain that, nevertheless, the government had to point to a legal provision which specifically empowered it to interfere was to misunderstand its position according to Dutch constitutional law. Van Praag could not agree with those who were of opinion that any act of the department vested by the Constitution with the executive power, must rest upon a definite law enabling it so to act. This assertion went much too far, and its application restricted the power necessary to any government. This was evident in such a case as that under discussion. The government had the authority to prevent the execution of this decree rendered contrary to international law, and contrary, therefore, to Dutch law, since it was its duty to use all the means at its disposal to prevent any infringement of the international-law rights of foreign states, by or as a result of acts of national organs, including the judiciary.[25] In cases of conflict between the administrative and judicial powers, a distinction must be made between cases where the government denied only the *competence* of the court, and those in which it challenged its *jurisdiction.* If it questioned the competence only, whether in a suit to which it was itself a party, or in a process

[25] *Cf.* certain opinions expressed in response to Government Canvass, March 7, 1917, Weekblad van het Recht, [1917] 10058, 1:1.

against another administrative organ, it did not thereby deny that it or the administrative organ was in general subject to the judicial authority of the judge. Of this subjection there was no doubt according to Dutch law. The fact that under these circumstances, the decision of his own competence rested with the judge, who could therefore render a decision binding on an administrative department which denied his competence, presupposed the general jurisdiction of the judge over the parties at suit. If that jurisdiction was not first established, then the decision of the judge that he was competent could not be binding upon a party that denied the jurisdiction of the judge. Applying this to the case in hand, where the exercise of jurisdiction by the national judge was forbidden by international law, it was clear that a decision rendered upon the assumption of such jurisdiction, but not in reliance upon a specific national law, could have no force as a final judgment. Therefore, there was no reason to assume the position that the condemned party would have to submit to the decision of the Rotterdam court, or to the execution thereof.

Van Praag thought it was most unfortunate that the Minister of Justice should have declared that he considered a garnishment of German state property permissible, for the legal means at the disposal of the Dutch government for the prevention of the execution of the Rotterdam decision did not extend to the prevention of the attachment of property in the hands of third persons. So far, the government was only confronted with the decision of 1916, which, since it was rendered without jurisdiction in either national or international law, the government was not obliged to respect. Were one to proceed to garnishment, however, with the garnishee subject to the jurisdiction of the Dutch courts, the same could no longer be said in respect to a decree that should order a delivery of the property. Although the government might refuse to aid in the execution of this decision, too, it could not do so on the ground that the decision was rendered *ultra vires*. And, as the third party would be bound by the decision, the government would be even less able to forbid him to carry it out, than to forbid the judge to decree the delivery. Thus a situation might arise, difficult of satisfactory solution.

**Questions of Ter Spill**

The interest of Dr. Ter Spill, member of parliament, seems to have been political rather than philosophical. He publicly propounded certain questions to the Minister of Justice: [26] Had the Minister forbidden the execution of a final judgment *(vonnis in kracht van gewijsde)* obtained by a Dutch subject against a foreign state from the Rechtbank at Rotterdam, September 25, 1916, or had he taken any measures to obstruct the execution? Specifically, had the Minister forbidden the warrant officer charged with the execution of the judgment to proceed therewith? What other measures had the Minister taken or contemplated to prevent the execution within Dutch territory of a judgment handed down by a Dutch judge? By force of what legal provisions did the Minister think to give instructions to a warrant officer as to whether he should or should not proceed to the execution of a civil judgment for which he had been commissioned by the Dutch citizen in whose favor the decision had been handed down? By force of what legal provisions did the Minister think himself authorized to interfere in the administration of Dutch civil justice by preventing or hindering the execution of a judgment delivered by a Dutch civil judge? Did the Minister purpose to continue in future to use the means at his disposal to obstruct the execution in Holland of civil judgments handed down by Dutch judges whenever they failed to accord with that which he, the Minister of Justice, deemed desirable?

**Answer of Minister of Justice Ort**

The Minister of Justice, Mr. Ort, appears to have been not unprepared to defend his course. In an address to the House he professed to be glad of the opportunity to go into the details of the matter at issue. He proposed first to recite what he had actually done—thus answering the first three of Mr. Ter Spill's queries—and then proceed to present the legal grounds upon which these measures were based. This would supply the answers to the last three questions.[27] The actual steps taken consisted first in notifying the procurator-general

[26] *Vragen door Mr. Dr. Ter Spill aan den Minister van Justitie Gesteld,* Weekblad van het Recht, [1916] 10023, 4:2, 3, and Nederlandsche Jurisprudentie, 1917, p. 13.

[27] *Antwoord van den Heer Ort, Minister van Justitie, op de Vragen van Mr. Dr. Ter Spill,* Weekblad van het Recht, [1916] 10024, 8:1-2, and Nederlandsche Jurisprudentie, 1917, pp. 14-15.

at The Hague that the proposed execution was not permissible and should be prevented, and second in having the attorney for the plaintiff informed of this fact, and the suggestion made to him that he approach the Minister of Foreign Affairs for assistance in obtaining an amicable settlement of the claim. Later a distinction was drawn between seizure on execution and trustee process, and the objection to the former, was specifically stated not to extend to the latter.[28] As to the legal issues, the Minister of Justice said that the question whether a sovereign state could be subjected against its will to the jurisdiction of another state did not always receive the same answer in theory and in practice. Whereas many answered the question in the negative, others made a distinction according to the circumstances of the case. Even among the latter, one could confidently assert that in a case such as the Rotterdam matter there would be unanimous agreement that the foreign judge should be considered incompetent. It would not be easy to point to a judicial opinion or a pronouncement of a responsible legal authority to the effect that a belligerent state was bound according to international law by a judicial decision rendered in a foreign country in connection with war damages inflicted in the territory of a third state upon property of a subject of the state where the judicial decision was invoked. The Minister explained that this was not intended as any criticism of the Rotterdam decision. The question whether Dutch judges in their decisions *jure privato* were bound to conform to this international-law principle seemed to be susceptible of different solutions, as was evidenced by the irreconcilable decisions of Dutch courts themselves.[29] The personal opinion of the Minister was that even in default of an express stipulation of domestic legislation, the principles of international law precluded the assumption of jurisdiction by the Dutch judge, and the admissibility of execution, in a matter such as that under consideration. So long as the Rotterdam judgment did not come to execution, the possibility of condemning a foreign state on account of sovereign acts in

[28] For the facts in greater detail, see *supra* pp. 110-112.

[29] Compare that under discussion of the Rotterdam Rechtbank of September 25, 1916, with that of the Maastricht Rechtbank of November 23, 1916, Weekblad van het Recht, [1917] 10035, 8:1.

war time on foreign territory, however undoubtedly at variance with international law, was really only of theoretical interest. The question became more serious with the first step to secure execution, however. No matter what opinion one might have about the competence of the national judge, it was not disputed that the seizure of property of a foreign state in the country where the decision was had, under circumstances such as those under consideration, was an infringement of the sovereign rights of that state. The state where such a seizure took place as the result of such a sentence would undoubtedly be guilty of a breach of international law. Both in theory and in practice, it was a well-known fact that responsibility for the violation of international-law obligations was in no wise lessened or even excused by the fact that the legislation of the guilty state must necessarily lead to such violation, the judicial or executive power being legally impotent to prevent the decree or act in question. Hence the Minister of Foreign Affairs had urgently requested the Minister of Justice to see to it that the contemplated execution should not take place, inasmuch as the execution of a judgment against a foreign state under circumstances such as those in question was a most serious matter. There was no doubt but that it was the duty of the Minister of Justice to give effect to the request of his colleague, and to take action.

Upon the justifiable refusal of Germany to recognize the competence of the Dutch judge in this case, the means of staying the execution was not *verzet,*[80] or any other procedural measure. Nor could a legal provision, declaring the Dutch judge incompetent to take cognizance of suits such as this, have been prepared so quickly that the execution of this judgment on property of the German Reich could thereby have been precluded. What could be done in this direction, the Minister of Justice did; as soon as such a draft law could be laid before the States General, the government would take it up. For the future then, decisions such as that of the Rotterdam court, with its undesirable consequences, would be impossible. But aside from the quickest possible preparation

[80] An action whereby one whose rights are injured by a judicial decision in a suit between other parties, brings opposition against that decision in the court which has rendered it.

of measures for the future, the interest of the country could brook no delay in staying the execution at once. Inasmuch as even in the absence of an express legal provision, as already said, the principles of international law precluded the admission of the execution, the Government was in duty bound to render the execution impossible so far as lay in its power. The execution of the decree could not take place, if the country did not want to be guilty of a breach of international law, with all the difficulties connected therewith. The Government must see to it that the Netherlands fulfilled its international-law duties strictly, as regarded no matter what foreign state.

For these reasons, the Minister of Justice explained, he had taken the above-mentioned measures to preclude the further execution of the decision. That the plaintiff, who naturally looked at the matter exclusively from the standpoint of national law, and, having once obtained a judgment, thought he had a vested right to make good his claim, was ill satisfied with the measures taken, was not lost to mind. Not only had an effort been made to avoid the repetition of the case in the future, by a speedy amendment of the law, but the Government had forthwith addressed itself to diplomatic measures for procuring compensation for the damage suffered by the judgment creditor.[31]

**Report of Commission for Private International Law**

In the meantime, on December 2, 1916, the Minister of Justice had appealed to the State Commission for Private International Law for the benefit of its advice. He had asked whether a Dutch judge was competent for the adjudication of suits instituted against foreign states, and whether, if judgment was obtained against a foreign state, such a judgment might be executed in Holland upon its property. What did the Commission think about the desirability of precluding this possibility by treaty, or by law? In formulating its reply, December 18, 1916,[32] the Commission pointed out that a third question was inherent in the first two, to wit, whether the government was justified in taking any measures to prevent the

[31] *Antwoord van den Heer Ort, Minister van Justitie, op de Vragen van Mr. Dr. Ter Spill,* Weekblad van het Recht, [1916] 10024, 8:1-2.

[32] Weekblad van het Recht, [1917] 10038, 1:3-2:2; Nederlandsche Jurisprudentie, 1917, pp. 137-140.

execution of such a decision. It therefore addressed itself to these four questions. 1. Had a Dutch judge competence for the decision of suits against a foreign state? Dutch law was silent on this point. It was a mistake to think to find it covered by provisions referring to "foreigners," for neither the ordinary nor the technical meaning of the word "foreigner" included a foreign state. The issue of competence in the question propounded was rather one of jurisdiction in the larger sense. The extent of the jurisdiction of a Dutch judge as such was determined by general principles of law. Hence the applicability of the above-mentioned provisions was to be tested first by this standard. Specifically, whether a Dutch court had jurisdiction over a foreign state, was determined by the general principles of international law. According to them, one state was not subject to the jurisdiction of another. This was the controlling rule in the Commission's eyes. The variously formulated exceptions had no bearing on a state exercising its sovereign powers in a country other than that of the court. This immunity was a principle of *law*—albeit international and unwritten—not of *custom*, to which reference was made in Article 3 of the General Provisions as conferring no rights unless substantiated by statute. International law was by its very nature general in its scope, and the extent of the jurisdiction of each state was controlled thereby. Had there been any provisions in Dutch law contrary to the international-law principle above stated, they would have had to be eliminated. As there were none such, the same reasoning led to the conclusion that the existing provisions regulating the competence and jurisdiction of Dutch judges did not invest them with any competence or jurisdiction over foreign states. The Commission was of the opinion that the Rotterdam decision of September 25, 1916, fell squarely within the principles outlined above.

**Competence of Dutch Judge**

2. In case judgment was obtained against a foreign state, could such judgment be executed in Holland upon the property of this foreign state? This, like the first question, the Commission considered must be answered in the negative. The legal stipulations concerning the competence and the sentences of judges were not written for cases where the judges, by force of

**Execution of Judgment**

international law, had no jurisdiction at all. They applied only within the limits of the judicial authority of the national judge. Such provisions, therefore, lent no validity to sentences rendered beyond the sphere of the authority of the judge, and the execution of such sentences could likewise not be based upon these provisions. True the judge had to go through the formality of rendering a decision as to his own competence, but this fact could not result in his sentence—when in the determination of his competence he had overstepped the bounds of his authority as a national judge—having force of law for the foreign state whose sovereignty he had thereby encroached upon; still less could it result in the latter's sovereignty being further outraged by execution of the sentence. The execution of a sentence rendered *ultra vires* was impossible. There was no occasion to distinguish between the property of a foreign state held *jure publico* and that held *jure privato* so far as execution was concerned. It was usually difficult to prove that a state owned property only *jure privato* and doubly so in time of war, and as regarded belligerents who were compelled to use all their property for the greatest good of their own country.

**Duty of Government to Intervene**

3. Did it behoove the government to take steps to prevent the execution of such a sentence? Since the execution of an *ultra vires* judgment obtained from a national judge against a foreign state was an infringement upon the sovereign rights of this foreign state, the government ought to prevent it with the means at its disposal. What means had it? Could it restrain the warrant officer from the fulfillment of his functions? Or must it prevent the execution by force? Either method might be used. The warrant officer was, in general, bound to lend his services, and even if the statutory provisions anent this were not applicable to the case under discussion in view of what had been said above, it was not to be assumed that to the warrant officer was assigned the task of determining whether or not the decision had been rendered in accordance with international law. The warrant officer was under the direction of the Procurator-General, who could indicate to him that in a given case the legal prescriptions did not put him under the professional obligation of rendering his services. Moreover,

**Restraint of Warrant Officer**

the government was justified in inviting the Procurator-General to bring such facts to the attention of the warrant officer. It would thereby be fulfilling its duty to watch out for the maintenance of international law by the Dutch State. If this means should fail, and the execution of the judgment should be persisted in, the government could prevent the execution by force, for acts which constituted an infringement of the sovereign rights of a foreign state could not be tolerated by the government within its jurisdiction.

**Force**

4. Was regulation of this issue desirable either in the form of a treaty or that of a law? From what had already been said it followed that such regulation was not necessary. Because the Penal Code provided that the application of certain of its articles was limited by the exceptions recognized in international law, it by no means followed, *a contrario*, that international law had no effect upon the other provisions of Dutch legislation. The lack of definiteness of the rules of international law not incorporated into statutes or treaties in no wise affected their validity, and it had frequently been decided that, with an eye to the requirements of international law, provisions of Dutch law could find no application in specified cases. Nevertheless, in view of the difficulties which had arisen, and from practical considerations, the desirability, even the necessity, for a positive provision was admitted. The Commission preferred regulation by law to regulation by treaty. A treaty with a single power seemed undesirable, for a thing of this kind was not of a *special* nature. It had a general character. Were a separate treaty to be negotiated with one power, such a treaty would have to be concluded with all or with several other powers, and in that case a general convention with different powers would be preferable. For that, it was not a propitious time. Hence, a statutory provision was in order, and that of a simple nature, consisting of an amendment acknowledging the principles recognized in international law. It would be better not to include detailed rules in the provision, for otherwise Dutch law would be determining what were the principles of international law to be respected in the Netherlands, whereas it was the duty of state organs in every country to respect international law as such.

**Regulation by Treaty**

**Regulation by Law**

It was suggested that a new article be inserted after Article 13 of the General Provisions,[33] providing in general terms that the judicial authority of the judge was limited by the exceptions recognized in international law. This bill was to be introduced on the responsibility of the Ministers of Justice and of Foreign Affairs. It should be explained that the provision was retroactive. The Commission did not suggest requiring reciprocity. It considered that superfluous, because, whatever might be said about the practice of nations as to other points where civil and international law might come into conflict, as to the one under discussion the tendency was not toward disregarding the principles of international law. Time enough to demand reciprocity when some state ceased to observe them. *A priori*, the desirability of demanding reciprocal treatment was not certain. It seemed to the Commission to be part of the duty of the Netherlands to respect the principles of international law even in relation to powers which did not do so themselves. The time might come, however, when it would be possible to establish in a general convention with many powers the principles of international law on this point. In anticipation thereof, let the Netherlands follow a clear course by expressing in a legal provision the rule which the Commission was convinced already applied.

**Draft Law**

Following the suggestion of the State Commission for Private International Law, on January 12, 1917, the government introduced a bill inserting between Articles 13 and 14 of the Law of May 15, 1829, containing General Provisions for the Legislation of the Kingdom [34] a new Article, 13a, by which

"the judicial authority of the judge and the executability of judicial decisions and of authentic acts are limited by the exceptions recognized in international law." [35]

This was passed April 26, 1917.[36]

[33] *Wet houdende Algemeene Bepalingen der Wetgeving van het Koninkrijk.*

[34] Staatsblad 1829, No. 28.

[35] Weekblad van het Recht, [1917] 10038, 1:1.

[36] Staatsblad, 1917, No. 303. *Cf.* the wording of the corresponding provision of the German Constitution of 1919, Article 4: *Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile*

**Memorial of Explanation**

In the memorial accompanying the draft,[37] Loudon, Minister of Foreign Affairs, and Ort, Minister of Justice, explained that there were only two cases ordinarily recognized in international law where a foreign state was subject to the jurisdiction of the courts of another state: (1) when it declared that it was willing to submit to such jurisdiction for the settlement of the matter at issue, and (2) when the action concerned real property situated in the country of the judge seized with the process. It went without saying that if a judge rendered a decision in excess of his competence, internationally considered, its execution was not permissible. But even when the judge was within his competence, the execution of the decision was not permitted without restrictions. For example, a judgment could not be executed upon property destined for the public service of the foreign state.[38]

**Criticism of Amendment**

Although there had been much criticism of the "peculiar boldness of summoning a foreign state before a Dutch judge in the matter of a sovereign act committed in another state," there was nearly as much adverse comment on the measure proposed to remedy this situation. The necessity for the act was still questioned by some, while its title, its spelling, the place chosen for its insertion, the choice of words, its scope, its adaptability to the end in view were among the points with which fault was found.

**Necessity**

Heineken argued that if international law was really binding law, it could not be anticipated that a Dutch judge would do other than apply it. But international law was a law which existed only in the minds of scholars and writers, lacking an impartial forum where it could be crystallized into jurisprudence. An act directing the Dutch judge to take account of the provisions of international law was either superfluous or it referred those seeking justice to a judge who did not exist.[39]

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*des deutschen Reichsrechts.* The omission of the qualifying "generally" is commented upon by van Praag, *Volkenrecht, rechtsmacht en executie in burgerlijke zaken,* Weekblad van het Recht, [1917] 10045, 4:1-2.

[37] Weekblad van het Recht, [1917] 10038, 1:1-2.

[38] Weekblad van het Recht, [1917] 10038, 1:1. *Cf.* van Praag, *supra,* p. 118.

[39] *HET Volkenrecht,* Weekblad van het Recht, [1917] 10045, 3:3.

**Title**

The bill purported to be for the "prevention of breaches of international-law duties by the state in matters of civil procedure." [40] It was at once pointed out that the question of the "judicial authority" of the national judge was no "matter of civil procedure." It would have been better had the law referred to "civil suits" and the executability of judicial decisions and of authentic acts. It was contended that its place in the General Provisions would indicate that it had reference to all judicial sentences, whereas only civil decrees were contemplated. Furthermore, it would have been more appropriate to place it in the Code of Civil Procedure with which the warrant officer was himself directly familiar. Did the Minister correctly express what he had in mind by saying that the authority of the judge was limited by the *exceptions* recognized in international law? The limitation was prescribed not by the *exceptions,* but by the *principles* of international law. The analogous provision of the Penal Code did indeed make use of this expression, but in that case reference was made to the "applicability" of certain previous articles defining the scope of the Penal Code. This was a very different thing from saying that the authority was itself limited by the exceptions of international law. The law was considered to be too vague in its terms, in that no instances were named in which the judge was to refrain from exercising jurisdiction. This laid judges and those seeking justice open to possible arbitrary deportment by the Minister who had competence under the law to prohibit the execution of such judgments.[41]

**Location**

**Choice of Words**

**Scope**

**Adaptability of Measure to End in View**

The ability of the provision to provide a complete solution to the existing difficulty was doubted by many.[42] Were it incorporated into the law, the judge would have to apply to international law to determine his competence. But there was no unanimity as to the positive content of international law. For instance a difference of opinion existed over the important question as to whether a state might be subjected to the juris-

[40] *Voorkoming van inbreuk op de volkenrechterlijke verplichtingen van den Staat in zaken van burgerlijke rechtsvordering.*

[41] See article of Denekamp, *Schemerlicht over Volkenrecht,* Weekblad van het Recht, [1917] 10042, 3:3-4:1.

[42] *Cf.* Leader of January 26, 1917, Weekblad van het Recht, [1917] 10041, 1:1-3.

diction of another state as regarded strictly private undertakings, where its sovereignty is not involved. Suppose that in such a case, the Dutch judge assumed his competence to exist, ought a judgment delivered under these circumstances to be capable of execution, or should the executive authority, if it failed to share the feelings of the judge, be able to prevent the execution? The State Commission proceeded from the premise that this power existed. According to its way of thinking, the decision of the judge as to his own authority was not conclusive and when its limits had been overstepped his judicial decree was without force. Even admitting that such a judgment was null and void, the possibility remained that the very question as to whether the limits of his authority had indeed been transgressed might be the issue between the judge and the executive authority. One could admit with the Commission that the efficacy of statutory provisions regarding execution was limited to the sphere within which the judge had authority as a functionary of the state. But if the judge had assumed this authority, then the condition was fulfilled, unless one recognized in the executive authority the right to disregard the judicial pronouncement. Article 55 in conjunction with 57 of the Constitution—*Grondwet voor het Koninkrijk der Nederlanden,*[43] according to which the executive authority was vested in the king, who enjoyed also the supreme direction of foreign relations, was relied upon by those who thought this right was vested in the Government. Others felt that the appeal to the executive authority of the king against decrees of the judiciary was inconsistent with the provisions of Article 165 of the Constitution,[44] according to which the High Court of Justice had surveillance over the orderly course and settlement of judicial processes, as well as the observance of the laws by members of the judiciary, and might annul and set aside their proceedings and decrees, whenever they were con-

[43] That is, Articles 55 and 57 of the text of 1887, which articles became 54 and 56 of the revised text of 1922 incorporating the amendments of 1917 and 1922, Staatsblad 1922, No. 736.

[44] That is, Article 165 of the text of 1887, Staatsblad 1887, No. 212; the same provision appeared as Article 165 in the edition of 1918, not having been altered by the amendments of 1917. With some immaterial changes it appeared as Article 166 in the revision of 1922, Staatsblad 1922, No. 736.

trary to law. Supporters of the latter theory held that, even were it possible to find grounds for admitting that the Government should be conceded the formal right to prevent the execution of decisions in which according to its opinion the Dutch judge had improperly considered himself competent, it could not be denied that such a serious conflict between the executive and judicial authorities should be avoided, for deference to judicial pronouncements was one of the fundamental characteristics of the *"rechts Staat,"* and should not be disparaged except under supreme necessity. When one considered the possibility of such a conflict one must not envisage it as arising from unduly simple circumstances. True, the decision of the Rotterdam Court had thus far found no apologist, but there were cases where there might be serious difference of opinion as to the limitations imposed by international law.

Furthermore, international law was far from crystallized; it was in a state of flux. The sentiment in regard to the exercise of jurisdiction over a foreign state might change. If it was desired to make the proposed statutory provision not a temporary measure only, but the expression of a permanent principle, then account would have to be taken of the fact that a difference was quite possible between a well-considered and defensible pronouncement of a judge and the opinion of the executive authority. In such an instance, to let the latter opinion prevail was a matter for grave consideration—consideration in the interest of the executive authority itself. As it was, the Government bore the whole responsibility toward the foreign state, and was liable to become involved in serious difficulties if its views did not coincide with those of the latter. It was the desire of the country that there should be another authority with competence to enforce its decisions abroad, to which the Government might submit such an issue. Could this be an international judge, so much the better. So long as that was not yet possible, it could only contribute to the development of international law to have judicial questions decided by judicial bodies. Due to the gravity of such cases, these judges should be the highest in the land—*i.e.* the High Court of Justice in full bench.[45]

[45] Leader of January 26, 1917, Weeblad van het Recht, [1917] 10041, 1:1-3.

Such a suggestion was no new one. Article 157 of the 1922 revision of the Constitution [46] contained a statement to the effect that the law regulated the means by which the differences over competence, arising between the administrative and judicial authority, were to be settled. The government had proposed giving effect to this clause by adding that for the decision of such differences the High Court of Justice sitting with full bench should be competent. This supplementary provision had ultimately been rejected, however, and the whole passage had remained abortive. It was urged that such a measure, rejected at that time, would, if adopted then, have the double advantage of substituting a judicial process for an executive decree, and of not infringing upon the constitutional attributes of the highest court of the land.[47]

The above criticisms and suggestions called forth comments from van Praag.[48] He pointed out that there was a difference between issues as to the competence of the judge *vis-à-vis* the administrative authorities, and questions as to the jurisdiction of the judge, *i.e.,* the competence of a Dutch judge *as Dutch.* The difficulties with which one was confronted would be enhanced rather than obviated were the High Court of Justice to decide as a tribunal of conflicts upon the extent of the jurisdiction of the Dutch judge. The principle that a decision rendered *ultra vires* bound neither the Dutch nor the foreign government, held just as much of the decisions of the High Court of Justice sitting as a *court of cassation* as of judgments of inferior courts. On the other hand, were it sitting as a *court of conflicts,* with express jurisdiction to settle the difference between the judicial and executive authorities, the latter would be bound to abide by its conclusions. Suppose that the High Court of Justice in its capacity as a court of conflicts rendered a decision in the spirit of the Italian-Belgian jurisprudence according to which domestic courts had jurisdiction over a foreign state in the case of an act of the state which might have been performed by a private individual, or, that it did not categorically decide this point, but held that there was

[46] Article 156 of the text of 1887 and 150 of the text of 1848.

[47] Levy, *Eene sobere regeling,* Weekblad van het Recht, [1917] 10041, 4:1-2.

[48] *Volkenrecht, rechtsmacht en executie in burgerlijke zaken,* Weekblad van het Recht, [1917] 10045, 4:1-2.

no satisfactory evidence of the existence of a rule of international law covering this issue, with the result that the provisions of the proposed new article could not be appealed to. In such a case, the executive authority even though it felt entirely differently on the subject would be bound to bow before this pronouncement of the High Court of Justice since the purpose of investing the latter with competence as a court of conflicts was to settle such differences of opinion. For the *foreign* government, however, even this decision would have no binding force, with the result that serious difficulties might well ensue.[49] Only the decision of an international court could resolve a conflict of international import. However desirable it might be to keep the solution of differences within the sphere of one's own jurisdiction, one must become familiar with the idea that in international matters the national judge could not always have the last word.

It was true that the executive authority and not the court might be wrong in its view in case of a conflict of opinion, but considering that the Constitution placed the supreme authority in the conduct of foreign relations and the executive power in the same hands it seemed pertinent to suggest that the latter power should be the one to take care that the good understanding with foreign powers should not be disturbed by Dutch state organs themselves, through acts which the executive authority considered to be contrary to international law.[50]

**Further Judicial Proceedings**

For some three months the Dutch government had been conducting informal negotiations with de Booij, hoping to secure a personal guarantee that this judgment creditor would not attempt to use the authority he held from the court to execute his judgment. On January 9 or 10, 1917, this pourparler seems to have been broken off. The government was then under the necessity of resorting to more technical means of preventing the seizure of foreign state property which would inevitably involve it in serious international difficulties. The most effective procedural remedy was that of *derden verzet,* an action corresponding to the French *tièrce opposition,* open

[49] *Cf.* opinions of certain members in response to Government Canvass, Weekblad van het Recht, [1917] 10058, 1:1, 2:1.

[50] See rejoinder by Editors, Weekblad van het Recht, [1917] 10045, 4:2, and Levy, *Volkenrecht, ibid.,* 10047, 4:2.

to a third party whose rights have been prejudiced by a judgment previously rendered. It is brought in the court that rendered the judgment complained of, by joining as defendants all parties to the previous suit. Whereas this was an efficacious method of obtaining its ultimate aim, the government dared not wait the outcome of such a suit. So it had recourse at the same time to another process provided by the Code of Civil Procedure, *kort geding*.[51] This is a summary process available to a plaintiff desiring the settlement of some point subsidiary to the main issue and without prejudice to it, when haste is essential. Application is made to the president of the arrondissements-rechtbank who sets a time in the immediate future for hearing the suit. His decision, barring the right of appeal, has the force of law from the moment of its pronouncement, without registration or other formality.

**Kort geding**

On January 10th the Dutch state obtained oral permission from the president of the Arrondissements-rechtbank at Rotterdam to prosecute an action in summary process before him with the object of obtaining an injunction restraining de Booij from proceeding with the execution of the judgment he had obtained against the German Reich on September 25, 1916, until it should have had an opportunity to "oppose" the decision in that case. On January 13th the writ in *derden verzet* was issued and on the same day the suit in *kort geding* was heard.[52] The German Reich had been joined as a party defendant as a mere matter of form and it made no appearance. The judge declared the action of the plaintiff would not lie against it. Against de Booij, however, the desired injunction was granted, it being held that irretrievable damage might result from an act of execution prior to the definitive determination of the issue by the proceedings in "opposition" then being instituted.

**Appeal March 23, 1917**

On March 23, 1917, de Booij appealed, basing his action on the failure of the German Reich to appear.[53] In refusing to

[51] Wetboek van Burgerlijke Regsvordering, Articles 289-297.

[52] De Staat der Nederlanden *v.* (1) B. A. de Booij, (2) het Duitsche Rijk, Arrondissements-rechtbank, Rotterdam, January 13, 1917, Weekblad van het Recht, [1917] 10038, 3:2.

[53] B. A. de Booij *v.* (1) den Staat der Nederlanden, (2) het Duitsche Rijk, Gerechtshof, The Hague, March 23, 1917, Weekblad van het Recht, [1917] 10170, 2:2.

grant the appellant's plea that the German Reich be condemned by default, the Court of Appeal at The Hague said that the application of the principle of default, as connoting the inexcusable neglect of a party served with due notice to appear before the court, could be applied only upon the assumption that Germany was subject to the jurisdiction of the Dutch State. The present case arose out of acts of one of the public organs of the German Empire, perpetrated in the exercise of its sovereignty outside Holland. Such acts were not subject to review by Dutch courts, hence the German Reich was not subject to the jurisdiction of the Dutch state, so that its failure to appear could not be regarded as evasion making possible the application of the principle of default. The appellant was ordered to proceed against the other appellee.

**"Derden Verzet" April 19, 1920**

Article 13a of the General Provisions, proposed on January 12, had become effective April 26, 1917,[54] but it was not until April 19, 1920 that the *derden verzet* was heard in the first instance.[55] The court held that a sovereign state could not be subjected to the jurisdiction of another state against its will; that states were bound to refrain from all acts that presupposed the exercise of such jurisdiction; that this duty involved the right not to be hampered in its fulfillment, and that if the judicial organs of the state handed down a decision that was incompatible with this duty, rights of the state were thereby prejudiced and the state was justified in instituting *derden verzet*. The decision rendered against the German government in default on September 25, 1916 was, therefore, declared null and void. As a provisional supplementary remedy its further execution was suspended until the judgment then being delivered should become final.

**Appeal December 22, 1922**

On December 22, 1922, de Booij made an unsuccessful attempt to have this decree set aside. He appealed to the Court of Appeal at The Hague.[56] It was again held that the generally

[54] Staatsblad 1917, No. 303.

[55] De Staat der Nederlanden *v.* (1) het Duitsche Rijk, (2) B. A. de Booij, Arrondissements-rechtbank, Rotterdam, April 19, 1920, Weekblad van het Recht, [1920] 10638, 2:1; Nederlandsche Jurisprudentie, 1921, p. 853.

[56] B. A. de Booij *v.* (1) den Staat der Nederlanden, (2) het Duitsche Rijk, Gerechtshof, The Hague, December 22, 1922, Weekblad van het Recht, [1923] 11050, 2:1.

recognized rules of international law did not permit national judges to take cognizance of a claim against a foreign state for compensation for damages caused by acts of war, when the foreign state gave no intimation of recognizing the competence of the judge. The decision of September 25, 1916 was contrary to this rule of international law. Therefore, it was not only an offense against the foreign state which was condemned to pay damages, but it was prejudicial to the interest the Dutch state had that friendly relations be maintained with this foreign state. The remedy of *derden verzet* was accorded by Article 376 of the Code of Civil Procedure to third parties whose rights were prejudiced by a decision rendered between two other parties by a civil judge. Although the rights primarily envisaged by this provision might be those recognized and protected by the civil law, no such limitation was specified, and there was no reason why the remedy should be denied to one whose rights were founded in a different system of law. The court therefore affirmed the decision of the court below.

**Cassation March 21, 1924**

De Booij then took the case to the Court of Cassation.[57] The Court agreed with the judge below that, according to an unwritten rule of international law, a civil judge could not take cognizance of a suit against a foreign state in regard to acts of the latter done *jure imperii*, except when the foreign state voluntarily submitted. From the point of view of international law, the Dutch state owed the foreign state the duty of observing this rule, and hence was bound to maintain it by means of its organs—in this case the judiciary. But with this duty there was no corresponding right of the state in Dutch law to enforce this rule against particular individuals—in this case the appellant de Booij. According to the express words of the Code of Civil Procedure, the remedy of *derden verzet* was open to third parties not when their *interests* but when their *rights* were prejudiced. This article, both from its nature and its history, was to be interpreted strictly. So interpreted, it could not find application to the case in hand. It was true that the meticulous observance of the rules of international law was an interest of first importance to the state, but for

[57] B. A. de Booij *v.* (1) den Staat der Nederlanden, (2) het Duitsche Rijk, Hooge Raad, The Hague, March 21, 1924, Weekblad van het Recht, [1924] 11269, 1:1; Nederlandsche Jurisprudentie, 1924, p. 535.

this interest to be capable of leading to *derden verzet,* it would have to be protected by the law, and thus elevated to a substantive right, which, however, was not the case. The circumstance that international law consisted in part of rules which dealt with the friendly relations of nations, could not suffice to transform interests of the state into rights of the state. The appeal succeeded, and the decisions of April 19, 1920 and December 22, 1922 were annulled.

Thus after seven and a half years of contention the highest court in the land held that the executive authority could count on no judicial aid in the performance of its international duty of preventing the execution of an *ultra vires* judgment. As the *derden verzet* failed of its purpose, the temporary injunction secured by summary proceedings against the execution of the original judgment was no longer available to the Dutch State.[58] The new legislative provision, however, specifically covered this situation and seems to have been effective in preventing further attempts at seizing or garnisheeing property of the German Reich. At all events, the de Booij case gave place to a series of decisions involving Article 13 a of the *Algemeene Bepalingen.*

[58] See the prognostication of the usefulness of the *derden verzet* made in 1917 by W. van Rossem, *Volkenrecht en nationaalrecht.* Weekblad van het Recht, [1917], 10033, 3:3.

## CHAPTER III

### PRACTICE UNDER ARTICLE 13 A "ALGEMEENE BEPALINGEN"

DURING the continuance of the de Booij case, two other suits were brought against the German government. The first was in the Arrondissements-rechtbank at Maastricht, and was decided on November 23, 1916, just a month after the much talked-of decision of the neighboring Rotterdam court.[1] A Dutch subject, the neutral owner of sugar beets taken over by German authorities in Belgium in January, 1915, was dissatisfied with the award made him by the *"Reichsentschädigungskommission"* and desired the court to establish the true amount of damages to which he was entitled. The court held that as the German Reich did not even make an appearance it could not be held to have voluntarily submitted, nor were any of the exceptional circumstances present, which would prevent the application of the international-law rule that a state was not subject to the jurisdiction of a foreign judge. Hence the court had no choice but to declare itself incompetent, whether it followed the prevailing doctrine that the immunity of foreign states had a general application, or that of some authorities and of the courts of certain countries, according to which this immunity extended only to public acts of the State. For the act complained of was a public act, perpetrated in Belgium.

**Act of Requisition**

The second suit by a Dutch subject against the German government to be decided during the progress of the de Booij case, came up while the amendment to the *Algemeene Bepalingen* was pending, on March 1, 1917.[2] The plaintiff brought

**Defaulting Foreign State**

[1] De N. V. Limburgsch Landbouwsyndicaat *v.* het Duitsche Rijk, Arrondissements-rechtbank, Maastricht, November 23, 1916, Weekblad van het Recht, [1917] 10035, 8:1; Nederlandsche Jurisprudentie, 1917, p. 12.

[2] J. Crooy & Co. *v.* (1) de gemeente Lyck, (2) den Staat het Duitsche Rijk, Arrondissements-rechtbank, The Hague, March 1, 1917, Nederlandsche Jurisprudentie, 1917, p. 389.

suit against the German state and against the Prussian municipality of Lyck as responsible for an alleged breach of contract on the part of the *Kriegswirtschaftsamt* at Lyck. Neither defendant appeared, and it was sought to have a decision rendered against them in default. This the court refused to do so far as the German Reich was concerned. It explained that rendering a decision in default did not merely establish the non-appearance of a defendant, but served to bring into play the legal consequences which the law attached to non-appearance. Hence the question whether these two defendants could be defaulted depended upon whether they were subject to the jurisdiction of the Dutch judge. If they were not, the judge would have to refrain from making any decree concerning them, including one of default. According to the generally recognized rule of international law, one state had no jurisdiction over another. Many authorities admitted the existence of exceptions to this rule, based upon the character of the act giving rise to the suit, but they differed among themselves as to the extent of these exceptions. The court was of opinion that in cases like the one under consideration, involving a payment to be made by a sovereign state, there was no exception to the general rule. For independently of the legal ground upon which the demand for payment might be based, a decree directing it was addressed to the state in all its capacities, including that of a sovereign. This reasoning did not apply to the suit against the town of Lyck, and hence, although the German state could not be declared to be in default, Lyck was.

**Construction of Article 13a A. B.**

**Cautio Judicatum Solvi**

The first occasion where the new Article 13 a of the *Algemeene Bepalingen* was invoked in a suit involving a foreign state appears to have been on February 18, 1921.[3] Here *cautio judicatum solvi* was asked of the Turkish government plaintiff before the Arrondissements-rechtbank at Amsterdam. It was held that the word "foreigners" from whom the giving of such security was required by Article 152 of the Code of Civil Procedure, could not be restricted to "subjects" of foreign

[3] Het Ottomaansche Keizerrijk *v.* Roselins [Roselius] en Co., Arrondissements-rechtbank, Amsterdam, February 18, 1921, Weekblad van het Recht, [1921] 10707, 4:2; Nederlandsche Jurisprudentie, 1921, p. 851.

states, nor was there any exception recognized by international law by which security could not be demanded of foreign states, themselves plaintiffs before the courts, which would prevent the application of the above provision to them. Furthermore, evidence of such an exception was not to be found in the Hague Convention of July 17, 1905 dealing with civil procedure, to which, incidentally, Turkey was not a party. Article 17 of this convention provided for the exemption of subjects *("onderdanen")* of the contracting states from the requirement of *cautio judicatum solvi.* The absence of any mention that the exemption applied to the states themselves as well as to their citizens should be interpreted as meaning that the contracting parties considered it self-evident that it was to apply to them, and that it would be supererogatory to set it out expressly in an article. [The implication was that states not a party to the Treaty would be liable to the payment of security.] Thus by applying to a state a domestic provision regarding foreigners, by interpreting an international instrument for the mutual benefit of citizens of different countries as referring also to states the court reached the conclusion that Turkey should give security for costs and damages.

**Garnishment**

On April 29, 1921 the court of appeal at Amsterdam construed the new legislative provision in relation to the garnisheeing of property of a state.[4] A Swedish mining company had attached by trustee process in an Amsterdam bank funds emanating from the sale of a floating dock which had been the property of the Austro-Hungarian monarchy. The object of the attachment was to obtain security for the payment of damages arising from injury to its property in Serbia at the hands of the Austro-Hungarian military authorities during the World War. The latter, represented by the *Militär Liquidirungsamt,* secured from the president of the Arrondissements-rechtbank at Amsterdam an order vacating the attachment. From this order the Swedish company appealed. The court sustained the ruling of the president of the court below. The injunction had been granted on the supposition that in

[4] N. V. Bergverksaktiebolaget Kosmai *v.* het Militär Liquidirungsamt, Gerechtshof, Amsterdam, April 29, 1921, Weekblad van het Recht, [1921] 10750, 2:1; Nederlandsche Jurisprudentie, 1922, p. 620.

view of the origin of the claim and having in mind the history of Article 13 a *Algemeene Bepalingen* the court would not consider itself competent to take cognizance of the case on its merits. This doubt entailed the duty of vacating the attachment to prevent needless loss to both parties. The appellant argued that a case like that under consideration was not envisaged by Article 13 a *Algemeene Bepalingen* which could find application only when a sovereign state was involved, not a state no longer in existence, but in process of liquidation. The court pointed out that in the petition for the attachment, appellant described the moneys as resulting from the sale of property belonging to the former Austro-Hungarian monarchy. The dissolution of the latter did not result in this property becoming ownerless, for the Monarchy had been composed of two states, and its property was really owned by them, although undivided. These two states had continued in existence, while new states had been formed from portions of their territory. Hence property of the old Dual Monarchy had become property of these states. Hence the moneys whose attachment was desired were owned or claimed by sovereign states. The judgment of the lower court, vacating the attachment, was affirmed.

On June 9, 1922 an action was brought before the Arrondissements-rechtbank at Amsterdam involving the same parties.[5] Here the claim was for damages received as a result of belligerent operations of the military authorities of the former Austro-Hungarian monarchy, represented by the defendant. The court held that the latter was a public organ of the sovereign state of Austria, which had declined to submit to the jurisdiction of the court. Hence it was not competent to entertain the suit.

On July 14, 1921 the President of the Arrondissements-rechtbank at Amsterdam suggested that the immunity recognized by international law and hence of concern to the courts referred only to acts of the state undertaken *jure imperii.* As the case was decided on another issue, this was mere *dicta* and is of interest only as the unique expression of this theory by

[5] Weekblad van het Recht, [1922] 10928, 3:2.

a Dutch judge from the bench.[6] The Union of South Africa brought suit for the removal of the attachment by trustee process of a cargo of cement upon which the defendant claimed a lien for salvage. It contended that the attachment was contrary to the express provisions of Article 13 a of the *Algemeene Bepalingen.* The court thought otherwise. It pointed out that the article itself laid down no rule, but merely referred to international law. Whereas there could be said to be an established rule that a foreign state could not be subjected to the jurisdiction of another state when it had acted in its sovereign capacity, there was a difference of opinion as to whether a state enjoyed this immunity with reference to undertakings of a strictly private nature, having nothing to do with its rights as sovereign. The court affiliated itself with those that held that when the relation of the parties was that of private individuals, even a state was subject to the jurisdiction of the judge. However, the court considered that the Union of South Africa was not a sovereign state but a colony to which a certain measure of independence had been accorded through self-government. Its authority was merely derivative. Lacking the right to appoint diplomatic representatives, declare war, conclude peace, and other rights of a sovereign state, it could not be considered as such. For these reasons the plaintiff's suit was dismissed with costs.[7]

**Express Submission**

In a suit against the United States in its character of ship owner, its voluntary and express submission to the jurisdiction of the Dutch judge for the issue involved, robbed the case of any specific significance.[8] The facts were as follows: A Dutch cotton-spinning mill brought suit against the United States

[6] De Unie van Zuid-Africa *v.* Herman Grote, Arrondissements-rechtbank, Amsterdam, *Kort Geding,* July 14, 1921; Nederlandsche Jurisprudentie, 1921, p. 849.

[7] Van Praag, apparently assimilating the Union of South Africa with British "dominions," thinks that immunity can no longer be refused them on the ground of their lack of sovereignty. See his note on *Rechtspraak en voornaamste Litteratuur betreffende de Wet houdende Algemeene Bepalingen,* p. 237, note i, Léon's Rechtspraak, Pt. II, § 2.

[8] De N. V. Spinnerij *"Roombeek" v.* de Vereenigde Staten van Noord-Amerika, Arrondissements-rechtbank, Rotterdam, March 15, 1922, Weekblad van het Recht, [1922] 10884, 3:1.

for damages resulting from the late delivery of certain parcels of a shipment of cotton. The court held the liability was to be decided according to the law of the United States, and after a discussion of the effects of the Harter Act with reference to the limitation of liability expressed in the bill of lading, condemned the United States to damages and costs.[9]

**Counter-claims**

Application of the general principle of immunity to counterclaims was made by the district court at Rotterdam, November 24, 1922.[10] The Belgian state brought suit against a Dutch shipping company to recover the proceeds of the sale of a cargo of wheat of which it was owner. It appears that this wheat had been requisitioned by the government and confided to the defendant for shipment to the Belgian authorities at Ostend early in the War. Ostend having fallen under German occupation, this delivery became impossible, and the grain had been sold to a dealer in Rotterdam. It was to the proceeds of this sale that claim was made by the plaintiff.

The Dutch ship owner set up a counterclaim: The Belgian government owed it an amount in excess of the original claim for hire from it of requisitioned vessels. For this counterclaim, Belgium refused to recognize the jurisdiction of the Dutch judge. In this contention the court supported it. It pointed out that a state, at liberty to claim immunity, did not lose this prerogative by recognizing the jurisdiction of a foreign state in another suit, and that the situation was not changed by the fact that the two suits, instead of being brought separately, were combined as claim and counterclaim. For, according to the Dutch Code of Civil Procedure, a counterclaim never lost its character as an independent suit. The situation was particularly clear in this case, for the Belgian state was suing on grounds of a purely private transaction, whereas it was being sued in regard to the exercise of its sovereign rights. The court declared itself incompetent to consider the counterclaim.

**Tort Action**

On July 11, 1923, the court at Dordrecht had occasion to

[9] See comment by van der Flier, *Procédure contre des États étrangers,* Grotius Annuaire, 1923, p. 87, at p. 89.

[10] De Belgische Staat *v.* E. A. G. de Badts, Arrondissements-rechtbank, Rotterdam, November 24, 1922, Weekblad van het Recht, [1923] 10978, 2:1.

apply the principle of immunity in an action in tort, brought by a Dutch subject against the Belgian State and the captain of the tug *"Angleur,"* owned and operated by it.[11] The plaintiff's vessel, the *"Hendrika II"* was at anchor in the Meuse at Dordrecht, when the tug *"Angleur,"* employed in the public towing service of the Belgian state, hit it with one of its tows. The suit was brought to recover for damages suffered in this collision. Belgium expressly refused to submit to the jurisdiction of the Dutch courts, claiming for itself and the other defendants protection under Article 13 a of the *Algemeene Bepalingen.*

The court held that no situation was admitted in international law in which one sovereign state was subject to the jurisdiction of another in regard to acts performed in the exercise of its political functions in the territory of the second state, unless it voluntarily submitted. This principle, originally only admitted in regard to acts undertaken by the state *jure imperii,* due to the continual enlargement of the circle of concerns of the state, had gradually found application in instances where the state, in providing for some public interest, had placed itself in situations which, from their nature, belonged to the domain of private law. This principle, thus extended, not only had found support in numerous judicial decisions in foreign countries, but had many partisans among recent writers. In view of this recognition it should be considered as forming part of the positive law of nations, which should be taken into consideration in the application of domestic law. Hence the court declared itself without competence as regarded the Belgian State.[12]

As to the other defendant, the captain of the tug, the situation was different. Although under the circumstances he might be considered a functionary, he was in no sense a representative of the state, and a foreigner could be accorded the immunity of a state only if he actually represented it. Hence in his action against the captain, the plaintiff was allowed to

[11] F. Advokaat *v.* (1) Schuddinck, (2) den Belgischen Staat, Arrondissements-rechtbank, Dordrecht, July 11, 1923, Weekblad van het Recht, [1923] 11088, 5:2.

[12] See van Slooten, *Immunité de Navires d'État,* Bulletin de l'Institut Intermediaire International, X (1924), pp. 2-10.

proceed to the introduction of further evidence to establish his case.

**Foreign Municipality**

On December 11, 1923, the court of first instance at The Hague refused to accord the benefits of Article 13 a *Algemeene Bepalingen* to the German city of Cologne.[13] In a suit brought against it, Cologne failed to file an appearance, and the plaintiff claimed a decision by default. This the court granted. The immunity accorded by international law to sovereign states had no application to municipalities, which in this regard were assimilated to private individuals.

**State-owned Vessels**

The attitude in Holland toward foreign state-owned vessels may be seen from the report of the Dutch Association of Maritime Law to the *Comité Maritime International* at its 1922 meeting.[14] The report stated that the most competent scholars of international law in Holland were in accord that there existed an *indirect* immunity which was enjoyed by foreign state-owned vessels. It would be impossible for such vessels to be seized or arrested except with the authorization of the court, or in execution of a judgment rendered by it. The tribunal could not give this authorization or render this judgment if it thereby arrogated to itself jurisdiction over a foreign sovereign state. For a foreign sovereign state could not be subjected to the jurisdiction of a Dutch tribunal except voluntarily. The exceptions to this rule had no application to a foreign state in the character of ship-owner. This immunity was not derived from the application of the rule according to which a state could not be subjected to the jurisdiction of its own tribunals against its will. The Dutch state could be cited before its ordinary courts. Indeed as to suits involving collision, salvage, towage and merchandise-transportation claims, its position was that of an ordinary juristic person. The distinction attempted by Belgian and Italian courts, which resulted in the usual immunity not being granted in suits arising from an act committed by the state in the exercise of *jus gestionis*, had been rejected by the majority of the authorities in the Netherlands.

[13] De N. V. Hanzebank *v.* de Stad Köln, Arrondissements-rechtbank, The Hague, December 11, 1923, Weekblad van het Recht, [1924] 11238, 6:3.

[14] *Comité Maritime International*, Bulletin No. 57 (1922), pp. 96-105.

Besides this indirect immunity which the maritime property of the state enjoyed, there was a direct immunity which could be brought to bear in cases where—through voluntary submission, or, as an exception to the general rule—the courts were competent to entertain a suit against a foreign state, or even where they had authorized an attachment. This direct immunity was based on the principle that no impediment might be placed in the way of a government carrying out a task which it had undertaken; hence the use of property appropriated to this end could not be obstructed. It was generally considered that it was for the foreign state itself to say whether a given act should be considered as performed for the needs of the state *(pour les besoins de l'état)*. If a state so testified such testimony constituted a conclusive presumption of the fact. Hence, inasmuch as the spheres of activity of the state were circumscribed differently by different states, and there was no general principle by which these legitimate activities could be limited, as a practcal matter, there was no ground upon which to deny immunity to merchant vessels of the state, or even those belonging to private individuals chartered to the state, if the claim to immunity was made by the latter.

**Brussels Convention**

When the Brussels Convention of April 10, 1926 largely restricted this immunity as to government-owned merchant vessels,[15] Dutch legislation was brought into practical conformity therewith. Formal ratification of the Convention, however, awaits similar action by other leading maritime powers.

The whole course of Dutch practice indicates that whatever legal writers or even the courts may have contended, the government itself has stood firm in its position that international law forbids the subjection of foreign states to the jurisdiction of national courts, and has protected their property from seizure. A multilateral convention, ratified by the chief maritime powers of the world would be adequate to change international law on this point, but the attitude of the Netherlands remains very conservative.

[15] See Appendix.

# THE POSITION OF FOREIGN STATES BEFORE FRENCH COURTS

## CHAPTER I

### JURISDICTION OVER FOREIGN STATES AND SOVEREIGNS

**Attitude of Courts to French Government**

In France the principle of the immunity of foreign states from the jurisdiction of domestic courts, and the freedom of their property from seizure has received broad application. As regards the French government, the system of administrative courts, notably the *Conseil d'État,* affords a happy method of reconciling a theoretical independence of judicial control with a practical means of seeing justice done, even when the state is the offender. This system, however, is not applied to foreign states, one reason being that such states have no similar jurisdiction to offer in return.

**Competence vis-à-vis Foreign State**

The efforts that have been made to bring suits against foreign governments, in derogation of the international-law principle of independence and equality, have for the most part been founded upon Article 14 of the *Code civil,* which permits suits in French courts against foreigners, even non-residents, for the enforcement of obligations contracted at home or abroad with a Frenchman. This provision was extended by the lower tribunals so as to bring foreign states within the judicial competence of the French courts, although it was recognized that even as applied to individual foreigners it constituted an exception to the general rules for determining the limits of a state's jurisdiction. On January 22, 1849, the Court of Cassation definitely settled this point, holding that the article in question was not applicable to a foreign *state,* which could not be subjected against its will to the jurisdiction of French courts.

**Decisions of Lower Courts Prior to 1849**

Before this decision by the Court of Cassation, several judgments had been rendered to the same effect by inferior

tribunals. Significant is that of the Civil Tribunal of Havre handed down May 25, 1827, in a suit brought against the Government of Haiti.[1] One Blanchet, a French citizen, had a claim in connection with some work he had done on the draft Constitution of the Republic of Haiti. In denying him the right to satisfy his claim by seizing property of Haiti in France, the court pointed out that the right to exercise jurisdiction, one of the attributes of sovereignty, was normally limited to one's own nationals. Nevertheless, a foreigner might be prosecuted for criminal acts committed in the country of the court, or civilly in regard to contracts made with a French subject in France. For non-resident foreigners the rule was that they were not to be summoned before domestic courts in connection with contracts made abroad, even with a national of the country of the court. To this general principle, Article 14 of the French Civil Code formed an exception. It was inserted to afford an additional protection to French citizens. When the sovereign was concerned with one of his own citizens, in a matter not involving his sovereign character, it was conformable to that love of justice which Vattel said ought particularly to inspire a sovereign, that the litigation be resolved by the tribunals of the state. But this was entirely different from the case where a foreign sovereign was concerned. One sovereign could not be subjected to the jurisdiction of another, for jurisdiction was an emanation of authority. Under such circumstances the principle of the independence of nations required that equal deal with equal by diplomatic means. It was useless to attempt to apply Article 14 of the Civil Code to cover such a case by analogy, for the article in question, being in derogation of the common-law principle, must be strictly interpreted. There was internal evidence, too, that the article was intended to apply only to individual foreigners. It would constitute an affront to the dignity and independence of a foreign sovereign to compel him to submit to the jurisdiction of a French court. Hence, in the present instance, if the plaintiff had a claim against Haiti, he had no recourse to the courts of France; he must either ask the intervention of the King, or submit to the

**Article 14 of Civil Code not Applicable to Foreign State**

[1] Dalloz, 1849-1-6, note; Sirey, 1849-1-83, note.

jurisdiction of the courts of Haiti. Such being the case, it was not material to enquire whether the property whose attachment was demanded was or was not liable to seizure.

In a similar decision of May 2, 1828,[2] the Tribunal of the Seine adverted to further evidence that the scope of Article 14 was limited to engagements contracted by individuals. It was implicitly recognized in the preliminary discussions before the *Conseil d'État,* where it was admitted that the provision in question did not apply to foreign ambassadors, resident in France. If, the court reasoned, ambassadors were not subject to the jurisdiction of the country wherein they resided, so much the more must the governments from whom these representatives derived their authority be immune.[3]

**Foreign State not Liable to Suit on a Contract**

On April 16, 1847, the Civil Tribunal of the Seine rendered a decision in the case of Solon *v.* The Egyptian Government.[4] Appointed by the Pasha of Egypt to found a school of public administration in Egypt, the plaintiff claimed that the contract had been broken, and brought suit against the Egyptian Government for damages. This claim had been allowed by the lower court. On appeal by the viceroy, the Tribunal held that there was no local jurisdiction over foreign governments except when the action involved real property possessed by them in France. To assume jurisdiction in the present case would involve an examination of an administrative and governmental act of a foreign government, for which the French court was without competence.

**Spanish Government v. Cassaux**

Finally, on January 22, 1849, the Court of Cassation affirmed these decisions in principle, and gave its interpretation of Article 14 of the *Code civil:* it could not be relied upon to extend the jurisdiction of French courts over the public acts of a foreign government.[5] The case arose out of a contract for the supply of shoes by certain Bayonne merchants to the Spanish Government. The payment of a draft drawn

[2] Dalloz, 1849-1-6, note; Sirey, 1849-1-85, note; *Gazette des Tribunaux,* May 3, 1828.

[3] See also judgment of Tribunal of the Seine, July 11, 1840; Sirey, 1849-1-86, note.

[4] Dalloz, 1849-1-7, note; *Journal du Palais,* 1849-1-172, note; *Gazette des Tribunaux,* April 17, 1847.

[5] Dalloz, 1849-1-5; *Journal du Palais,* 1849-1-166; Sirey, 1849-1-81.

by the Minister of the Military Treasury of Spain in favor of the plaintiff was refused. Hereupon the plaintiff garnisheed all debts of a certain merchant at Bayonne admitted to be owing to the Spanish Government. On March 7, 1844, the Minister of Finance, representing Spain, was cited before the Civil Tribunal of Bayonne. In a judgment of July 30, 1844, the attachment was declared valid, and the garnishee was ordered to deliver to the plaintiff funds owing to Spain up to a certain specified amount. This decision was affirmed May 6, 1845, by the Court of Appeal of Pau, on the ground that there could be no doubt of the genuineness of the debt, that the sovereignty of Spain was not involved, and that since the execution was to take place in France there could be no embarrassment on that score.[6]

**Garnishment of Foreign Government Property Held Valid**

The case was taken before the Court of Cassation on the plea of violation of the principle of the independence of sovereign states and the false application of Article 14 of the *Code civil*. The decision appealed from was said to be summed up in the statement that the sovereignty and independence of Spain were not involved in the issue. Was that true? Did not the case rather turn on this very point, and was not this great principle openly violated? If a state were subject to the jurisdiction of another state, was it independent, as the law of nations stipulated? Jurisdiction was one of the principal attributes of sovereignty—*jurisdictio inhaeret, cohaeret, adhaeret imperio*. The appellants further argued that Article 14 of the Civil Code was the only text of French law by which foreigners were made subject to French jurisdiction, and that this article did not apply to foreign states. How could France, in codifying its own law, have arrogated to itself a right of jurisdiction over its own peers, who owed it no obedience? From the legislative discussion of this article, it was obvious that no such intention existed. The original draft of the Code contained an article to the effect that foreigners, clothed with diplomatic character in the quality of ambassadors, ministers, or whatever the denomination might be, were not subjected to the civil laws of the nation within which they resided in this

**Argument of Appellants**

[6] Dalloz, 1849-1-7; Sirey, 1849-1-87.

character. They could not be summoned before French tribunals either in civil or criminal matters. This provision was thrown out by the *Conseil d'État* as foreign to civil law.[7] Later, Monsieur Portalis, speaking on the amended bill, said, "We do not mention ambassadors; what concerns them is regulated by international law." If, instead of ambassadors or ministers, the state itself were involved, there was all the more reason why the law of nations should alone be applicable. The extraterritoriality of ambassadors being derived from their representative character, it would be absurd not to grant it to the state itself. Moreover, a state was sovereign on condition that it respect the sovereignty of other states. A foreign state was not subject to the civil laws of France except in regard to real property which it might possess in France. This single exception to the general rule was recognized both by Blackstone and by Article 3 of the *Code civil.*

If Spain could be cited before French tribunals on any other score, it would take its revenge by not executing the judgment. And what was a judgment without means of execution? It had been contended that in the present case, this difficulty would not be encountered, since the execution could be made in France, but it was the principle of execution which had to be considered. The tribunals had begun by declaring Spain a debtor, and condemning it to an attachment, without even knowing whether the property to be attached sufficed to cover the debt, or whether the balance would have to be obtained by the levy of an execution upon property in Spain. The real point was whether a French tribunal could decide on a question regulated by foreign administrative or constitutional law, such as the payment of a bill of exchange issued by an official of a foreign government. Were this competence admitted, what would become of the independence of a state thus made subject to another? It was an incontestable principle that the property of a foreign state was not subject to seizure.

[7] *Projet de Code Civil presenté par la Commission nominée par le Gouvernement le 24 Thermidor an 8,* page 7 (white), page 13 (green); *Recueil des Discours du Code Civil,* II, 20.

**Decision**

The court held that the reciprocal independence of states was one of the most universally recognized principles of international law; that no government could be subjected against its will to the jurisdiction of a foreign state, since the right of jurisdiction was inherent in its sovereignty. Because

**Article 14 of Civil Code not Applicable**

Article 14 of the Civil Code authorized summoning foreigners before French tribunals under certain circumstances, it by no means followed that foreign *states* were subject to similar jurisdiction as the result of engagements entered into by them with

**Renunciation of Jurisdiction by Act of Contracting**

Frenchmen. Moreover, whenever an individual dealt with a state, by the very fact of entering into a contract, that individual submitted to the laws and to the judicial or administrative jurisdiction of that state. Hence, the matter of verification, liquidation, or seizure of the credits of a government in the hands of nationals or foreigners could only be settled

**Commercial Instrument as Evidence of Title**

according to the law of that state. In the present case, it was of no importance that the evidence of title to the money claimed by the appellee—a bill of exchange—was an instrument of commerce. The form of the evidence did not alter the fact that to obtain payment of a debt contracted by a foreign government with a Frenchman, an attachment had been made in France of funds in the hands of a debtor of that government. Therefore, the rules of international law did not cease to apply. The lower court, in permitting the garnishment, violated the principle of the law of nations which consecrated the independence of states, exceeded its powers, and falsely applied Article 14 of the Civil Code. Hence the Court of Cassation reversed this judgment.

**Criticism**

This decision of the Court of Cassation was violently criticised in many quarters.[8] Demangeat [9] went so far as to say that the statements made by the court were mere assertions, no one of which could resist an attentive examination by an unprejudiced legal mind. Such a study he then proceeded to make. As for the motive of immunity based on reciprocal

[8] *Cf.* Conférence des Avocats de Paris, December 27, 1858, *"Les tribunaux français peuvent-ils valider la saisie-arrêt formée, en France, par un Français, sur des fonds appartenant à un gouvernement étranger?"* (Revue Pratique, VII [1859], pp. 182-186.)

[9] *Revue Pratique,* I (1856), pp. 385-397; note on Foelix's Treatise on Private International Law, fourth edition, I, 419.

independence, Demangeat said this only held of a state acting in its sovereign capacity. Proof of the fact that a foreign state's independence was not necessarily sacrificed by a suit before a French court, he thought to find by reference to certain recognized exceptions to the general rules. The argument that Article 14 of the Napoleonic Code applied only to individuals seemed equally inconclusive, since other provisions of the Code placed in the book on *Persons* and concerning their *Civil Rights* were applied to the French state. The argument that an individual submitted *ipso facto* to the jurisdiction of a foreign state by contracting with it appeared to him beneath comment. Demangeat summarized his disapproval by asking why, since the courts were competent to take cognizance of suits between the French Government and an individual, foreign governments should enjoy a privilege which the French legislator (Napoleon) had been unwilling to accord to the French Government? [10]

Despite the criticism evoked by this decision, subsequent judgments rendered by the courts of France have followed closely in the lines here laid down. When a foreign state is the defendant the courts have not distinguished between its sovereign and civil capacities, but have declared themselves equally incompetent to review the acts of foreign military authorities, or a contract with a trucking concern for the removal of a state exhibit at an international exposition. When foreign sovereigns are concerned, however, the difference between their official and private acts have been taken into consideration, with the result that competence, denied in the one case, has been admitted in the other.

**Suits Against Foreign Sovereigns**

The decision of the Court of Appeal of Paris, rendered on August 23, 1870, is illustrative.[11] A French citizen with a commercial establishment in Russia had suffered alleged illegal arrest at the hands of the Russian police on Russian territory. She brought suit for damages against the French Minister of Foreign Affairs and the Tsar of Russia. The tribunal of first instance had rendered a judgment in default against the Russian Government in the person of the Tsar.

[10] *Cf.* also criticism by Royer in Dalloz, 1867-2-49, note.

[11] Dalloz, 1871-2-9; Sirey, 1871-2-6; *Journal du Palais*, 1871, 73.

**Public Acts**

In reversing this decision the court said that the reciprocal independence of states was consecrated by international law; that each state was sovereign within its borders and there administered justice, one of the attributes of sovereignty, through its courts, which were invested with jurisdiction and the power to enforce their decisions. It followed that one could not cite a foreign sovereign before one's courts, any more than the diplomatic representative of the state. To do so would be a violation of international law. Nor was it contemplated by Article 14 of the Napoleonic Code. This provision referred only to private individuals, not to foreign sovereigns or states. The incompetence of the court was held to be a matter of public policy, which it was the duty of the attorney-general to defend.

The distinction to be drawn, in case of suits brought against foreign sovereigns, between the sovereign acting as the head of the state and in a personal capacity, is well illustrated by two cases decided in the spring of 1872. The first was one brought against the heirs of Emperor Maximilian of Mexico.[12] This was a suit brought to recover the amount of a bill due for the supply of decorations manufactured by the plaintiff for the government of Maximilian, Emperor of Mexico. These decorations were to be bestowed on those upon whom an Order was conferred as a reward for public service. Under these circumstances it was held on appeal that an order for such decorations on the part of the sovereign was a public administrative act, and that French courts were not competent to consider contracts made by a foreign sovereign acting as chief of state in the exercise of *puissance publique*.

**Personal Acts**

This decision is to be contrasted with that in a suit against Isabelle de Bourbon, ex-queen of Spain, for a debt contracted by her in part while she was still reigning and in part after her deposition by revolution.[13] The action was brought by a firm of jewellers in Paris for payment for several gems ordered at various times by the defendant. The court held that to

[12] Court of Appeal, Paris, March 15, 1872, Dalloz, 1873-2-24; Sirey, 1872-2-68; *Journal du Palais*, 1872, 350.

[13] Court of Appeal, Paris, June 3, 1872, Dalloz, 1872-2-124; Sirey, 1872-2-293; *Journal du Palais*, 1872, 1185.

justify her exception to the competence of the court, the defendant would have to prove that she had purchased the diamonds in her sovereign capacity for the account of the Spanish treasury. That such was not the case was sufficiently evidenced by the facts. The jewels were actually furnished for her personal use and as wedding presents for her daughter. Inasmuch as some of the gems were delivered after the revolution, it would be impossible to maintain that they were items on the civil list of Spain. Finally, the Spanish treasury was known to possess no crown jewels. Hence the contract was concerned only with private interests of the Crown, and as such was regulated not by international law, but by the rules of French civil law. Applying Article 14 of the Civil Code, the plaintiffs were entitled to have this action heard before a French court, and the court was competent to take cognizance of the case.

A similar case was that of a suit brought against the ex-sultan of Zanzibar for the payment of a bill for medical services. It is not made clear in the report whether the services were rendered at a time when the defendant was still a prince or at a subsequent date. The court, however, in determining its own competence to hear the suit, said that if, despite the generality of the terms of Article 14 of the *Code civil,* the principle of the reciprocal independence of states excluded the possibility of French tribunals assuming jurisdiction in regard to foreign sovereigns, that exception did not include a case like the one in hand, where the sovereign had acted in his own personal interests.[14]

**Jurisdiction over Foreign States**

In regard to foreign states, however, although the courts might base the immunity they granted on grounds of the public character of the act under review, no such fundamental distinction was drawn as in the case of sovereigns. Whether the question involved a governmental activity or a purely civil relationship, the immunity of the state was equally secure. When the Swiss Government was sued in connection with a contract to charter certain vessels for the transportation of

[14] Civil Tribunal of the Seine, July 25, 1916, *Journal du Droit International,* XLIV (1917), p. 1465; *Revue de Droit International Privé,* XV (1919), p. 505.

cocoa in the interests of the Swiss chocolate industry, the tribunal of first instance applied the Belgian doctrine that sovereign states enjoyed immunity from the jurisdiction of foreign courts only so long as they engaged in sovereign acts.[15] It held that in the case before it, the agreement involved was a purely commercial one. As regarded foreign states, it was admitted that the issue was new, in that, prior to the World War, it was not the custom for them to engage in commercial enterprises. On the other hand, it was recognized that the ordinary courts were competent to review all cases arising between individuals and the French state acting as charterer, insurer or transporter by rail. Applying this principle, it was held that the Swiss Government had specifically renounced its immunity in making this charter-party. On appeal[16] this was held not to constitute a commercial venture, but to have been an undertaking in the interests of national provisioning, which the French courts were not competent to review.

**Operations of Swiss Bureau of Transports**

**Participation in International Exposition**

A case in which no distinction was recognized between sovereign and civil acts of the state so far as immunity was concerned was that decided on April 30, 1912, by the Court of Appeal at Paris affirming a decision of the Tribunal of the Seine.[17] The Russian State Railway had exhibited some railway carriages at the Universal Exposition of 1900 in Paris. As they were being sent back, the conveyance containing one of these carriages hit a street lamp, which, in falling, severely injured a French gentleman. He brought suit against the transportation company and against the Russian Railway, obtaining a judgment of 2,000 francs plus a life pension. The transportation company proved to be insolvent, and the Russian Railway refused to pay the damages. The plaintiff thereupon brought suit against the Russian Government.

The court, in denying its competence to entertain the action,

[15] December 26, 1919, *Gazette du Palais*, 1920-2-382; *Revue de Droit International Privé*, XVII (1921), 70.

[16] Court of Appeal, Paris, March 16, 1921, *Revue Internationale du Droit Maritime*, XXXIII (1922), p. 763; *Journal du Droit International*, XLVIII (1921), p. 179.

[17] Dalloz, 1913-2-201, *Revue de Droit International Privé*, XV (1919), p. 493.

said that whereas the fact that a state took official part in an exposition in a foreign country constituted a governmental act, which could never give rise to a civil liability, the same could not be said of agreements made by a state with contractors for undertakings incidental to its exhibits. Such arrangements were no doubt simple acts of public administration, which would render it civilly liable to a national or a foreigner, as responsible for the torts of its agents. Nevertheless, the principles of sovereignty and independence were opposed to the idea of having a state subjected against its will to the judicial authorities of another country. In the case of a state there was no room for the recognition of the distinction commonly made for sovereigns—to wit, that between a public personality which escaped the competence of foreign courts, and a moral personality which was subjected to it. The reason for this was that all the acts of a state could have but one end and aim, which was always a political one. Its unity did not admit of the conception of a dual personality. As the state could, therefore, not be assimilated to an individual, and as Article 14 of the Civil Code upon which reliance was had applied only to such, the court was not competent.

**German Government Agents in Alsace-Lorraine**

An interesting case that arose on the morrow of the Franco-Prussian war, which may not have been devoid of political considerations, was that decided by the Court of Appeal of Nancy on August 31, 1871.[18] By the Treaty of Frankfurt, May 10, 1871 (Art. 2), French subjects domiciled in the ceded provinces of Alsace and Lorraine were to retain their French nationality until October 1, 1872. Previous to the expiration of this time, such a French subject brought suit in the tribunal at Nancy against an agent of the German Government in Alsace-Lorraine in connection with a sale consummated between the two parties in France. An attempt was made to apply Article 14 of the Civil Code, but the court held that it was not competent to consider the matter. The German officials represented the German state, which could not be compelled to appear before a French court without compromising the great principles of sovereignty and mutual inde-

[18] Dalloz, 1871-2-207; Sirey, 1871-2-129; *Journal du Palais*, 1871, 485.

pendence. This doctrine had been consecrated by the law of nations, taught by all publicists, and followed in judicial practice. It was, moreover, implicitly admitted by the *Conseil d'État* in its session of the 6 *Thermidor an* ix to the profit of ambassadors, ministers and their suites. Such an immunity accorded to its envoys appertained *a fortiori* to the state which accredited them and from which their powers were derived. Article 14 could not be extended to such a case, and French courts were incompetent to take cognizance of it.

**Claim for Wages of State Agent**

Similarly, the courts declared themselves incompetent to hear the suit of a French engineer brought against the Bey of Tunis for payment of some 4,500,000 francs, alleged to be due him in connection with work he had been charged to execute for the restoration of the aqueducts of Carthage.[19] A foreign government could not be subjected to the jurisdiction of national courts for the engagements to which it was a party.

**Situation of Cooperating Armies in France**

Certain cases which arose during the World War were of more than usual interest due to the peculiar situation of the allied armies on French soil. Troops from Great Britain, the United States, Belgium, Servia, Poland, Czechoslovakia, Portugal and Russia were operating in France, and, in addition, the seat of the Belgian Government was transferred to France. The right of requisition, essential to the well-being of armies in the field, was early accorded by the French authorities to the allied forces. In some cases, requisition was effected by the French for the benefit of the army in question; in some cases the right was given directly to the foreign army; in others, one foreign army was responsible for making requisitions for another.[20] It was inevitable that the exercise of this right should involve the foreign armies and the inhabitants in disagreements which were theoretically without means of solution, since the rules governing military requisitions in France, which were carefully laid down in the *Loi Relative aux Réquisitions Militaires* of July 3, 1877,[21] provided for suits against the military authorities in the ordinary courts where the

[19] Tribunal of the Seine, May 1, 1867; Dalloz, 1867-2-49, note.
[20] Chalufour, *Statut Juridique des Troupes Alliées*, pp. 4, 5.
[21] *Bulletin des Lois*, No. 346, 1877, II, p. 1.

indemnities proposed were not satisfactory to the inhabitants.[22] Such suits could of course not be brought against foreign armies, as that would be tantamount to suing the foreign state. To obviate this difficulty, definite arrangements were made with Great Britain and the United States, to the effect that where the inhabitants were not satisfied with the indemnity proposed by the military authorities, suit was to be brought against the *French* Government in accordance with the provisions of the law of July 3, 1877.

The first arrangement to be made was with the British authorities. A conference was held in Paris, March 19-20, 1915, which resulted in a draft project to the effect that the French Government should be substituted for the British in litigation arising from requisitions. The former was to proceed in its own name before the courts. If the decision was subject to appeal by the government, the British authorities were to be informed and their conclusion was final as to whether the judgment should be paid or an appeal taken. Copies of all final judgments were to be sent the British authorities, who were to repay the French Government the amounts it had advanced. The French state alone appeared before the courts as defendant.[23]

**British Forces**

On December 18, 1915, an agreement was concluded between the French and British Governments providing for the complete substitution of the French Government for the British in all litigation, not only that resulting from requisitions, but in tort actions involving the responsibility of the British Government. The text is as follows: [24]

Les deux gouvernements français et anglais, ayant voulu régler la procédure à suivre en cas de désaccord sur le montant des indemnités à attribuer à la suite des dommages causés par l'armée anglaise pendant son séjour en France, le projet d'accord suivant a été établi:

1. Dans le cas de réquisitions faites par les autorités militaires britanniques en France ou de torts ou de dommages causés par l'armée britannique à des personnes ou à des biens

[22] Article 26.

[23] *Archives du Service Historique du Ministère de la Guerre,* M. 505, quoted in Chalufour, *Statut Juridique des Troupes Alliées,* p. 19.

[24] *Ibid.*

et qui, s'étant produits dans des circonstances dûment constatées, engagent la responsabilité du gouvernement britannique, si le plaignant, après s'être adressé à la Commission britannique des réclamations, n'est pas satisfait de l'indemnité accordée, on appliquera la procédure suivante:

2. Le plaignant pourra intenter une action devant les tribunaux contre le gouvernement français comme si au lieu de l'armée britannique, il s'agissait de l'armée française.

3. Les autorités militaires britanniques fourniront aux autorités militaires françaises tous renseignements et documents leur permettant de traiter l'affaire.

4. Le gouvernement français traitera l'affaire sous sa propre responsabilité de telle façon qui lui conviendra.

5. Après la guerre, le gouvernement français pourra réclamer au gouvernement britannique les frais causés par les satisfactions accordées à ces réclamations, et toute l'affaire sera arrangée par voie diplomatique.

A ministerial circular of February 15, 1916, stipulated that the tribunal in which the action was to be brought against the French Government should be the appropriate judicial court in the case of requisitions, and the *Conseil d'État* in the case of tort actions. It further provided that the decision of the British authorities as to the existence of their liability was final. It was only where the amount of indemnity due was in dispute that the matter could be litigated before the courts. This latter provision was obviously at variance with the terms of Article 1 of the agreement of December 18, 1915, which referred to injuries to persons or property, which, "having occurred under circumstances duly certified to, involve the liability of the British Government." In other words, it had not been agreed that the existence of the liability was to be determined by British law. The implication was rather that French laws were to provide the criterion for the vesting of responsibility, and, for the determination of this question, French courts, not British military authorities, were competent. Foremost among those to point out the discrepancies between the text of the agreement and that of the circular were the advocates of Boulogne-sur-Mer where many of the suits brought indirectly against the British Government were heard. The result was that

the offending article was revoked by a circular of July 1, 1916.[25]

The amount of actual litigation reported is surprisingly small. A decision of the *Conseil d'État*, of December 1, 1922,[26] illustrates the procedure. A Frenchman, injured by a British army motorcyclist in 1918, brought suit against the French Minister of War. It was established that the plaintiff had been guilty of contributory negligence, and the British Claims Commission had refused to admit any liability. Under the terms of the Circular of February 15, 1916, this refusal would have been conclusive, the existence of the liability being determined in accordance with English law. Under the terms of the agreement of December 18, 1915, however, this refusal to recognize even the principle of liability was subject to review by the courts, in this instance, the *Conseil d'État*. The court decided in conformity with French law that the British Government, being partly to blame, would be liable in a certain sum. Judgment was accordingly rendered against the French Minister of War for that amount. **Decisions**

Another case of a tort action brought against the French Ministry of War, substituted for the British Government, was that decided by the *Conseil d'État* May 16, 1924.[27] A claim for damages for an injury caused by a British army automobile had been referred to the French Minister of War and rejected. The state was condemned by the *Conseil d'État* to pay the damages asked, despite the fact that in a criminal action brought against the driver of the automobile, the *Tribunal correctionel* had awarded damages to the present plaintiff which he had been unable to collect on account of the insolvency of the individual.[28]

[25] Chalufour, *Statut Juridique des Troupes Alliées*, p. 23. See also, Henry, *Requisitions exercées par les armées alliées.* (*Revue du Droit International Privé*, XIV [1918], pp. 44-61.)

[26] Recueil des Arrêts du Conseil d'État, XCII (1922), 896.

[27] *Ibid.*, XCIV (1924), p. 480.

[28] The competence of criminal courts to deal with the civil aspects of a case before them on the criminal issue and so to award damages to the injured party is accorded by article 3 of the *Code d'Instruction Criminelle. Cf.* power of equity courts to award money damages.

**American Forces**

A United States statute of April 18, 1918, entitled "An act to give indemnity for damages caused by American forces abroad," provided that claims of inhabitants of France for damages caused by American military forces should not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occurred.[29] In other words, requisitions by the American Expeditionary Forces in France were subject to the French law of July 3, 1877, with its provision for suit against the requisitioning government. The question of negotiating a convention between the French and American Governments providing that in the litigious cases the French state would appear before French tribunals in place of the American Government, the latter undertaking to refund to France the successive indemnities, was broached by the French Government as early as March, 1918. The United States was not persuaded that such an agreement was necessary. To a subsequent proposal on the part of France for the entry into certain conventions, among others one regarding appeals in the matter of requisition by the American troops in France, the American Government, under date of February 15, 1919, informed the French Government as follows:

> With reference to the convention proposed for the settlement of claims arising out of damage that may be caused by the American troops in France, the authorities of this Government point out that, under the legislation that has been passed by Congress, especially the Act approved April 18, 1918, . . . officers of the Army . . . are authorized to consider, adjust, and pay claims of this class within certain limits, and that until it appears that the favorable results expected of the legislation that has been passed are not realized, the execution of such a convention would be inadvisable.
>
> . . . . . .
>
> In coming to the conclusion that the execution of these proposed conventions is inadvisable and unnecessary, the authorities of this Government point out the well-known principle of international law that a sovereign State may not be sued in the courts of any other sovereign State, but that any claims against such State may be prosecuted before the courts of that State in such manner as it may deem advisable to spec-

[29] United States Statutes at Large, (1917-1919), XL, Pt. 1, p. 532.

ify, and that the proposed agreements would authorize individuals and others to bring suit against this Government in the courts of the French Republic. . . .

**Parker-Ignace Agreement**

It was not until December 1, 1919, that an arrangement—known as the Parker-Ignace agreement—was entered into between the United States and France, whereby France was to substitute itself for America in reference to all unsettled claims and also those concerning which offers of settlement had not been accepted, arising or accruing during the "war period," *i.e.* between the 6th day of April, 1917, and the 31st day of December, 1919. Claims arising under the Act of April 18, 1918, were specifically mentioned.[30] This agreement was frequently referred to by the courts in suits against the French Minister of War in the matter of requisitions by the American forces. In a decision of February 27, 1924,[31] the *Conseil d'État* relied upon it in condemning the French state to indemnify the widow of a man killed by accident by a motorcyclist of the American Army. The suit was brought against the French Minister of War. On May 2, 1924, the *Conseil d'État* dismissed a suit similarly brought on the ground that the liability of the French state was not involved by the wanton killing of a youth in his father's house by a corporal of the American military police. This crime was considered to involve the personal liability of the corporal, both according to French and American legal principles.[32]

**Status of Belgian Government in France**

Not only the presence of the coöperating armies on French soil, but that of the Belgian Government as well, gave rise to unusual legal issues. The seat of the Belgian Government was in France, yet the general rules of immunity from suit were held to apply to it. On April 13, 1915, the Civil Tribunal at Havre [33] held that the members of the Belgian Government in residence in Havre enjoyed extraterritoriality, and in consequence were deemed to retain not only their nationality but the residence which they had had before leaving their own

[30] Final Report of United States Liquidation Commission, War Department, p. 179.

[31] Recueil des Arrêts du Conseil d'État, XCIV (1924), 228.

[32] *Ibid.*, XCIV (1924), 437.

[33] Dalloz, 1915-5-3; *Gazette des Tribunaux,* May 1, 1915.

country, and that no matter how long their absence. The Belgian cabinet officers resident in France, being inviolable, could not be subjected to any act of the judicial authority of France. No writ could be served upon them, unless they voluntarily received the warrant officer. They were subject only to the jurisdiction of their own courts. However, this immunity, which was the same as that enjoyed by Belgian diplomatic representatives in Paris, might be tacitly renounced. It was so renounced when the Minister in question gave the official charged with making the attachment all the necessary information to enable him to serve the writ. If the immunity had thus been waived, the place of residence of the Belgian Government was to be considered at Havre.[34]

The Civil Tribunal at Saint-Malo in a summary judgment of July 4, 1917, declared itself incompetent in a suit brought against the Belgian Government by some French women with whom the latter had contracted for the maintenance of Belgian soldiers at Saint-Malo. They claimed that their property had been damaged by acts of the soldiers.[35]

**Suits Resulting from Foreign Loans**

Participation in the loans of foreign governments or issues guaranteed by them has been the foundation of many suits brought in French courts. When the actions in such cases are brought against agents of the foreign governments, it becomes necessary to determine whether the banks have been acting in their personal capacities or within the scope of the authority delegated them by their principals. In 1867, holders of certain obligations of the Cavour Canal Company brought suit against the Italian Government.[36] They invoked the guarantee made by the Government in reliance upon which they had done business with the company which was now defaulting. The court declared itself incompetent, without adducing further

**Suit v. Foreign Government**

[34] See also the decision of the *Tribunal correctionnel* at Havre, November 15, 1915, to the effect that the French law prohibiting trading with the enemy was violated within French jurisdiction by the act of sending merchandise to a Hungarian in Switzerland from a window in a French post-office reserved to the use of the Belgian mail service, which service was effected by means of Belgian postage stamps. (*Journal du Droit International*, XLIII [1916], 164.)

[35] *Journal du Droit International*, XLVI (1919), 749.

[36] Commercial Tribunal of the Seine, April 11, 1867, Dalloz, 1867-2-49, note.

reasons than the decision of the Court of Cassation in the Spanish-Government case of nearly twenty years before.[37] This unusual application by a French court of the principle of *stare decisis* gave rise to certain adverse comment. It was questioned whether such an unmotivated judgment of a court of first instance, relying solely on "an isolated decision of the supreme court," did not constitute "a renunciation of the power placed by law in its hands." [38]

**Suit v. Agent of Foreign Government**

On April 21, 1886, the Court of Cassation determined a case involving a loan not merely guaranteed, but issued by a foreign government.[39] Suit was brought against several banks that had negotiated a loan for the Republic of Honduras. The bonds had become worthless, and the plaintiffs sued for the purchase price, alleging fraud. The Court of Appeal on February 26, 1880, handed down a judgment to the effect that the basis of the suit was a state loan, emitted in the name and to the account of the Republic of Honduras. The banks, named as agents of the Honduran Government, constituted a committee of surveillance. For acts undertaken in this capacity, they could not be subjected to the jurisdiction of national courts, any more than the government for which they were acting. The court rejected the contention that they had contracted any personal engagements toward the plaintiff. If the prospectus of the loan aimed to deceive, the fraud was a governmental act of an official agent of the Republic of Honduras. For the review of such an act, French courts were not competent. The Court of Cassation affirmed this decision.

Under slightly different circumstances, in connection with two loans emitted by Peru in 1870 and 1872, the courts of France were held to be competent.[40] Here suit was brought by holders of the bonds against Dreyfus Brothers who had floated the loan. The claim was that the bankers were liable on personal engagements entered into with the plaintiffs. The defendants excepted to the jurisdiction of the French courts. The Court of Appeal at Paris decided June 25, 1877, that the

[37] January 22, 1849, Dalloz, 1849-1-5, and *supra*, p. 3.

[38] See note of Royer on decision above, Dalloz, 1867-2-49, note.

[39] Dalloz, 1886-1-393.

[40] Court of Cassation, August 14, 1878, Dalloz, 1879-1-57; Sirey, 1878-1-345; *Journal du Palais*, 1878, 878.

Peruvian Government was not a party to the suit which was against Dreyfus Brothers in their personal capacity, and that the mere fact that condemnation of the latter in this suit might give them recourse against the Peruvian Government, would not suffice to prevent the court from taking jurisdiction over the case. On the facts, the bankers were held to have entered into no personal engagements with the plaintiffs, but to have acted throughout as agents of Peru. This decision was upheld by the Court of Cassation.

**Submission to Jurisdiction by Foreign States**

Where the foreign government has itself submitted to the jurisdiction of French courts, such submission is held to be irrevocable as regards that issue. Moreover, the submission of one phase of a difficulty to settlement in France has been held to include a willingness to subject another phase of the same affair to settlement by an entirely different process. The finality of the attribution of jurisdiction is well brought out in a suit involving the Government of Tunis. Certain Tunisian bonds had been issued through French banks under an agreement that all disputes arising in connection therewith should be settled according to French law by the French tribunals of the department of the Seine, to which the parties agreed to grant jurisdiction for this purpose. Subsequently, the Bey established a special commission for the management and control of his financial affairs. In a case brought against the Government of Tunis, in connection with these bonds, the Civil Tribunal of the Seine held [41] that the establishment of the Commission could not serve to withdraw the case from the jurisdiction of the French courts in favor of that of the Commission. Moreover, there was nothing to indicate that the Commission was invested with judicial powers. Nor did the fact that the plaintiff had permitted the Commission to list his holdings amount to a renunciation on his part of the jurisdiction of French courts. Having once submitted to its jurisdiction, that jurisdiction remained obligatory upon both parties.

**Effect of Submission to Arbitration**

The courts went even further, however, and decided that submission of an issue to a French arbitrator implied sub-

[41] April 10, 1888, *Journal du Droit International Privé*, XV (1888), 670.

mission to the judiciary of all questions connected with the execution of the award. On June 30, 1891, the Civil Tribunal of the Seine decided a case brought by the heirs of Ben Aïad against the Bey of Tunis and the Tunisian Government for the payment of sums granted him by an arbitral award of Napoleon III on November 30, 1856.[42] In declaring its competence, the court said that although one government could not be subjected to the jurisdiction of another, this principle gave way before a definite acceptance by that government of a jurisdiction foreign to it. When the Bey of Tunis, upon the occasion of certain difficulties with General Ben Aïad, asked Napoleon III to arbitrate the issue, he thereby accepted all the consequences, and renounced the privilege of invoking the immunities attached to his sovereignty in all that concerned the arbitration or the ensuing execution of the award.

**Foreign State as Plaintiff**

The French courts permit a foreign state to bring suit before them, but such a plaintiff is not entitled to the benefits of the laws of France if it has bound itself by a contrary agreement. On the other hand, the defendant may claim such protection, to the extent of having costs decreed against the state or requiring security to be given. According to the French rule, a judicial decision is the prerequisite of any liquidation of collateral. In making a contract with a French bank, the Ottoman Government stipulated certain conditions under which collateral put up by it might be liquidated. No mention was made of any judicial process, however. When, therefore, the Ottoman Government brought suit against the bank to have this rule of French law enforced in its own favor, in derogation of the conditions it had itself stipulated, the court refused to grant its request. It held that as the bank had acted in accordance with the agreement, and the agreement was not contrary to public policy, it should be enforced in France, although it was not in consonance with French law.[43]

**Claim to Benefit of French Law**

**Condemnation of Foreign State in Costs**

In a suit brought April 13, 1867, before the Court of Appeal at Paris by the Spanish Government to recover certain sums

[42] *Journal du Droit International Privé*, XIX (1892), 952.

[43] Civil Tribunal of the Seine, March 3, 1875; Sirey, 1877-2-25.

from the widow of one of its former employees, the court, after holding that the statute of limitations had run as regarded this claim, condemned by the plaintiff state in costs.[44]

**Security Required of Foreign State**

Similarly, when the agent of a foreign state appeared as plaintiff, the usual security was required. In the case of the *Western Wave,* the captain of this United States Shipping Board vessel brought suit against the Paris-Lyons-Midi Railroad Company.[45] The defendants, in accordance with their rights under the civil code, demanded security for costs. The plaintiff maintained that the Shipping Board, as an integral part of the United States Government, could not be subjected to any such requirement. The court held, however, that inasmuch as the code required security from all foreign plaintiffs, a treaty alone could protect a foreign state from a like necessity. Not only was there none in this instance, but it was pointed out that a court of appeals in the United States had once held that the Republic of Honduras was bound to give security when it appeared as a plaintiff.[46] The ordinary immunities were not recognized as applicable to the case, and the security was ordered to be provided.

**Intervention**

Although permitting foreign states to sue, French courts did not feel obliged to permit a foreign state to intervene (*faire tièrce opposition*) to assert that a litigation between other parties violated its rights, when the rights rested upon national legislation which was thought to be contrary to the fundamental conceptions of the social institutions of France. Thus the right to intervene in a suit between the captains of certain vessels of the Russian Navigation Company (*"Ropit"*) and the administration of its fleet in Marseilles was denied to the U. S. S. R.[47] The basis to the claim to intervention was the decree of nationalization of these vessels, which it was contended could not be disregarded by French courts in deciding

[44] Dalloz, 1867-2-49.

[45] Commercial Tribunal of Marseilles, January 11, 1921; *Revue Internationale du Droit Maritime,* XXXIII (1922), 98.

[46] The reference is apparently to *Republic of Honduras* v. *Soto,* decided by the New York Court of Appeals, January 29, 1888, 112 N. Y., 310.

[47] État Russe *v.* Ropit, Court of Cassation, March 5, 1928, Journal du Droit International, 1928, p. 674.

an issue involving their juridical position. The Court of Cassation held, however, that the taking over of private property by the state without compensation was contrary to the *"ordre public"* of France, and hence could not be made the basis for an intervention.

**Attitude towards U. S. S. R.**

Generally speaking, for some eighty years a foreign sovereign state might maintain a position of immunity from process before French courts under almost any circumstances. It mattered not whether it acted in a public or a private capacity. But with the recognition of the Russian Soviet government, and the reëstablishment of diplomatic relations through its Commercial Representation, situations arose which forced the French courts to change their point of view. Many Russian corporations were active in France, and entered into business relations with French citizens, but, due to the socialization of foreign trade by the government, they were unable to make contracts in their own name. The Commercial Representations were the only representatives abroad of the Soviet government, and they alone were empowered to sign contracts on behalf of these business corporations. When litigation arose out of such contracts, it was obvious that the Commercial Representation was the proper defendant, and that it represented the Soviet state. Yet at the same time it was apparent that the whole transaction had been strictly commercial, not in any way involving the sovereignty of the U. S. S. R. Moved by such considerations the courts abandoned the long line of precedents against distinguishing between acts undertaken *jure imperii* and *jure gestionis,* and assumed jurisdiction over the U. S. S. R. in such suits.

The first case was that of Gostorg et Union des Républiques Socialistes Soviétiques *v.* Association France-Export, decided by the Court of Appeal in Paris on November 19, 1926.[48] The French Export Company had made arrangements with the People's Commissariat of Foreign Trade of the U. S. S. R. to participate in an exposition of commercial samples in Moscow. Among other things, it had contracted for the hire of an appropriate building and had advanced a certain sum on the rent to the Gostorg company, under whose direction the exposition

[48] Dalloz, Recueil Hebdomadaire, 1927, p. 56.

was being organized. A controversy arose between the parties which resulted in the refusal of the necessary permission for importation of the samples into Russia. The French Export Company thereupon sought and obtained attachment of property of the Russian Company and of the Commercial Representation of the U. S. S. R. in France on the basis of the debt established by the advance payment. The U. S. S. R. intervened and demanded that the attachment be dissolved, at least in so far as it concerned its Commercial Representation. It maintained that foreign trade constituted a government monopoly in Russia, conducted through the medium of commercial representatives, themselves attached to the diplomatic missions in the countries with which the U. S. S. R. had resumed official relations. Hence it claimed that the attachment in question was in reality directed against itself, *i.e.* against a sovereign state, acting in its public capacity, and as such was untenable. The court held, however, that until the status of the Commercial Representation of the U. S. S. R. was more definitely established, its activities were to be considered as purely commercial, upon which the principle of the sovereignty of states had no bearing whatsoever.

With this view the Court of Cassation agreed.[49] It held that inasmuch as the attachment had been made against the Commercial Representation of the U. S. S. R. in France, whose activities could only be regarded as acts of commerce completely foreign to the principle of sovereignty, the attachment could properly be maintained.

On January 13, 1927, the Commercial Representation of the U. S. S. R. was ordered by the Commercial Tribunal of the Seine to be inscribed in the Registry of Commerce.[50] Since then it has been completely assimilated with commercial entities and there has been no difficulty in admitting that French tribunals are competent against it as regards its own acts or the commercial acts of organizations trafficking abroad under its control. Thus the Civil Tribunal of the Seine, in a summary judgment of January 7, 1930, affirmed an attachment against

[49] Decision of February 19, 1929, Dalloz, Recueil Hebdomadaire, 1929, p. 161.

[50] Gazett du Palais, 1927-I-359.

property of the U. S. S. R.[51] This was based on a breach of a contract of sale entered into between the latter, on behalf of the Rudmettalltorg, and a French corporation.

On March 5, 1930, the Civil Tribunal of the Seine went so far as to order the execution upon property of the U. S. S. R. of a judgment rendered in England five years before against the Russian Volunteer Fleet. The argument that convinced the court was that as the U. S. S. R. had assumed the monopoly of foreign commerce and had absorbed the Volunteer Fleet, it must be liable to answer for the obligations of the latter, including measures of execution against it.[52] This portion of its judgment was reversed, however, by the Court of Appeal of Paris,[53] but on grounds of French rather than international law. The Court said that when a demand for execution of a foreign judgment was made to French courts they had to examine whether the judgment was justified in principle, but they could not add a condemnation to those contained in the judgment in question. They were bound to avoid the consideration of any new claim, either as to an object or as to a party not included in the original condemnation. The English judgment had been directed solely against the Volunteer Fleet. It was true that the claim was made that the U. S. S. R. had succeeded to the Volunteer Fleet, and hence must assume its obligations. But whereas this claim might be made in a principal instance, it could not be made in a demand for the execution of a foreign judgment in which the U. S. S. R. had never figured. The execution was granted as against the Volunteer Fleet, but not as against the U. S. S. R.

On June 30, 1930, the U. S. S. R. and the Librairie Brenner in Paris were sued jointly for violation of a copyright in connection with a book, published by the Soviet government and sold by the other defendant in France. The U. S. S. R. pleaded misjoinder of parties, but entered no claim to sovereign immunity. The court said that anyhow this principle could not

[51] Représentation commerciale de l'U. R. S. S. *v.* Sté. anonyme des Entreprises Gere, *et al.*, Journal du Droit International, LVIII (1931), p. 413.

[52] Herzfeld *v.* Dobroflotte (État Soviétique), Journal du Droit International, LVII (1930), p. 692.

[53] February 19, 1931, *ibid.*, 1931, p. 393.

be applied to a case growing out of purely commercial transactions undertaken in the conduct of its commercial activity by its commercial representation. It was held that there was no misjoinder; the court was competent and the U. S. S. R. was condemned to pay the costs of the proceeding.[53a]

Whether this new departure of the Court of Cassation in distinguishing between commercial and sovereign acts of foreign states will be extended to apply to states other than the Union of Soviet Socialist Republics remains to be seen. There is an indication to the contrary in a decision of the Civil Tribunal of the Seine of December 30, 1930, holding that garnishment of funds of Jugoslavia for the payment of principal and interest of the government loan was not permissible in France.[54] This decision mentions no distinction between public and private acts, however, nor does it suggest that a seizure of property rests upon a different footing from the mere assumption of jurisdiction, so that it cannot be considered as satisfactorily foreshadowing the future course of French jurisprudence on this point.

[53a] Chaliapine *v.* Etat russe et Librairie Brenner. Commercial Tribunal, Seine, June 30, 1930. Journal du Droit International, LVIII (1931), 411.

[54] Banque ottomane et Société financière d'Orient *v.* Philippe, Journal du Droit International, LVIII (1931), p. 1040.

## CHAPTER II

### THE COURTS AND FOREIGN STATE-OWNED PROPERTY

In France, there being no suits *in rem,* suits arising from the use of government-owned property may be assimilated to other suits against foreign states, and the treatment of the property *per se* considered only in regard to its liability to seizure either as *cautio judicatum solvi* or in execution of a judgment rendered against a state although perhaps arising from circumstances entirely unconnected with the use of the property. Such a division reflects the common distinction between *"la jurisdiction"* and *"l'exécution."* On the other hand, a classification based on the independent treatment of all actions arising in connection with property—especially means of transportation—in conjunction with a consideration of execution and attachment offers some advantages, especially to those familiar with suits *in rem,* where the nature and use of the property as well as its ownership may be of decisive importance.

**Attitude of Courts to French Government**

From the national point of view, the attitude of the courts towards the French state as a carrier reflects the growing tendency to extend the jurisdiction of the judicial courts at the expense of the administrative tribunals. This is evidenced not only by the more recent decisions of the judicial courts but by those of the administrative tribunals as well.[1] The old notion that any liability which may devolve upon the state for injury caused to individuals as the result of acts of persons in its employ in public service escapes the competence of the ordinary courts and lies within that of the administrative authorities [2] has given way to the realization that in the

[1] *Cf.* note by G. Ripert, *Revue Internationale du Droit Maritime,* XXXIII (1922), 762.

[2] Commercial Tribunal of Marseilles, June 29, 1915, Dalloz, 1920-2-121; *Revue Internationale du Droit Martime,* XXX (1915-17), 367.

conduct of public industrial services, the management of which the state has assumed, it places itself in the same situation as an ordinary business agency as regards the users of that service.[3] Thus the ordinary courts are competent in cases arising from labor contracts with employees of state railways, compulsory war-risk insurance issued by the state, in litigation with the senders and recipients of parcel-post packages, and in tort actions resulting from collisions of government-operated merchant vessels, or theft of merchandise committed aboard the same.[4]

**Competence of Courts vis-à-vis Foreign States**

Despite the growing tendency to subject the French state to the competence of the ordinary courts in various circumstances, there is no indication that the courts themselves contemplate a similar development as regards foreign states. Complete consistency is evidenced in the repeated refusal of the judicial courts to entertain suits instituted against such foreign government agencies as the United States Shipping Board. As the administrative tribunals are not open to foreign states, the result is that the latter are virtually immune from suit on the score of the use of their property as well as on general grounds. These suits, being brought *in personam*, are subject to the same rules as those controlling other suits against foreign states. A complicating circumstance, however, in regard to United States Shipping Board vessels has been the fact that they were frequently not operated directly by the government but by commercial lines, which in turn engaged the captain. The question then arose whether the captain, or the company, were acting merely as the agents of the government so as to be able to claim the immunities of the former. In denying their competence in such cases, the French upper courts made no distinction between direct and delegated operation, and

**Suits in Personam**

[3] *Conseil d'État,* December 23, 1921, *Revue Internationale du Droit Maritime,* XXXIII (1922), 760.

[4] *Cf.* Law of March 21, 1905, on competence in labor contracts; Law of July 12, 1905, on parcel post; Georges Ripert, *Condition juridique des navires appartenant à l'état,* etc., *Comité Maritime Internationale, Bulletin No. 51,* p. 16; Decision of Court of Appeal, Paris, July 20, 1921, *Revue Internationale du Droit Maritime,* XXXIII (1922), 768; Commercial Tribunal, Nantes, August 2, 1919, *ibid.,* XXXII (1920-21), 445; Court of Appeal, Paris, December 20, 1921, *ibid.,* XXXIV (1922), 133.

although referring wherever possible to the public use of the vessel concerned, contented themselves with regretting the necessity of refusing to take jurisdiction when there was no evidence of any but a purely commercial undertaking.

**Incompetent v. Captain of Naval Vessel**

The case of the *Powhatan* came up before the Commercial Tribunal of Saint Nazaire on May 8, 1918.[5] This was an ex-German vessel which had been taken over by the United States and added to its war fleet. In denying the right of the captain of a vessel injured in collision with the *Powhatan* to proceed against her captain, the court observed that war vessels were considered floating portions of the national territory, and hence neither they nor their crews were subject to the laws or to the jurisdiction of any other state in whose waters they might be. This immunity applied not only to "war vessels" properly so-called, but to all vessels commanded by an officer of the navy and flying the naval ensign. At the time of the collision, the *Powhatan* was manned by a naval crew, commanded by a captain whose name appeared in the navy list, and was flying the American flag together with the naval pennant, and hence was held to be assimilated to war vessels.

**Not Competent v. Captain of Government Merchant Vessel Used for National Defense**

In the case of the *Hungerford,* which was a merchant vessel employed in the carriage of goods, the court held the same despite some further qualifying circumstances.[6] This was an ex-German vessel taken over by the English Crown, pursuing a voyage from Australia, bringing grain for the account of the French Government and wool for the English Government. It was operated for the latter by a commercial company under agreement with the Board of Trade. The captain was employed and paid by this company, and when he became involved in a collision with a French vessel, agreed to furnish security on terms of reciprocity to preclude the attachment of his vessel. Subsequently, suit was brought against the captain of the *Hungerford* to recover damages. The defendant pleaded to the jurisdiction, but the Commercial Tribunal of Nantes assumed jurisdiction, holding that no question of sover-

[5] *Revue Internationale du Droit Maritime,* XXXII (1920-21), 439.

[6] Court of Appeal, Rennes, March 19, 1919; *Revue Internationale du Droit Maritime,* XXXII (1920-21), 345.

eignty was involved.[7] Both the navigation company and the captain were subject to the jurisdiction of the court under Article 14 of the Civil Code. Furthermore, by putting up security the parties at least tacitly admitted the jurisdiction of the French courts. The Court of Appeal at Rennes reversed this decision. It held that in transporting grain and wool for the French and English Governments, the *Hungerford* was not employed commercially but for the national defense. The mere fact that she was not managed directly by officers of the English Navy could not change the nature or character of her use. Unless there had been a valid renunciation of immunity, the rules of extraterritoriality were applicable. The court below erred in assuming such a renunciation from the giving of security. The rule was that the renunciation might be express or tacit, but in either case it must be certain. This requirement was not fulfilled by an amicable agreement, before any suit had been instituted, to put up security. As for the company and its captain, they were properly to be considered agents of the English Government, and might raise any exception to the jurisdiction of the court which that government itself might raise. For these reasons the tribunal should have declared itself incompetent as did the Court of Appeal.

**Incompetent v. Owner of Shipping Board Vessel Used in Commerce**

In the case of the *Avensdaw*, a French ship broker asked the Commercial Tribunal at Rouen to condemn the United States Shipping Board as owner of the vessel for a large unpaid balance on a bill of repairs and advances to this merchant vessel, which had entered the French port in the course of purely commercial operations.[8] The defense was that the Shipping Board was identified with the United States Government, and hence could not be subjected to the jurisdiction of the court. In admitting this contention, the judge observed that it seemed as though the Shipping Board ought to be assimilated to an ordinary ship-owner, but that, as it did in fact constitute an administrative branch of the Government of the United States, it could not be cited before a French court even in the person

[7] June 29, 1918.

[8] January 20, 1922, *Revue Internationale du Droit Maritime*, XXXIV (1922), 1074.

of its agents. This was true even as regarded a contract made within the jurisdiction of the court. In acting as broker for such a vessel, the plaintiff was deemed to have renounced the protection of French courts for any disputes arising in connection therewith. The court therefore declared itself incompetent.

**Property per se**

Thus the courts refused to permit a suit *in personam* arising from a contract or tort of a vessel operated by a foreign government whether the vessel was incorporated in the Navy, performing a special carrying service for the state, or engaged in purely commercial operations. The ownership and not the use appears to have been the ultimate criterion. This is not the full measure of protection afforded foreign state property, however. Not only is the owner state immune, but the property itself is inviolable. Interference with its free enjoyment is justified only by express permission from its sovereign proprietor. Such license cannot be presumed from other acts of submission on the part of the state, such as a voluntary appearance in a suit brought against it, or its election to use the courts itself as plaintiff. Nor does the purpose for which the seizure is desired modify this rule. Seizure on execution and attachment are equally precluded.

**Saisie Conservatoire**

That attachment does in fact frequently take place, especially of government-owned merchant vessels—only to be invalidated by subsequent court process—is due primarily to the technicalities of the *saisie conservatoire* in commercial cases. Any creditor who entertains a justifiable fear that the debtor may remove his property and so escape the payment of his obligation may resort to this form of attachment. It is not necessary that the debt should be liquidated, or payable, or its existence determined. But the applicant must have a *prima facie* case, there must be some real danger of his ability to recover otherwise, and the amount claimed must have some reasonable relation to the value of the property desired as security. If these conditions are satisfied, the President of the Commercial Tribunal, in summary *ex parte* proceedings, may authorize the detention of a vessel until the issue is determined and the obligation paid, subject to a right of the owner to procure its release by giving bond. Thus this attachment is a

*fait accompli* before the owner has a chance to reveal his status and claim exemption for his vessel. This situation is responsible for a number of cases.

**The "Campos"**

The case of the *Campos* involved the ratification of an attachment for debts due on account of advances to a former German vessel which had been taken over by the Republic of Brazil.[9] It was claimed on the one hand that the vessel was the property of the Government of Brazil, and hence was not liable to seizure. On the other hand, it was alleged that the vessel had been merely requisitioned, and hence could not be considered as forming a part of the public or private property of the Brazilian state. Moreover, by incorporating it in the fleet of the Lloyd Brazileiro and using it for commercial purposes, the state had renounced any immunity to which it might have been entitled. The court held, however, that the renunciation of a right had to be formal and not based upon presumption. Aside from voluntary renunciation, it was an incontestable principle that the property of a state was not liable to be attached for a debt of the state. This principle was recognized as applicable to the French state, and applied *a fortiori* to a foreign state. The fact that Brazil used the vessel it had confiscated for commercial purposes could in no wise modify the nature of the property or serve to confer a private character upon it. Nor could any distinction be admitted between debts of Brazil on account of the vessel in question and from any other cause. The seizure was inadmissible.[10]

**The "Balosaro"**

The *Balosaro* and the *Englewood* were two vessels of the United States Shipping Board which had been subjected to attachment. The captain of the *Balosaro*[11] claimed that this vessel was not liable to seizure for debt inasmuch as it was the property of the United States Government. He asked her release on this score. The creditor

[9] Commercial Tribunal of Havre, May 9, 1919, *Recueil du Havre*, LXII (1918-1919), I, 28; *Revue Internationale du Droit Maritime*, XXXII (1920-21), 600.

[10] See also the suit brought by the captain of the *Campos*, representing the Brazilian Government, for damages resulting from this arrest, *Recueil du Havre* LXIII (1920), I, 119.

[11] Commercial Tribunal of Havre, September 17, 1919, *Recueil du Havre*, LXII (1918-19), I, 31.

denied that the ownership of the Government had been sufficiently proved. The court accepted the proof, and ordered the release of the vessel, on the ground that property of a foreign state was not liable to seizure.

**The "Englewood"**

Permission to attach the papers of the *Englewood* had been granted by the President of the Civil Tribunal of Bordeaux. Upon proof that this vessel, although operated by the Cosmopolitan Line, belonged to the United States, the President revoked his former order and directed the immediate release of the ship's papers.[12]

**The "Glenridge"**

A similar case was that of the *Glenridge*, decided by the Commercial Tribunal at Havre, July 17, 1920.[13] An attempt was made here to attach a vessel of the United States Shipping Board as security for the payment for damage sustained by merchandise of French citizens. Despite the fact that the *Glenridge* was being operated for commercial purposes by a third party, the court ordered the release of the vessel on the ground that no attachment of state-owned property was possible.

If the numerous cases of attempted attachment of foreign government property are the result of technicalities of the *saisie conservatoire*, whereby the identity of the owner is not revealed until after the process is undertaken, the paucity of cases arising from attempted execution of a judgment is probably due to the inherently different nature of the *saisie executoire*, whose function is to secure the payment of a judgment already rendered. The right is no longer inchoate nor the amount uncertain. No "permission" is required, for the debtor is provided with a writ of execution from the court. In the course of the suit, the status of the parties will have become apparent; if the party against whom the judgment is rendered is a foreign state, no execution upon the property can be enforced against the will of the state, hence neither its vessels nor any other property can be seized. Thus, on May 5, 1885, the Court of Cassation refused to countenance the seizure of German Government property in execution

**Saisie executoire**

[12] Référé, April 27, 1920, *Gazette des Tribunaux*, 1920-2-367; *Revue Internationale du Droit Maritime*, XXXII (1920-21), 602.

[13] *Revue Internationale du Droit Maritime*, XXXII (1920-21), 599.

of a decision of a lower court against that state.[14] The imperial railway of Alsace-Lorraine had been condemned by a French tribunal to pay the plaintiff a certain sum in compensation for merchandise lost by it in transportation. The railway had admitted the jurisdiction of the court for questions arising from commercial operations, but it then refused to pay the damages. The plaintiff, therefore, seized all the property of the line at the station at Nancy. This seizure was validated by the civil court there, but was reversed on appeal. It was established that the railway was an organ of public administration under the Chancellerie of the German Empire, and that both its rolling stock and its earnings belonged to the German state. The railway in recognizing the jurisdiction of the court did not admit its competence to enforce the execution. In France, one could not seize goods of the state in execution of a judgment against it. It was held that what could not be done against the French state could not be done against a foreign state. The law of nations granted the latter complete immunity in this respect. In affirming this decision, the Court of Cassation considered only the fact of the public character of the operation of this railway, and then stated it as an absolute principle of law, that a creditor, even to assure the execution of a judgment, could not seize the property of a foreign state.[15]

**French Government-owned Vessels Before Foreign Courts**

It is apparent that the ownership of the property and not the nature of the use to which it may be put is the controlling element in the immunity of government-owned property from seizure in France, whether for security or in execution of a judgment. Yet there has been recognition of the fact that the courts of other countries might not take the same view with regard to French government-owned merchant vessels abroad. When, in 1840, the French Government, realizing the inherent possibilities in steam-propelled vessels, committed

[14] Dalloz, 1885-1-341; Sirey, 1886-1-353.

[15] See also a decision rendered by the Court of Appeal of Paris on March 22, 1889, regarding the seizure of property of the state of Portugal, *Journal du Droit Internationale Privé*, XVI (1889), 461.

Law of July 16, 1840

itself to the ownership and operation of a commercial line between France and the Americas, questions were raised before the Chambers as to the status of the vessels so used should they become involved in litigation abroad. It was said that the government's proposal would create an anomalous situation in that a vessel flying the royal pennant was not a merchant vessel; whereas, a vessel carrying passengers and commercial cargo ceased to be a vessel of the Royal Navy. It was pointed out that the immunities accorded to public vessels depended upon their keeping aloof from interests of a private nature. The essential characteristic of a vessel of state was that it might be made war upon but not sued. It seems to have been admitted by the reporter to the Chamber of Peers that unless some agreements could be made with foreign states, releasing these vessels from the ordinary obligations of merchantmen as regarded customs, jurisdiction of commercial courts, and attachment, their commercial character would take precedence over their public qualities.[16]

In practice the question appears not to have been solved either then or later. At the close of the World War, when France again found itself possessed of certain vessels not of a public character, the prompt liquidation of this merchant fleet prevented it from becoming the source of any difficulty as regarded questions of jurisdiction.[17] When it has been desired to accord immunity to certain privately owned vessels performing public service, this has been accomplished by treaty. France has thus covenanted with several states as regards mail packets. By treaties with Italy of March 3, 1869 (Article 6), and November 18, 20, 1875 (Article 14), vessels employed in the Mediterranean by the postal administrations of France and Italy respectively, whether owned, chartered or subsidized by the state, were to be exempt from attachment, embargo or *arrêt de prince*. When, therefore, an attempt was made to seize such a vessel in execution of a judgment for damages growing out of a collision in

Mail Packets

[16] *Moniteur Universel*, June 30, 1840.

[17] By a law of August 9, 1921, the liquidation was to be complete by July 31, 1923. *Bulletin Officiel de la Marine Marchande*, 1921, 693.

which it had been involved, the Court of Appeal at Aix in a decision of August 3, 1885, declared the attachment null and void. It having been established that the *Solunto* was a bona fide mail packet employed by the concessionary of the Italian postal service subsidized by the state, the court refused to consider the question of its actual ownership. The plaintiff further relied upon the fact that the vessel had touched at the port of Marseilles for purposes of commerce only, that not being a port of call on its regular itinerary as a mail packet. Moreover the Italian Consul had lent his assistance in bringing about the attachment without apparently having thought of claiming the privilege which the Italian Government subsequently invoked. The court declined to see in these facts any ground for excluding the *Solunto* from the immunity accorded by the treaty.[18]

The conservative attitude of the courts lead the maritime interests of the country to place their hopes for the reduction of the handicap under which private shipping labored in competition with the protected government industry rather on an international treaty than on a change in the practices of the judiciary. Their efforts resulted in the International Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels[19] being signed at Brussels by the French government in 1926, but ratification appears not to have taken place to date.

**Conclusion**

In France the courts have been scrupulous in applying the general international-law doctrine of immunity for foreign states and their property. With a single exception as to the Russian Commercial Representation, they have denied their competence to hear a suit instituted against a foreign state unless it was deemed to have submitted to its jurisdiction. Whereas they have interpreted the submission rather broadly as to its general effects, they have recognized that it did not extend to the execution of a judgment against the state. In national matters, the jurisdiction of the administrative tribunals has tended to give way in favor of the judicial courts

[18] *Revue Internationale du Droit Maritime,* [I] (1885-86), p. 225.

[19] For text, see Appendix.

as regards means of transportation operated by the state. From the international point of view, however, a government may enter the carrying trade without prejudice to its security from suit. As regards the instrumentalities by which this enterprise is carried on, not even attachment as security is permissible.

# THE POSITION OF FOREIGN STATES BEFORE BELGIAN COURTS

## CHAPTER I

### BASIS AND GENERAL APPLICATION OF PRINCIPLE OF IMMUNITY

**Separation of Powers**

BELGIAN courts, although formerly sharing the common conception of complete immunity for foreign states from the jurisdiction of domestic tribunals, have shown a marked tendency recently to differentiate between public and private acts of the state, and to recognize their incompetence only in suits involving the former. Over litigation concerning the latter, they have frequently assumed jurisdiction. This change in point of view is a tardy reflection of a change in attitude toward certain provisions of the Belgian Constitution: Articles 25-31, establishing the principle of the "separation of powers," and Article 92, providing that litigation involving civil rights belongs to the exclusive competence of the courts. The early construction placed upon Article 92 was that it precluded the possibility of leaving to administrative determination questions arising from the violation by the state of private civil rights, despite the general provision for separation of powers.[1] Later, however, a distinction began to be made between acts of the state in its sovereign and in its civil capacity. For the former, the principle of the separation of powers became fundamental, and for many years there was a strong tendency to preclude the possibility of the courts taking cognizance of any litigation between an individual, on the one hand, and the state, as the incarnation of the executive power,

[1] Cassation, December 3, 1842, Pasicrisie, 1842-1-358, 361. See also Cassation, September 5, 1856, *ibid.*, 1856-1-455; *idem*, December 23, 1865, *ibid.*, 1866-1-7.

on the other, even though the individual had suffered the violation of a civil right by an administrative act of the state.[2] When, however, the state or commune had acted not in the rôle of a sovereign, but in that of a private individual, the courts still considered themselves competent.[3] Due to the inherent difficulty of classifying acts of the state, this attempted distinction led to grave inconsistencies in the decisions.[4] In 1917 the Court of Cassation finally declared that "the state as sovereign and the state as a civil person comprise a single personality whose diverse activities these expressions serve to distinguish," and "that consequently any undertaking regularly entered into by the state in the sphere of its civil activity binds the state in its sovereign capacity. . . ."[5] The former criterion was thus reëstablished: if the suit was based upon the violation of a civil right, an action might be maintained before the courts be the defendant who he might. The problem of reconciling this conclusion with the doctrine of the separation of powers was disposed of by the Court of Cassation in a leading decision rendered November 5, 1920.[6] According to it, the ancient rule of French public law, which, originating at a time when monarchical absolutism flourished in France, forbade the judiciary to decide litigation involving the state (thus limiting the competence of the judiciary to cognizance of suits between individuals, and permitting the government to dispose arbitrarily of the persons and property of its citizens) was not adopted by the Belgian Constitution, despite the provision for "separation of powers." On the contrary, the system inaugurated by the Belgian Constitution

**Jurisdiction over Belgian Government**

[2] Tribunal, Antwerp, March 6, 1895, Pasicrisie, 1895-3-161; Cassation, April 13, 1899, *ibid.*, 1899-1-173; *idem*, February 13, 1902, *ibid.*, 1902-1-143.

[3] Appeal, Liège, July 13, 1898, Pasicrisie, 1899-2-374; Appeal, Brussels, July 18, 1899, *ibid.*, 1900-2-124.

[4] Compare Cassation, December 9, 1990, Pasicrisie, 1881-1-14 and *idem*, November 8, 1894, *ibid.*, 1894-1-321, with *idem*, December 1, 1881, *ibid.*, 1881-1-145, and *idem*, May 25, 1882, *ibid.*, 1882-1-137. Also, Cassation, April 24, 1840, *ibid.*, 1840-1-375, and *idem*, February 23, 1850, *ibid.*, 1851-1-162, with *idem*, May 27, 1852, *ibid.*, 1852-1-370, and *idem*, May 7, 1869, *ibid.*, 1869-1-330.

[5] Cassation, March 5, 1917, Pasicrisie, 1917-1-118, 134.

[6] Pasicrisie, 1920-1-193, 239.

was inspired by distrust of the governmental practices under previous régimes. Its intent was to safeguard private rights from incursions by the executive, by putting them under the protection of the judicial power. Under this system, the government, like the governed, was subject to the law, and limited in its activities by the law. If it trespassed upon the civil rights of an individual, the judicial power might declare the act a tort for which recovery might be had by the injured party. Thus the Belgian state was no longer immune from the jurisdiction of Belgian courts when it committed a tort against an individual. Even if it were acting in its sovereign capacity, it could no longer protect itself behind the mask of *puissance publique* to avoid all responsibility.

**Execution on Property of Belgian State**

So far as the competence of the courts is concerned, there can be no question but that they are competent today with regard to suits against the Belgian state, whether the act from which the injury resulted was a public or private act. This is not to say, however, that judgments obtained against the Belgian state can be executed upon its property. Such execution is in fact not allowed under any circumstances, whether it be upon property held by the state in its sovereign or in its private capacity, the theory being that the judgment creditors of the state should not be permitted to interfere with any functions of the state by levying upon the property whereby such functions are exercised.[7]

**Jurisdiction over Foreign States**

With regard to foreign states, the jurisdiction of Belgian courts is far less extensive. Not only may they not order the attachment of state property, but they are not competent to hear suits brought against foreign states, unless the basis of the litigation is a purely private act of the state. The courts themselves usually decide whether the act in question does or does not fall within that category. There is no specific rule of Belgian law defining the position of foreign governments before the courts. When the courts have had occasion to handle cases involving foreign states, they have resorted to one of three lines of procedure: (1) states have been classed with private individuals, and the provisions of the codes referring to foreigners before the courts have been stretched to

[7] *Comité Maritime International, Bulletin No. 57,* p. 152.

apply to foreign states; (2) states have been considered more akin to the diplomatic agent than to the private foreigner, and the immunities customarily granted the former have been extended to the state; (3) the foreign state has been recognized as being beyond all rules of civil law, whether written or unwritten, and as subject only to international law. The application of these different principles obviously leads to different results.

**Status of Foreigners**

Article 14 of the French civil code permitted suits in French courts against foreigners, even non-residents, for the enforcement of obligations contracted at home or abroad with a Frenchman. This old rule, adopted in Belgium with the Napoleonic Code, was replaced by a law of March 25, 1876, Articles 52 to 54 of which modify the instances in which jurisdiction may be assumed. When the courts apply to foreign states the provision of this code, especially the old text, the result is that the state may be subjected to the jurisdiction of the court.

**Diplomatic Immunity**

The position of diplomatic agents in Belgium does not rest upon any express statutory provision, but upon a custom received implicitly into the law of the land from France. When in 1801 French legislators attempted to include in the *Code civil des français* a definite provision for the immunity of foreign diplomatic agents, such a stipulation was deemed supererogatory.[8] This tradition has prevailed in Belgium as well as in France, and it is an established practice to accord immunity from jurisdiction to diplomatic agents despite the absence of any legal text. When, therefore, foreign states are considered as the source from which emanates the authority of their representatives, the benefit of the immunity is extended to them.

**International-Law Rules**

In applying international-law rules to the problem of suits against foreign states, the courts have considered the principles of sovereignty and independence of paramount importance. If it is felt that jurisdiction can be assumed without violating

[8] *Projet de Code Civil presenté par la Commission nommée par le Gouvernment le 24 thermidor an 8*, page 7 (white), page 13 (green). Recueil des Discours du Code Civil, II, 20.

these principles, the court declares itself competent, otherwise the suit is dismissed.

**Judicial Decisions**

On December 30, 1840, the Court of Appeal of Brussels, relying upon the principles of international law, annulled a decision of a lower court which attempted to extend the application of the civil code to a foreign state.[9] The significant facts were as follows: Previous to the Revolution of 1830, by which Belgium secured its independence from Holland, the Society for Promoting National Industry, established at Brussels, owned certain property and tithes in Holland which King William had ceded to it at the time of its creation. Upon the outbreak of the revolution, this property was taken over for the benefit of the Dutch treasury, and continued in the possession of the Government even after the Treaty of Peace of April 19, 1839, despite the protests of the Society. On the other hand, the Society had subscribed to a bond issue of the Syndicate of Amortization, a public administrative body of the Netherlands. When the revolution broke out, the bonds had been delivered to the Society, but had not been paid for. After the war, securities in the hands of an agent of the Society in Holland were attached at the request of the Syndicate. The former requested the tribunal at Brussels to vacate this order of attachment. It took advantage of the same opportunity to demand the restitution of the goods and tithes seized in Holland, and brought suit against the Syndicate and the Dutch Government. The latter refused to appear, the other defendant entered a plea to the jurisdiction. The lower court established the fact that the Syndicate acted under the orders and for the account of the Dutch Government, and hence was to be considered as a part of the general administration of the Government, and subject to the same consideration as the Dutch Government itself as regarded the competence of the court. It then reasoned as follows: Article 14 of the Belgian civil code enabled Belgians having any claim against foreigners to bring suit in their own courts. The mere fact that a Dutch subject, relying upon a similar

**Sovereign Acts of the State**

[9] Pasicrisie, 1841-2-33.

rule of Dutch law,[10] had already seized a Dutch court with the case, could not oust the jurisdiction of the Belgian court. Moreover, the jurisdiction of Belgian courts over foreigners, thus clearly attributed to them by the civil code, extended to the Dutch Government in the present case. For the fundamental law of Holland made such a suit if brought by a Dutch national against the Dutch Government subject to settlement in the Dutch courts. In other words, in regard to such a suit in Holland, the Government found itself on the same footing as a private individual. Therefore, it being treated as a private citizen by its own courts, it might be treated as a private foreigner by the courts of Belgium.

These conclusions were rejected by the Court of Appeal. It held that the Government of Holland and the Syndicate, as a public administrative body of that country, represented the Dutch nation. In their relations with Belgium, foreign states were subject only to the law of nations. The mutual independence and equality of nations precluded any one of them from imposing its particular laws or its courts upon another for the settlement of differences between them. There was no ground for claiming that Belgium intended to subject foreign states to the jurisdiction of its courts by Article 14 of the *Code civil,* which admittedly was not applicable to ambassadors. Such an extraordinary innovation, had it been intended, would have been expressed in clear and precise language; it was not permissible to infer it from an article which in its natural sense applied only to private foreign citizens. The judgment of the lower court was therefore annulled.

It has been said that this decision was not uninfluenced by the fact that it was rendered shortly after the conclusion of the treaty of peace between Belgium and Holland by which Belgian independence was recognized, when it was desired to avoid at all costs rekindling the hates and rivalries but lately extinguished.[11] Certain it is that the court did not concern itself with the nature of the act giving rise to the suit, nor

[10] The Dutch civil code, like the Belgian, was the *Code Napoléon.*
[11] Spée, Belgique Judiciaire, 1876, col. 1449.

**Private Acts of the State**

suggest that the sovereign character of that act was alone responsible for its own lack of competence to entertain the suit. The decision did not involve the sophistry of a dictum of the Civil Tribunal of Brussels delivered December 29, 1888, in a suit brought against the Minister of War of Bulgaria.[12] In that case, the plaintiffs sued for the payment of certain shipments of bullets supplied by them to the defendant for the Bulgarian army. The defendant excepted to the jurisdiction of the court. The court admitted that Belgian tribunals would be incompetent to review an act of government undertaken by the Bulgarian state in its sovereign capacity. But such an act, a manifestation of sovereign authority to command, was held to be incompatible with the idea of a contract, in which both parties bound themselves freely and reciprocally. In making a contract with a Belgian company for the purchase of bullets, the Bulgarian state acted as a private person, thus submitting itself to all the civil consequences of this contract, including the rules governing judicial competence. It followed that the defendant was wrong in thinking that he could base the incompetence of the court upon principles of international law. On the contrary, the court would deduce its competence from Article 52 of the law of March 25, 1876.[13] In this case, however, the parties had expressly agreed that for the settlement of any disputes arising under the contract, recourse was to be had to the ordinary Bulgarian courts, the plaintiffs renouncing for this purpose Belgian consular jurisdiction. The court held that this choice of jurisdiction was binding between the parties, and, as it contained nothing contrary to public policy, should be respected. It therefore declared itself not competent.

**Contract of Purchase for Bullets**

**Peruvian Guano Industry**

The line of reasoning of the court in its dictum was to receive the seal of approval of the Court of Cassation in a case involving the operation of a state railroad. Previous to this, the lower courts found a fertile field for the development of distinctions between sovereign and civil acts of foreign

[12] Pandectes Périodiques, 1889, No. 309; Pasicrisie, 1889-3-62; Belgique Judiciaire, 1889, col. 383.

[13] Specifying the cases in which foreigners may be cited before the courts of Belgium.

states in cases involving the vast business enterprise of Peru in supplying nitrogenous fertilizer from its guano islands. Contracts of sale or of monopolies made by Peru with firms all over the world gave rise to much litigation, a fair share of which came before Belgian courts for adjudication. On August 13, 1857, the Court of Appeal of Brussels in affirming a decision of the Commercial Tribunal at Antwerp approved the condemnation of the state of Peru to the payment of damages occasioned by it to Belgian citizens.[14] Peru brought suit against the consignee of a certain cargo of guano which had been shipped from a Peruvian island under the authority of the *de facto* rebel governor of the island in question. It offered evidence to show that guano being one of the principal resources of the public treasury, its sale had been restricted to certain concessionaries in order to guarantee the credit of the government. It claimed that authority to traffic therein, granted by a revolutionary leader who had been publicly declared a rebel, should not be recognized by the courts of a friendly nation. The court held that, whereas the Isle of Chincha, together with the guano thereon, belonged to the state of Peru, and the latter had claim to all guano removed without its consent, yet the state could only give its consent by its political representatives. The guano was purchased *bona fide* under the authority of one Vivanco, who, acting as supreme chief of the isle, represented the state so far as foreigners were concerned. This authorization was conclusive as regarded foreign nations, which could not interfere in Peruvian politics.[15] Hence no action lay for the plaintiff. On a counterclaim, however, brought by the consignees against Peru for damages alleged to have been suffered by them as a result of the restrictions placed upon the free disposition of the guano, the court gave a decision for the claimant, condemning Peru to pay 300,000 francs. This liability was held to result from Article 1382 of the *Code civil*—any act of man which causes another injury obliges him by whose fault it has occurred to give compensation for it. No mention was

[14] Pasicrisie, 1857-2-348; Belgique Judiciaire, 1859, col. 331.

[15] *Cf.* Opinion of Civil Tribunal of Antwerp, June 19, 1880, Pasicrisie, 1881-2-313, 316.

made by the court as to whether this provision applied to foreign states, or, indeed, to any foreigners. Nor was the effect of Peru's bringing suit herself, or the nature of the act involved, considered in its bearing upon the question of immunity. The conclusions of the Tribunal were not reviewed by the higher court in dismissing an appeal brought by Peru.

On November 28, 1876, the Commercial Tribunal at Antwerp declared itself competent to consider a case arising out of the following facts: The plaintiffs were holders of securities of a 6% loan of the state of Peru, issued by the defendants, Dreyfus Brothers, under guaranty by them to the subscribers that their holdings were specially secured by the value of certain guano, the monopoly of which they had obtained from the Government of Peru. The holders claimed that subsequently the defendants had entered into a contract with the state of Peru which deprived them of the special security guaranteed them. Interest had not been paid on these bonds for some months, and the plaintiffs brought suit, claiming that the defendants had disposed for their own profit and for the profit of the Peruvian Government *et al.* of the security which belonged to them and which had been in the hands of the defendants. On these facts, the Court of Appeal of Brussels on August 4, 1877, held that the Commercial Tribunal had correctly assumed jurisdiction of the case, since the action was brought exclusively against Dreyfus Brothers, and not against Peru. Hence the question of the right of Belgian courts to review acts and obligations of a foreign government was not involved.[16]

On March 14, 1879, the Court of Appeal of Ghent rendered a decision in the matter of the *Havre*. The captain of this vessel had delivered a cargo of guano from Peru to one Rau at Ostend and ultimately brought suit against him for payment of the freight. At first no question was raised as to the competence of the court, but Rau later alleged that he was an agent of the Government of Peru, and hence not liable to be sued in a Belgian court. In condemning him to pay the

[16] Belgique Judiciaire, 1887, col. 1185; Pasicrisie, 1877-2-307.

freight, the Commercial Tribunal of Ostend said that the right of a state to claim immunity was conditioned upon its confining itself to its governmental mission, and taking measures for its own preservation or general interests. The principle of immunity could not be invoked when the state, by selling guano, entered into a commercial contract similar to those regularly subject to the jurisdiction of commercial tribunals. With this conclusion the Court of Appeal agreed.[17]

A case involving a different phase of the question of competence was that decided by the Court of Appeal at Brussels, January 22, 1881.[18] The action presented complicated issues between two parties to whom Peru had at different times given concessions in connection with its guano monopoly. The main question was the right of one of the concessionaries to seize a cargo of guano claimed as its property, but shipped by fraudulent bills of lading made out under coercion of the *de facto* authorities in Peru to the other. Under these circumstances the Peruvian Government not only sought to be made a party to the suit, but claimed that its mere statement that it wished to intervene was sufficient to render the court incompetent to hear the case. The court, however, maintained that such a contention could be sustained only in flagrant disregard of the sovereignty of Belgium, and that the formalities for intervention by a third party were laid down in the code of civil procedure, which rules, in default of a treaty to the contrary, were applicable even to foreign states. According to these provisions, intervention was permitted only when the judgment of the suit at issue was of such a nature that it might prejudice the rights of the intervening third party. In vain Peru contended that its rights were involved, because the final judgment might render nugatory its right to discontinue its contract with the appellant and its right to transfer possession and title to the cargo in question to the appellee. In denying this contention, the court pointed out that the very fact that the Government claimed to have transferred possession to the appellee proved that even a decision against the latter would not prejudice any rights of the state of Peru, any more

[17] Pasicrisie, 1879-2-175.

[18] Pasicrisie, 1881-2-313, 319; Belgique Judicaire, 1881, col. 1394.

than a decision in his favor, authorizing a release of the property to him, would in any way affect the rights of Peru. The court declared itself competent to decide the case, and denied to the state of Peru the right to intervene.

Without any definite text of law upon which to rely in determining their competence concerning suits against foreign states, the courts were obviously influenced by the custom prevailing with regard to the Belgian state, that of differentiating between sovereign and civil acts of the state. Not only were the rules of the civil code applied to the latter, but considerable freedom was shown in determining what acts should be included in this category.

## CHAPTER II

### ENTITIES WITH SPECIAL STATUS

AN interesting group of cases is that involving acts of states which for one reason or another might not be regarded in Belgium as entitled to enjoy all the prerogatives of sovereignty, whether from the fact that Belgians might claim extraterritoriality within their borders, that they had peculiar bonds with the Belgian state, or that they were only members of a federated state. Under the first head is Turkey. On November 11, 1876,[1] the Civil Tribunal at Antwerp was called upon to decide a case over which the president of that tribunal, sitting *en référé,* had assumed jurisdiction by ordering an attachment of property of the Ottoman Government. This action was brought for the purpose of vacating the attachment. The defendant claimed damages for the nonexecution of a contract that the Ottoman Government had entered into with him for certain supplies and labor. It had been stipulated that in case of any question regarding either the interpretation or the execution of the agreement the difficulty should be submitted to a board of arbitrators, whose method of selection was specified. Subsequently, however, both parties agreed to renounce the provisions for arbitration, "and to proceed before the ordinary jurisdiction." The court held that the two parties were thereafter subject to international law, and that the defendant could not rely upon the arbitration agreement to show that the Ottoman Government was willing to submit to a jurisdiction other than that of its own courts. The validity of the seizure in question, therefore, presupposed the competence of Belgian courts under international law to take cognizance of suits between its nationals and a foreign government, and to execute judgment against

**Turkey**

[1] Pasicrisie, 1877-3-28; Belgique Judiciaire, 1876, col. 1468.

property of that government at the time within Belgian territory. The court pointed out that Article 14 of the *Code civil* as modified by the law of March 25, 1876, permitting Belgians in certain cases involving the exercise of civil rights to cite foreigners before Belgian courts, was an exception to the general rule, and as such must be interpreted strictly. Taken in their natural sense, the words of the above provisions referred only to *individual* foreigners, and not to foreign governments. Moreover, it was expressly declared at the time of drawing up the code, that foreigners clothed with a representative character were not subject either to the civil or criminal courts of the country. It was inconceivable that, where the representative was granted such immunity, the state itself should enjoy less protection, and should be assimilated to the status of a private individual. Such assimilation would, moreover, be contrary to the fundamental principle of international law, by which states were deemed to be equally sovereign and independent, since the assumption of jurisdiction implied not perfect equality, but subordination. For these reasons, the court declared the attachment null and void, and condemned the defendant to pay costs.[2]

On April 28, 1902, Mr. Campioni, Justice of the Peace at Brussels, also held that the Ottoman Government could not be prosecuted except in conformity with the prescriptions of Turkish law.[3] Suit was brought against the Imperial Ottoman Government in connection with some repairs ordered upon a building it was renting for its embassy in Brussels. The Government failed to make an appearance. This was considered tantamount to a denial of competence in the court. A consideration of this question of competence afforded the Justice an opportunity to review the doctrine whereby a distinction was made between sovereign and civil acts of the state. He said that it had been maintained that states only appeared as sovereign when they commanded, not when they acted as mere individuals in ordinary civil life. Were one to adopt this reasoning, the court would be competent to hear any suit against a foreign state growing out of a contract for

[2] See comments of Spée on this decision, Journal du Droit International Privé, III (1876), 435.

[3] Pasicrisie, 1902-3-241.

the rental and repair of a building.[4] The *nature* of the act, not its *purpose*, would furnish the criterion. Whatever might be the merits of this argument for the settlement of domestic issues, the Justice held it to be erroneous when applied to international-law problems. The judiciary was only an instrument whereby the state exercised its sovereign authority. The origin of the power of the judiciary was the free consent of the people. In elaborating its functions they could not be presumed to have intended to extend its jurisdiction beyond the limits of their own polity. Article 92 of the Constitution had in view a separation of powers within the Belgian state. Its intent was to prevent any other Belgian authority than the courts from passing judgment in litigation involving civil rights. But that was not to say that the national tribunals might take cognizance of all civil litigation, irrespective of the parties thereto. International law proclaimed the mutual independence of sovereign states, one of the consequences of which was to preclude any nation from being obliged to accept the jurisdiction of another. Furthermore, the fact that the property of a foreign state was not liable to seizure was tending to become one of the best established principles of international law. To admit the competence of the court when its decision could result only in an empty judgment, a command without a sanction, an injunction without coercive force, would be neither reasonable nor conformable with the dignity of the judiciary. In conclusion the Justice said that, even were it necessary to admit a distinction between acts of a foreign state in its sovereign and civil capacity, renting a place for an embassy had the requisites of an act of *puissance publique*.

**Congo Free State**

Of peculiar interest is the group of cases in which the Congo Free State was involved. It should be remembered that upon the creation of this state, in 1885, the Belgian legislature authorized King Leopold II in his personal capacity to assume the sovereignty thereof. In 1890 the same body ratified a treaty between Belgium and the Congo Free State, by which Belgium agreed to loan twenty-five million francs to the latter for a period of ten years. In return, it was to have the right,

[4] *Cf.* de Paepe, Études sur la Compétence Civile à l'Égard des États Étrangers, § 47.

six months after the expiration of the ten years, to annex the Congo, together with all its attributes of sovereignty. In the meantime, the Congo Free State was set up as an absolute monarchy, all of whose powers emanated from the king—the King of the Belgians. The central government established by him had its seat in Brussels, and the sovereign was represented in the Congo by an Administrator-General.[5] Under these circumstances, it has been vigorously maintained that the Congo Free State, whose very seat of government was in Belgium, pledged as it was to complete loss of separate identity by annexation to Belgium within a few years, should not have been considered by Belgian courts as immune from their jurisdiction.[6] Nevertheless, the courts consistently refused to assume jurisdiction while this status continued.

On July 1, 1891, the Court of Appeal at Brussels affirmed a decision of the Civil Tribunal in which it declared itself incompetent to decide a suit arising from the following circumstances: [7] The plaintiff alleged that he had been engaged by the Congo Free State as a civil agent for a term of three years, and had been discharged before that time, for which he claimed damages amounting to 15,000 francs. The court held that, even were one to admit the competence of Belgian courts as regarded a foreign state acting in its civil capacity, yet courts were always incompetent to take cognizance of a sovereign act of a foreign state in the exercise of its *imperium,* such as the employment or discharge of an agent. It was established that the plaintiff was engaged as a civil agent, and was in fact performing acts for his superior proper to such a position, and not such as a person ordinarily performed for hire as the result of a contract on a basis of mutual equality. Irrespective of the instrument by which he had placed himself

[5] Hébette and Lambert Petit, Belgium, in Répertoire Alphabétique of Pandectes Françaises, XII, 748 *et seq.*

[6] See de Paepe, Études sur la Compétence Civile à l'Égard des États Étrangers, pp. 139-141.

[7] Pasicrisie, 1891-2-419; Belgique Judiciaire, 1891, col. 942; Jurisprudence des Tribunaux, XXXIX, col. 874; Journal des Tribunaux, 1891, col. 1056; Jurisprudence de l'État Indépendant du Congo, II, 97; Pandectes Périodiques, 1890, No. 2025.

at the disposition of the state, it was certain that he had demanded and obtained a post which put him in a position of subordination to the administrator of the Congo, and which made him a functionary, engaged and paid by the Congo Free State, a sovereign power, which might command him and might dismiss him, and whom he was obliged to obey. Hence the courts of Belgium were absolutely without competence to take cognizance of a claim for damages brought by such an agent who alleged that he had been unjustly discharged by the administrative power of the country to whom he had offered his services. The court made no mention of the fact that the Congo had been recognized as a state by the different governments, although the lower tribunal had referred to this as an element of its judgment.

In a similar case, decided February 5, 1898, it was held that a state in engaging or dismissing its functionaries acted not in its civil, but in its sovereign capacity.[8] Suit was brought against the Congo Free State by one who had been appointed a captain of the public forces of that state. The question involved his reinstatement on the terms of the original agreement after leave of absence granted for illness. The plaintiff maintained that the action was brought upon a bilateral contract; the Congo Free State excepted to the competence of the court. The court held that engaging a captain of the public forces, subject to the discipline of the state, was not a contract of hire, but was a sovereign act, regarding the legality of which Belgian courts were incompetent to decide.

On January 4, 1896, however, the same court declared itself competent to take cognizance of a claim for wages alleged to be due from the Congo Free State.[9] The plaintiff sought to obtain remuneration for his services as agent in negotiating with a banking house in Vienna for a loan for the Congo Free State. The court held that the obligation to remunerate an agent was essentially a civil obligation, whether it were entered into by an individual or by a state. In Belgium litigation

[8] Civil Tribunal, Brussels, Pasicrisie, 1898-3-305; Jurisprudence de l'État Indépendant du Congo, II, 100.

[9] Pasicrisie, 1896-3-252; Journal des Tribunaux, 1896, col. 69; Jurisprudence des Tribunaux, XLIV, 359; Pandectes Périodiques, 1896, No. 277; Jurisprudence de l'État Indépendant du Congo, II, 99.

involving civil rights belonged to the exclusive jurisdiction of the courts, and this held even when a foreign state was involved. Moreover, the same provision existed in the legislation of the Congo. A foreign state, acting in its civil capacity, was deemed to have submitted itself in advance to all the civil consequences of contracts entered into by it, including, except for express stipulations to the contrary, the ordinary rules governing the competence of the courts. In the present case, the obligation assumed by the Congo Free State had its origin not in an act of sovereignty, but in a contractual undertaking—a bilateral agreement. Hence the court was competent.

A state loan, however, was considered a sovereign act in a case decided by the Civil Tribunal of Brussels on December 9, 1893.[10] This suit involved a request that the Administrator-General of the Congo Free State be subjected to certain interrogatories in connection with a claim of the plaintiff for remuneration on the score of participation in a state loan. The court held that it was incompetent to order the investigation, because it was incompetent to decide the main issue. Moreover, the Administrator-General, in showing a willingness to renounce for himself the benefit of his extraterritoriality, could not be deemed to renounce it for the state which he represented.

The President of the Civil Tribunal at Brussels made a ruling in favor of the Congo Free State in a decision *en référé* of April 20, 1903.[11] The plaintiff had tendered to the Congo Free State certain government paper owned by him as security for his appearance in a suit pending against him in the Congo. He brought suit here for unpaid interest on this paper. The court held that the interest would follow the fate of the securities themselves, and that in holding the latter for the purpose above named, the state was acting in its sovereign capacity. The Congo Free State was an independent sovereign state, recognized as such by the family of nations, and hence, according to international law, was not subject to the process

[10] Pasicrisie, 1896-3-32; Jurisprudence de l'État Indépendant du Congo, II, 98.

[11] Pasicrisie, 1903-3-180.

of foreign courts. The Tribunal, therefore, had no competence to decide the case.

Not only were the courts willing to look upon Turkey and the future Belgian colony—the Congo Free State *ad interim*—as sovereign, and to apply the same rules in the matter of jurisdiction to them that they applied to other states, but they were inclined to admit that a political subdivision of a foreign state should have the same status. On November 22, 1907, the Court of Appeal at Brussels rendered a decision in a case brought against the state of Bahia.[12] The defendant excepted to the competence of the court, alleging that it was a sovereign state, forming part of the federal Republic of Brazil, and that it was being sued for a sovereign act. The court held that it was to be considered as acting in a sovereign capacity if it were exercising a right reserved to it exclusively both by its own constitution and by the constitution of the Republic of Brazil. Under these circumstances, Belgian courts would be incompetent. It held specifically that both the acts of authorizing and contracting a loan were sovereign acts, according to the law of the state in question, but that acts not indispensable to the issuing of the bonds authorized, even though connected therewith, were not sovereign acts, but simple agreements, of which Belgian courts might take cognizance. The present action was founded upon an oral contract between the plaintiff and a certain individual purporting to give the former complete power to negotiate a loan for the state of Bahia. The damages claimed resulted from an alleged violation of this agreement. The facts appeared to be that the governor of the state of Bahia had authorized a certain individual to endeavor to procure a loan abroad for the state, the government pledging itself to grant to the above person, or to anyone indicated by him and approved by the government, the necessary power to sign the contract after the preliminaries should have been arranged. The power thus delegated vested ultimately in one Worms, who concluded with the plaintiff the contract here in question. It was held that the delegation of authority by the governor of Bahia did not constitute an act of sovereignty or a delegation of power, but a mere mandate to

Bahia

[12] Pasicrisie, 1908-2-55.

make certain preliminary arrangements, which could only give rise to civil rights, and did not in any way involve the sovereignty of Bahia. Belgian courts, incompetent to judge of the legality or opportuneness of the authority given to the governor of Bahia to contract the loan, and of the fact of its consummation by the chief executive of the state, were nevertheless competent to take cognizance of the relations between the latter and third persons with a view to finding investors and discussing the conditions of the loan. No law, it was said, gave to a foreign state the right to decline the competence of Belgian courts in litigation arising from contracts of purely civil rights.

In treating Turkey, the Congo Free State and Bahia as entities entitled to the same consideration as fully sovereign powers, Belgian courts evinced a liberality in the selection of the persons permitted to profit by the customary immunity which they were far from showing in determining the acts which were exempt from their competence.

## CHAPTER III

### THE "BELGIAN DOCTRINE" AND ITS IMPLICATIONS

**Liège-Limburg Railway Case**

It was not until 1903 that the Court of Cassation set forth the doctrine which has come to be identified with Belgian and Italian jurisprudence. In the Liège-Limburg Railway case, it approved for the first time the distinction between the competence of national courts over the sovereign and the civil acts of foreign states. This case is also of interest because of the influence it might have been expected to exert upon Dutch jurisprudence, at least in so far as claims arising from civil acts of the Belgian state were concerned. The Dutch courts, however, refused to follow the example set in Belgium, and did not even make this new doctrine an excuse for reciprocal treatment when the occasion arose.[1]

The case of the Liège-Limburg Railway company arose from the following facts: In June, 1866, the Dutch Government, as operator of the state railway system, had made an agreement with the Belgian company above mentioned, that, should the latter participate in the expense of enlarging a certain station in Holland, it would reimburse said company for its share of the outlay, if for any reason the existing arrangement for the joint use of the station by the two lines should be terminated. Some time thereafter, the Dutch state bought out all interest of the Belgian company in the line from the Belgian frontier to the station in question. The Belgian railway company brought suit under the above agreement for its expenses in connection with the alteration of the station. The Civil Tribunal at Brussels on May 22, 1901,[2] declared itself competent in virtue of Article 92 of the Constitution, giving the courts exclusive jurisdiction over litigation involving civil rights, and Article 54 of the law of March 25,

[1] See the *Hendrika II*, Weekblad van het Recht (1923), 11088, p. 5:2.
[2] Journal des Tribunaux, 1901, col. 1127.

1876, stipulating that, save in certain cases, a foreigner might (if reciprocity were granted by his country) decline the jurisdiction of the Belgian courts, but if he failed so to do at the first hearing, the judge should retain the case and decide it. The tribunal held that states appeared as sovereign and fully independent only when they acted in the exercise of *imperium*, *i.e.*, when they commanded. Such was not the case when they acted in a civil or private capacity. Under such circumstances, states, placing themselves on an equality with mere individuals, were subject like them to municipal law and the courts. There was no reason to abandon this distinction when a foreign government was sued in Belgian courts.

The Dutch state appealed on the ground of jurisdiction, alleging that Belgian courts were incompetent to hear the case. The Court of Appeal at Brussels [*] held that this question could be decided only according to the principles of international law, and that the provisions of Belgian law sought to be applied by the Belgian company were foreign to the issue. Article 92 of the Constitution had in view the separation of powers within the Belgian state only. It aimed to preclude any other Belgian authority than the courts deciding litigation concerning civil rights. But it did not provide that the national tribunals were to take cognizance of all civil litigation whoever the parties, especially if they were not of Belgian nationality. Nor was Article 54 of the law of March 25, 1876, at variance with the constitutional provision, although it permitted foreigners in certain cases to refuse the competence of Belgian courts. International law proclaimed the mutual independence of sovereign nations, one of the results of which was to prevent any one nation from being constrained to submit to the jurisdiction of another. The jurisprudence of the different states of Europe in general made no distinction between cases where the defendant state acted in its sovereign and in its civil capacity. Moreover, the state performed no juridical act which was not, directly or indirectly, political in its aim; the state, even when it contracted, acted not in its personal interests, but only with a view to fulfilling its high

[*] February 7, 1902, Pasicrisie, 1902-2-162.

governmental mission. For these reasons the judgment of the lower court was reversed.

The railway company then took the case to the Court of Cassation.[4] It contended not only that the state was exercising its *jus gestionis* and not its *jus imperii* in making a contract, but that the nature of the contract under discussion precluded it from being considered as furthering a governmental purpose, as might be argued of certain contracts, as for the purchase of supplies for the army or fleet. The state, engaged in the enterprise of transportation for hire, was dealing with another carrier, and contracting with a view to their mutual interests. The court held that the rule of international law which proclaimed the independence of nations was derived from the principle of their sovereignty, and that it was without application when such sovereignty was not involved. Sovereignty was not involved except by acts of the political life of the state. The state need not, however, confine itself to its political rôle. It might acquire property, contract or engage in commerce. In so doing it was not exercising its sovereign power, but was acting as a private person. When, in such capacity, it contracted with another party as an equal, litigation resulting therefrom involved civil rights, and the courts had jurisdiction in accordance with Article 92 of the Constitution. Foreign states, as juridical persons, were held to be subject to Belgian courts on the same ground as other foreigners. The sovereignty of such states was no more involved than was that of the Belgian state when sued in its civil capacity. Moreover, there might surely be an implicit renunciation of immunity in the case of a contract, since the validity of such a renunciation was recognized in cases involving inalienable prerogatives. Furthermore, if the foreign state might use the courts for the prosecution of claims against its debtors, it should be responsible before them to its creditors.[5] The court below emphasized the impossibility of executing a judgment against a foreign government, but this objection was

[4] June 11, 1903, Pasicrisie, 1903-1-294; Weekblad van het Recht (1903), 7983, 3:2.

[5] See, however, the decision of the District Court at Rotterdam, November 24, 1922, Weekblad van het Recht (1923), 10978, p. 2:2, which refused to admit a counterclaim against the Belgian state in a suit brought by it against a Dutch shipping company.

not deemed decisive, for even if it was necessary to concede to foreign states a more favorable status than that accorded to foreign private persons in this regard, there was no reason for assuming the incompetence of Belgian courts, which did not cease to be competent to render judgments against the Belgian state because the latter's property was not subject to levy upon execution. Moreover, the validity of a judicial decision was independent of the difficulties which might be presented by its execution. Furthermore, it was wrong to lose sight of the moral influence which attached to a decision rendered by independent judges. A judgment founded on the principles of eternal and universal justice had of itself an effect upon the public conscience more powerful than the most energetic methods of coercion. For these reasons the decision was reversed, and the case remanded to the Court of Appeal.

Post-war Cases

Some interesting cases arose out of the post-war situation in Belgium. One was that decided by the Court of Appeal at Brussels, June 24, 1920. This was a suit for damages resulting from a collision which occurred in Antwerp, December 18, 1919, between an automobile of the plaintiff and a truck of the United States army base, driven by an American soldier in the performance of his duty. The judge below assumed competence in the matter, the United States making no appearance. Thereupon the attorney-general brought an appeal on grounds of public policy,[6] alleging that the judge below was not competent and could not arrogate to himself the right to review the acts of a foreign government acting as *puissance publique*. The court accepted this view, declared itself incompetent and annulled the decision of the tribunal below.[7]

On April 3, 1923, the Court of Appeal at Brussels affirmed a judgment of the Commercial Tribunal of February 2, 1922, involving the right of a corporation, defendant in a suit brought by the Belgian Government, to ask a foreign state to appear and plead cause with it in such a manner that the judgment to be delivered should bind both parties.[8] The basis

[6] See Article 46 of the Law of April 20, 1810.

[7] Pasicrisie, 1920-2-122.

[8] Pasicrisie, 1922-3-120; *ibid.*, 1923-2-89. See, too, Société France-Belgique "Société Lemoine et Cie." *v.* État Belge et État Brittanique, Civil Tribunal, Brussels, October 12, 1925, *ibid.*, 1926-3-121.

of the request was an agreement made by the British Government with the defendant syndicate for the sale of the former's property rights in the booty of war in its sector in Belgium, allocated to it by the Armistice and subsequent interallied arrangements. Some time after the sale, the Belgian Government laid claim to a certain portion of this booty, and brought suit against the syndicate, which, in turn, asked the intervention of the British Government in its behalf, the decision to be binding upon them both alike. The British Government protested the jurisdiction of the court. But the court held that in this instance the foreign state was being sued in connection with a business agreement which it had made with a private individual, thus impliedly submitting to the obligations incumbent upon a private individual from such a contract. There was held to be no legal provision which would withdraw litigation arising from contracts to which a foreign state was a party from the jurisdiction of the courts in Belgium. Hence, the dispositions of the law regulating the competence of Belgian courts in regard to foreigners should be applied to Great Britain. By this law, Belgian courts had competence over foreigners when the object of the suit was connected with a process already pending before Belgian courts, as was here the case. In the event, however, the court decided that the plaintiff's contentions were unsound on the merits of the case. Hence there was no necessity for bringing in the British Government by interpleader to strengthen the defense.

From the time of its pronouncement by the Court of Cassation in 1903, the "Belgian doctrine" may be regarded as full-fledged. Although foreshadowed by earlier decisions of lower tribunals, the final seal of approval was not given until the Court of Cassation expressed its approbation. From then on, the competence of Belgian courts to take cognizance of suits brought against foreign states arising from any act of the state undertaken in its civil or private, as distinguished from its sovereign, capacity, received consistent recognition in Belgian jurisprudence.* This decision of the Court of Cassation, however, did not establish any criterion by which to

* Monnoyer et Bernard *v.* État Français, Civil Tribunal, Charleroi, April 8, 1927, Pasicrisie, 1927-3-129.

differentiate between civil and sovereign acts. Is the nature of the act alone to determine its classification, so that all contracts, irrespective of their purposes, are to be considered as civil in their nature? Is a state, contracting for the purchase of bullets, for the rental of an embassy, for the services of an administrative agent, performing an act *jure gestionis?* [10] Or is it necessary to look not only to the nature of the act, but to its aim as well, with the result that a method frequently adopted by the private citizen for personal ends may, when resorted to by a foreign state for political purposes, acquire by that very aim a public character, and hence be protected from review by national courts? [11] Despite its incomplete expression by the Court of Cassation, the doctrine has been accepted in principle by Italian jurists. It has not, however, found favor with other nations, who seem rather inclined to follow the lead of Great Britain in according a very extensive immunity to foreign states.

Thus, with regard to foreign states, the first step has been taken toward the complete abandonment of the doctrine of immunity from suit, which has already been attained with reference to the Belgian Government. The second step, that of subjecting them to the jurisdiction of national courts for their sovereign acts, seems unlikely to be taken. It is not improbable, however, that further advance along the same course may be made in connection with the liability of foreign state property to seizure. It has been held that such property is not liable to be attached or to be taken on execution, whether in the hands of agents of the government or those of third persons, but the effect of the nature of the property has not been considered. The leading case assumed that the seizure was illegal because the courts had no competence to hear the suit, and the courts in subsequent cases have been not unwilling to refer to this fact whenever it could be maintained, but when, in view of the extension of competence more recently assumed by the courts, it has been impossible to base the illegality of the seizure upon lack of competence to decide the main issue, the courts have still refused to allowed it. It

**Seizure of Foreign State Property**

[10] *Cf.* Laurent, Droit Civil International, III, § 41; de Paepe, Études sur la Compétence Civile à l'Égard des États Étrangers, p. 87.

[11] *Cf.* Pradier-Fodéré, Traité de Droit International Public, III, § 1589.

is here that some change from the present practice may be looked for in the future.

**Cannon**

The principal case was that of the Turkish Government *v.* Sclessin.[12] On September 21, 1876, the president of the Commercial Tribunal at Antwerp authorized the garnishment of certain Krupp cannon belonging to the Ottoman Government on their way from Essen to Turkey. The attaching creditor alleged damages for the non-execution of a contract entered into with him by a representative of the Turkish Government. This attachment was only provisional pending an appeal by the creditor to the civil tribunal for a judgment which would enable him to transform it into a levy of execution. Before this event, the above action of the president of the Commercial Tribunal was freely commented upon. By some it was maintained that the essential of even a provisional attachment was that the court have jurisdiction over the person or property of the person against whom the writ ran. Not even such a preliminary measure could be taken against one over whom no jurisdiction at all existed. The impossibility of the principal action imported the illegality of the attachment and sequestration. Applying this principle to the case under discussion, it was alleged that if the Government of the Sultan could not be cited before the courts of Belgium to respond to the demands of its creditors, the attachment was likewise inadmissible. In the case of cannon of the Turkish Government, the incompetence of the Belgian courts was deemed to be particularly clear, being derived both from the special character of the property and from the "extraterritoriality" enjoyed by foreign governments.[13] Others maintained with equal ardor that the competence of Belgian courts to assume jurisdiction over a foreign state and to execute the ensuing judgment was the inevitable result of the absence of any express limitation upon their competence incorporated into the text of Belgian law.[14] The Civil Tribunal, basing its decree

[12] Tribunal of Commerce, Antwerp, September 21, 1876, and the Civil Tribunal, Antwerp, November 11, 1876, Pasicrisie, 1877-3-28; Jurisprudence d'Anvers, 1876, 1, 357; Belgique Judiciaire, 1876, col. 1467.

[13] Holtzendorff, Journal du Droit International Privé, III (1876), 431.

[14] See Spée, Belgique Judiciaire, 1876, col. 1441; Journal du Droit International Privé, III (1876), 329; Jurisprudence d'Anvers, 1876, 1, 305.

upon the lack of jurisdiction of the courts, ordered the immediate release of the cannon, holding that the mere fact that the attachment was provisional in its nature could not be pleaded as an argument to prove its legality.[15]

**Government-owned Merchant Vessels**

There have been but few cases involving foreign government-owned vessels decided by Belgian courts. That of the *Youlan* is in point.[16] This was a vessel bought in 1914 from the English firm of Furness Withy and Company by the West Russian Steamship Company, Ltd., incorporated in Russia. Subsequently it was taken over by Finland in the port of Helsingfors, and, in accordance with a resolution of the Finnish Senate of November, 1918, used under a Finnish captain and crew, for the transportation of foodstuffs from foreign countries to the account of the Government of Finland. The *Youlan* arrived at Antwerp in January, 1920, flying the flag of the Finnish Republic, and was arrested at the request of the West Russian Steamship Company, which alleged ownership of the vessel. Cross actions were then brought, one, an action by the West Russian Steamship Company for an order to the captain to quit the steamer, failing which it should be authorized to expel him by force; the other a request by Finland that, the seizure being arbitrary and vexatious, the company or its alleged representative, be ordered to release the vessel within twenty-four hours, and be condemned to pay the plaintiff 500,000 francs damages. Finland claimed first, that it had become the legal owner of the vessel in the course of 1918; second, that the argument that the seizure had not been confirmed by prize proceedings could not alter the fact that it was exercising the right of angary in employing this vessel in its public service. The West Russian Steamship Company maintained that Finland had not become the owner of the vessel because the confiscation had not been decreed by a prize court, and because the seizure was consummated at a time when Finland had not yet become a state in the international sense. Moreover, the alleged exercise of

**The "Youlan"**

[15] See Spée, Journal du Droit International Privé, III (1876), 435; Jurisprudence d'Anvers, 1876, 1, 362.

[16] Tribunal of Commerce, Antwerp, February 9, 1920, Jurisprudence d'Anvers, 1921, 593; Pasicrisie, 1922-3-3; Belgique Judiciaire, 1920, col. 211.

the right of angary could have no effect outside of Finland. Furthermore, when the *Youlan* arrived in Antwerp it had on board a cargo of wood to the account of a private individual, and intended to return in ballast, so that neither the vessel nor the voyage had any public character.

The court rendered its decision as follows: The Finnish Republic was in possession of the vessel, and the suit brought against it was in reality for the purpose of divesting it of this possession. On June 10, 1919, Belgium had officially recognized the Republic of Finland, and as a sovereign state it was not subject to the jurisdiction of foreign tribunals. By unanimous accord among civilized people the immunity vouchsafed foreign ambassadors extended to their families, their property, and their servants. It was inconceivable that the government itself should enjoy less protection than its representatives. The Russian company was wrong in contending that the Finnish Republic could be deprived of possession of the *Youlan* by a decision of a Belgian court, on the pretext that the sovereignty of a state was limited to its own territory and had authority outside those boundaries only when the state had received international recognition. For Finland was in possession as the result of an act of appropriation which took place within its own territory. Finland was not bound to prove that the vessel in question was in fact engaged in its public service. Its affirmation was sufficient. To force it to give proofs would be to make it subject itself to the jurisdiction of the court to which it submitted the proof. Moreover, on the authority of the English case of the *Parlement Belge*,[17] a vessel belonging to the state, even though used for private or commercial ends, would not lose its immunity. Nor did Finland submit to the jurisdiction of Belgian courts by bringing its action for the vacating of the attachment and for damages. For its whole contention was that the judge who decreed the attachment lacked authority to do so, in view of the fact that it had physical possession of the vessel. The state could not be placed in the alternative of submitting to be dispossessed of its property or of being forced to submit

[17] (1880) 5 P. D. 197.

to the jurisdiction of a foreign court. For the above reasons the attachment was ordered vacated.

The "Lima" and the "Pangim"

In 1921 a Belgian company obtained from the president of the Commercial Tribunal at Antwerp permission to attach two steamers of the *Transportes Maritimos do Estado,* claiming that this organization owed them some four million francs for coal they had supplied it. The Portuguese Government thereupon requested the release of the steamers, claiming the seizure was null and void as the vessels were the property of the Portuguese state. The judge held that the identity of the Transport Company and the Portuguese state was not made out sufficiently clearly by the latter. It was not established that the company was more than one in which the government had a preponderant interest. He therefore declared himself competent and rejected the request of Portugal.[18] This decision was reversed by the Court of Appeal of Brussels, June 27, 1921.[19] Portugal demanded the release of the vessels, maintaining that the company was one of its organs, forming with it a single juridical entity, and that the vessels were its property, employed in its public service. It based its request principally upon international custom, which, it said, embodied the immunity of property belonging to the state, or property being used as above. It appeared that Portugal, by decrees of February 24 and March 6, 1916, had requisitioned these former German vessels, re-christened the *Lima* and the *Pangim,* for public purposes, *e.g.* to promote the supply of raw materials and manufactures of prime necessity, and to normalize its domestic markets. It handed them over to a commission especially established for their management. There was, therefore, no doubt of the public character of the organization and of the service it was rendering. Nor could there be any question as to the present title of Portugal. These vessels had belonged to German subjects, whose ownership Germany had renounced by the Treaty of Versailles.[20] Furthermore Portugal had been in undisputed possession since

[18] Jurisprudence d'Anvers, 1921, 338.
[19] Pasicrisie, 1922-2-53; Jurisprudence d'Anvers, 1921, 496.
[20] § 1 of Annex III of Part VIII.

the date of the requisition. This property was being prevented from performing a public service by the detention under discussion. The reason that Belgian jurisprudence admitted no levy of execution against the property of the Belgian state was to preclude judgment creditors of the state from interfering with the progress of its public services. According to the international-law principle of equality of states, such immunity ought to be accorded to other states, especially when the property was used as in this case. This principle being based upon the comity existing among nations, was paramount to the interests of individuals. In vain the appellee contended that the property of foreign states was not immune from provisional detention, because the latter was not a measure of execution but merely one of precaution. By the detention the two vessels had been prevented from prosecuting their employment, and the state had been deprived of the free disposition of its property. The measures taken were all really the first steps towards execution. Hence, it was held that Belgian courts were absolutely incompetent to authorize such a seizure, the writs of attachment were declared null and void, and the vessels were ordered to be immediately released.

**Judgment and Execution**

It has been suggested that the decision of the Court of Cassation of 1903 removed the grounds previously held to exist for declaring such a seizure invalid, and that had this decision been referred to the Court of Cassation, it would have been reversed.[21] Neither in practice nor in theory does the liability of property to seizure follow *ipso facto* from the competence of the court to decide a case involving the owner of the property. This fact is common knowledge as regards the execution of judgments rendered against the Belgian state. Despite the broad jurisdiction of the courts over acts of the government in relation to its citizens, no creditor of the Belgian state is permitted to impede the performance of any public service undertaken by the state by seizing its property or funds. This is a matter of public policy. Applied to

[21] *Cf.* views of Messieurs Smeesters and Sohr in their report, *Comité Maritime International, Bulletin No. 57,* pp. 153, 154; and editorial comment in Jurisprudence d'Anvers, 1921, 500.

foreign states, the doctrine that the right of jurisdiction implies the power of execution encounters a difficulty of a practical nature. Whereas there is no physical prerequisite for the assumption of jurisdiction over a foreign state, execution of a judgment implies the presence of some property upon which the execution may be levied. It is certainly not requisite that the court, before hearing the issue, should first assure itself of the presence of some available property of the foreign state upon which the judgment might be executed should it be against the government in question. The courts have chosen to render their decisions irrespective of the possibility of execution. The inchoate nature of such a decision is not thought to involve even a theoretical objection to this practice of the courts. Although it has been held that it would be unreasonable to admit a competence in the courts which could result only in an empty judgment,[22] the Court of Cassation has expressly denied that the validity of a judicial decision is dependent upon matters concerned with its execution, and has maintained that a judgment founded upon the principles of universal justice has an effect upon the public conscience more powerful than the most energetic methods of coercion.[23]

Although it can therefore not properly be said that foreign state-owned property is liable to seizure if the court is competent to assume jurisdiction over the case involving it, stated negatively the proposition is true. Hence the courts, which have upheld the inviolability of such property on entirely independent grounds—apparently those of the mutual respect and comity of nations—have not hesitated, when denying the right to seize property of a foreign state, to refer whenever possible to the incompetence of the court to assume jurisdiction over such foreign states. As long as the exceptions to the immunity from jurisdiction were few, this formed a convenient basis upon which to refuse interference with foreign state-owned property and funds. But from the moment when

[22] Justice Campioni, in decision of April 28, 1902, Pasicrisie, 1902-3-241. *Cf.* also Gabba, Journal du Droit International Privé, XVII (1890), pp. 29, 34.

[23] June 11, 1903, Pasicrisie, 1903-1-294. *Cf.* Laurent, Droit Civil International, III, 87 *et seq.*

Belgian jurisprudence admitted that in all cases where the foreign state was acting in its private capacity, the national courts might take cognizance of suits against it, the courts were forced into a dilemma: either openly to ascribe the complete immunity from seizure—if it were to be maintained—to its real cause, or to consider making a differentiation according to the nature of the property involved. If such a distinction were to be made, it might well be argued that, whereas cannon of the Ottoman Government were inherently immune from seizure, vessels of foreign states engaged exclusively in commerce had no such innate characteristics, and might well be placed in the category of property liable to answer for the execution of a judgment properly rendered against its owner. This would be particularly true were the case one arising from the activities of the vessel itself, a suit *in rem*. Would the Court of Cassation have turned its discriminating powers to this problem and have evolved distinctions in the field of execution comparable to those it delineated in the realm of competence, or would it have followed the Court of Appeal in holding that comity and the reciprocal duty of nations required that regard be had for the uninterrupted exercise of all foreign state activities?

**Proposal of Belgian Maritime Law Association**

This question has not yet been answered in principle by the court. In the meantime, however, an attempt has been made to outline the rules that should apply to government-owned merchant vessels. The Belgian Maritime Law Association had long been actively coöperating with other such Associations for an international convention "according to which the states operating a merchant fleet and earning money in navigating ships ought not in future to be entitled to shield themselves behind the immunity attached to their sovereign character in order to escape their contractual obligations or other liabilities." [24] When the *Conférence Internationale de Droit Maritime* at Brussels finally drew up the text of an international convention on April 10, 1926, it was signed by the Belgian delegation, although not strictly conforming to its proposals. Subsequently, the text was incorporated into a bill presented to Parliament in order to bring Belgian

[24] 1923, *Bulletin No. 65*, pp. 58-65.

national law into conformity with the terms of the convention.[25]

Conclusion

Thus has Belgian jurisprudence been instrumental in blazing new trails in the field of international law. An attempt has been made to modernize the time-honored custom of granting immunity to foreign states. As the state has appeared emancipated from its traditional limitations, Belgian courts have endeavored to lay upon it the attendant obligations. Naturally the experiment has resulted in some inconsistencies, and its full development has not yet been attained. It is perhaps impossible to forecast the result of a universal application of this innovation in the practice of international law. It constitutes, however, a constructive attempt at reform, which should be of interest to other states. The most serious objections to the idea in practice might be obviated by the adoption of an international convention covering the general problem of suits against foreign states in somewhat the same way as the Brussels Convention of 1926 dealt with litigation involving government-owned vessels.

[25] International Maritime Committee, Bulletin No. 84, Synoptical Tables.

# THE POSITION OF FOREIGN STATES BEFORE ITALIAN COURTS

ITALY is usually associated with Belgium as one of the states whose courts have taken the lead in differentiating between the public and private acts of sovereign states. They do not refuse to assume jurisdiction even over foreign states when the latter are engaged in acts belonging to the second category. In Italy, as in Belgium, the treatment of foreign states is but a reflection of the position of the local sovereign before his own courts. Both countries have experienced a reaction from the over-zealous insistence upon the "separation of powers" of French revolutionary doctrinaires. Thus prior to 1865, when the great work of unifying the legislation of Italy was accomplished, differences between the state and individuals were of the exclusive competence of administrative tribunals. At that time, however, the doctrine of the immunity of the state gave way to the principle that all violations of civil rights were of the competence of the judiciary, whether the malfeasor was the state or an individual. The administrative tribunals were suppressed, and the state became subject to the jurisdiction of the ordinary courts whenever a violation of the rights of an individual by the state was claimed,[1] irrespective of whether the act giving rise to the claim was a "public" or a "private" act.

**Separation of Powers**

The application of this general theory to foreign states, however, is qualified by concepts of sovereignty, equality and independence, so that the foreign state can be subjected to the local courts only for its "private" acts. The first courts to assume jurisdiction over foreign sovereign states seem to have disregarded this principle and to have assimilated foreign states with foreigners in general, witness the decision of the Civil Tribunal of Brussels of June 20, 1840.[2] By 1878, how-

[1] Law of March 20, 1865, Annex E.

[2] Société Générale pour favoriser l'Industrie Nationale *v.* Le Syndicat d'Amortissement, le Gouvernement des Pays-Bas, et le Gouvernement Belge, Pasicrisie, 1841-2-33, 34, and *supra,* p. 191.

ever, the Commercial Tribunal of Ostend differentiated between the immunity of a state for acts undertaken in the exercise of its governmental mission and the possibility of its subjection to local jurisdiction for acts connected with commercial undertakings.[2a] Although it was not until 1903 that this distinction received the sanction of the Belgian Court of Cassation,[3] in Italy it found ready approbation. The court of Cassation of Naples condemned a foreign state on this basis in 1886 in one of the first recorded Italian cases brought against a foreign state before the judicial courts.

It requires no argument to prove that a foreign state cannot be sued for its sovereign acts. In assuming jurisdiction over the "private" acts of a state, however, the courts were under the necessity of establishing that they were not contravening recognized principles of international law. As international law must be evidenced either by international agreements or by custom, and as no general agreement existed according to which foreign states were immune from local jurisdiction, it should follow that this principle was incorporated in the common practice of nations. But before Italian courts came upon the scene, Belgian courts had been denying immunity under certain circumstances. Hence from the very beginning, and with increasing foundation of fact, Italian jurists could claim that no such unanimous practice of immunity was recognized by the states as would constitute it a principle of customary international law, and Italian courts consistently applied to states the rules of the Code of Civil Procedure relative to foreigners. Article 105 is to the effect that the foreigner who has no residence within the realm may be sued before the judicial authorities of the realm even though not present there, (1) if the action concerns movable or immovable property within the realm; (2) if the action concerns obligations originating from contracts or acts undertaken within the realm, or which are to be performed within the realm; (3) in all other cases where this is permitted by reciprocity. This article represents a limitation upon the broad jurisdiction

[2a] Rau, Vanden Abeele et Cie, *v.* Duruty, Commercial Tribunal, Ostend, July 17, 1878, Pasicrisie, 1879-2-175.

[3] Chemin de Fer Liégeois-Luxembourgeois *v.* État néerlandais, Court of Cassation, Belgium, June 11, 1903, Pasicrisie, 1903-I-294.

over foreigners claimed by Article 14 of the French *Code civil.*

Not only did the practice of applying to foreign states not international law but the civil law applicable to foreigners crystallize much more quickly in Italy than in Belgium, but there was no feeling-about for the proper criterion for the assumption of jurisdiction. In Belgium, the aim or purpose of the act giving rise to the claim was discussed in its bearing upon the issue, but in Italy the nature of the act alone provided the gravamen. Thus one misses any sense of growth of the doctrine in Italy; it sprang into being Minerva-like, full-fledged. The very first case decided was an extreme example. There are no landmarks in the development; there are no subtleties of distinction. It is not even clear what started the trend of judicial opinion on its distinctive course. Pisanelli is credited with being the originator of the theory in his commentary on the Code of Civil Procedure.[4] He certainly advances it without reference to any previous authorities, but as he wrote about 1855, it is clear that there had already been several decisions to this effect in Belgium.

The foreign state as a plaintiff before Italian courts raises no problems. Recognition as a state involves recognition as a juristic person, *i.e.* as a foreigner. According to Article 3 of the Civil Code the foreigner is admitted to the enjoyment of the civil rights accorded to citizens. Hence recognized foreign states, like foreign corporations, may use Italian courts for purposes of suit. So, too, counterclaims by respondent foreign states are permitted in the normal course.

**Maintenance of Insane Subject**

As to suits against foreign states, the first judicial decision found to express the "Italian doctrine" is that of the Court of Cassation of Naples of March 16 (27), 1886. This decision went very far. It not only enunciated the principle that a foreign state might be subject to the jurisdiction of local courts when engaged in private enterprise, but it applied this doctrine to a single act of a foreign state in agreeing to maintain a maniac in a local asylum.[5] On September 11, 1858, the Greek

[4] Commentario del Codice di Procedura Civile per gli Stati Sardi, vol. I, pt. 1, p. 527.

[5] Typaldos, Console di Grecia a Napoli *v.* Manicomio di Aversa, Guirisprudenza Italiana, 1886-I-1-228; Foro Italiano, 1886-I-399; Annali della Giurisprudenza Italiana, XX (1886), I-1-222.

Consul at Naples, in his official capacity, assumed the obligation to pay for the maintenance of a Greek subject who had been sheltered in an Italian asylum in Aversa since 1857. This obligation was assumed at the request of the asylum authorities, upon the refusal of the relatives of the patient, and was fulfilled until 1878. An inferior grade of care was given him from then until 1883, when the Greek Government had him removed to Corfu, leaving the bill for the last five years of maintenance unpaid. In 1884 the asylum sued the consul of Greece in Naples, at that time one Typaldos. The lower court condemned him to pay the sum due. Typaldos had recourse to Cassation, claiming that Italian courts were without jurisdiction and that the suit should have been brought against the Greek state rather than against him. The Court of Cassation agreed that the consul was less a private individual than a foreign official delegated by his government to perform certain duties relative to his co-nationals in the place to which he was accredited. What he did as consul was to be considered as done in the interests of his state. But the court differed with the appellant as to the conclusions to be drawn from this fact. The contention, based upon some judicial authority, that the mere fact that a foreign state was involved sufficed to render Italian courts incompetent to hear the suit, was based upon a fundamental fallacy, the court said. No one would deny that the foundation of international law was the sovereignty and independence of states, and that in consequence, each state in the exercise of its powers was withdrawn from the jurisdiction of the others. But the fallacy consisted in considering the state exclusively as a political entity, whereas there could not be denied to it the character of a civil entity as well, which it used in acquiring rights and contracting obligations in private relationships, like any other physical or juristic person capable of exercising civil rights. It was desirable that the state, which was the guardian of most important interests, should profit by all the contractual forms and relationships whereby economic activity was fostered in the commercial undertakings of the civic community. But to desire that these contractual relationships should be regulated by the law of nations was to confuse different things and ideas and to push

a just principle to the most absurd conclusion. The principle of the sovereignty of states had been capable of involving all the possible aspects of a state and of exceeding the limits of a rational conception of the latter as a body politic, both at home and abroad, as long as the political condition of nations and the traditions of the people identified the State with the Prince. But near the end of the nineteenth century there was no one who failed to see the double function of the state, according to whether it were regarded as the head of the political or of the economic activity of the nation. In its domestic routine, the state as a political entity could certainly not be sued, nor could the judicial authorities assume jurisdiction over any of its acts whatsoever, yet the state became subject to the courts when it was involved in civil transactions, and no one had ever contended that its sovereignty was thereby impaired. But the justice of the law would be impaired from the opposite system whereby the state should assume to protect its rights as a plaintiff while remaining beyond the reach of actions against it. As the state in its international aspect was intrinsically interrelated with the state in its domestic aspect, questions regarding its sovereignty should be judged by the same criteria. Hence there was no fear that the state, merely because it was foreign would be offended by the exercise of the jurisdiction to which was confided surveillance of civil relations, when the domestic state was subjected thereto without danger of offense to its sovereignty.

The second ground of appeal was likewise rejected. It was held that the consul as the representative of his government within the sphere of his functions in the place to which he was accredited, was the proper person to represent it in responding to an obligation assumed in the name of his principal by a predecessor in office. The act of providing for the maintenance of the Greek subject was clearly within the sphere of a consul's duty, so as to implicate the Greek state, and the Greek state was represented locally by the consul. Hence Italian courts had jurisdiction, the suit was properly brought and the appeal was dismissed.

This decision is very far-reaching. It is to be observed that there is no question of engaging in a commercial, industrial,

financial or other business enterprise in Italy. Nor was the single act in Italy upon which jurisdiction was based connected with such an enterprise conducted in Greece or elsewhere. Neither can the criterion of financial profit have been the controlling one. On the whole it is hard to find the elements of an act *jure gestionis* in providing for the maintenance of a necessitous subject. The *form* of the act—evidently a contract, express or implied—seems to be the only basis for such a classification; the *purpose* of the act is entirely disregarded. This seems to be the controlling factor in most of the Italian cases on this issue.

**Samama Will**

Within a week after this decision was handed down, the Court of Appeal of Lucca applied the new doctrine in a case of very dissimilar import.[6] This was in connection with the famous Samama will. Samama, a rich Tunisian, formerly Receiver-General and Director of Finances of Tunis, died in Livorno, where his will, drawn up in France, was offered for probate. There was some question as to its validity. The Bey of Tunis was interested on two scores. He had bought the expectations of one of the beneficiaries under the will, and at the same time, should the will not be allowed, as an alleged creditor of Samama, he planned to sue the heir at law of the testator. Through two successive agents, Heussein and Guttieres, the Bey negotiated with other parties interested in this enormous fortune. Heussein had applied to one Elmilik, an interpreter of Arabic, Hebrew, French and Italian, and also versed in the law of the Hebrews. Elmilik had undertaken to give his services for a large sum agreed upon in advance. To obtain payment of this remuneration, Elmilik brought suit against Heussein and Guttieres, as representatives of the Bey of Tunis, before the Tribunal at Leghorn. The tribunal declared itself competent[7] and Guttieres appealed on the issue of jurisdiction. The Court of Appeal of Lucca affirmed the decision of the tribunal below. It did not deny that mutual independence and sovereign autonomy were among the highest prerogatives of states, so that one state could not be sued

[6] Guttieres *v.* Elmilik, March 22, 1886. Foro Italiano, 1886-I-490. This case is frequently cited as of April 2, 1886, and is reported under that date in Annali della Giurisprudenza Italiana, XX (1886), 3, 230.

[7] February 12, 1885.

before the courts of another. This, however, was true when the government, keeping within the limits of its high political mission engaged in a direct exercise of its sovereignty, which brooked no control by the judicial authority. But it was not true when the government appeared in civil guise, contracting with private persons, for when, as a juristic person, *utitur jure privatorum*, private motives succeeded to public, and justice no longer permitted the refusal of all interference by foreign judicial authority. To this class belonged the act under consideration. In such circumstances the court would extend the provisions of article 105 of the Code of Civil Procedure, defining the jurisdiction that might be exercised over non-resident foreigners, to include a foreign sovereign who by his behavior had placed himself on a par with a private person. For these reasons the decision of the court below was affirmed.

The case was then taken to the Court of Cassation at Florence,[8] one of the grounds being the distinction made by the Court of Lucca between the sovereign and private capacities of the state. Anent this the Court of Cassation expressed itself at length. It said that the theory according to which the independence of states was admitted as a general and absolute maxim such that it was not permissible to consider whether acts of the government concerned *"imperio"* or *"gestione"* could not be embraced without affront to reason and justice. Certain it was that the principle of the independence of states did not allow the acts of a government concerning its high political mission to be subjected to the control of another Power or of a foreign authority, nor the exercise of its sovereignty to be subject to the jurisdiction of a foreign authority. When, however, these high prerogatives were not jeopardized, when the government, as *ente civile*, descended into the field of contracts and transactions, acquiring rights and assuming obligations like any private person, then its independence was not involved, then private acts and obligations only were at issue and the rules of common law should be followed. It was true that in the past not a few writers and courts had ex-

[8] July 25, 1886, Foro Italiano, 1886-I-913; Giurisprudenza Italiana, 1886-I-1-486.

pressed themselves to the contrary, but, taking into account the times and the concepts of sovereignty then prevalent, the manner of its development and the fusion of its diverse functions into the single dominating principle of the absolute, all-absorbing power of the sovereign, it became easy to account for these views and decisions, which, however, no longer conformed to the varied conditions, political, civil and economic of modern states. Hence a select but numerous body of modern writers, followed by authoritative decisions, had turned to other ideals involving a careful distinction between that which concerned the real independence of states as political entities and that which was attributable to their acts *gestionis*, as civil and juridical entities. This rational distinction, while it detracted nothing from the independence of states, facilitated in the highest degree the exercise of their economic activities, for the latter could always develop better in foreign lands when it was established that governments, like private persons, might be called upon to fulfill their obligations where they had been assumed or were to be performed. The lack of legislative norms for determining the character of the acts in question should not prove a deterrent to a strict judgment as to their essential nature in the various contingencies presented in the cases. Whether they were clothed with the character of governmental or civil acts was to be inferred from the intrinsic nature of the acts, from the provisions contained therein, and from the objects they had in view.

There was no need to fear either resentment among states or reprisals as the result of applying the above system. So long as justice, the foundation of every well-ordered government, was held in esteem, fears on the first score would be vain; and reprisals might well resolve themselves into a general adoption of similar treatment, and thus contribute to the dissemination of a principle of equity and justice which would reflect honor upon whoever contributed to its realization in modern international law. Thus, the Court of Cassation continued, far from having violated article 105 of the Code of Civil Procedure, the judges of the court below had applied it with wisdom. According to this article, a foreigner, having no residence within the kingdom, could be cited before the judi-

cial authorities in cases involving obligations arising out of contracts or transactions concluded or to be performed there. Once the distinction between the government as a political entity and the government as a civil entity was admitted, once it was recognized that even a state might for purely administrative acts be made subject to the jurisdiction of foreign tribunals without offense to its political sovereignty, there could be nothing more fitting than that the foreign state against whom a proceeding was instituted in the second of the above capacities should be included in the category of foreigners contemplated in article 105 of the Code of Civil Procedure. The decision of the Court of Appeal of Lucca was affirmed.

In an interesting note on this decision [9] Gabba agreed with the conclusion of the Florentine Court of Cassation, but not with its reasoning. He said that the exercise of jurisdiction could proceed only from consent on the part of the foreign state and not at all from the mere fact that it had contracted a civil obligation with a national to be performed within the kingdom. Where *implied* consent was relied upon as the basis of the jurisdiction it must be evidenced not by the simple fact of an obligation assumed by the foreign state *vis-à-vis* an Italian national, but by the establishment within the realm of a seat of the state's patrimonial interests, from which not one but repeated obligations arose, and by the transfer of itself in certain guise to Italy as the director of such interests, by means of a special representative to this end. It was a question not of single acts and obligations but of an entire continuing *"gestione"* of acts and obligations of a certain kind, and of a continuing representation as regarded them The concurrence of these conditions was what justified the assumption of judicial competence, because only thus did the foreign state place itself in the same position as a private citizen. He enumerated certain classes of situations that illustrated the conditions under which he conceived domestic courts might properly assume jurisdiction: if, a) a business agency, say of a railroad belonging to the state, established its seat in Italy; b) merchant vessels, belonging to a foreign state and trafficking

[9] Foro Italiano, 1886-I-913-920.

for it, sojourned in Italy; c) a foreign state had on Italian soil a depot of coal for its navy; d) a foreign state, having patrimonial interests of some sort on Italian territory established in addition to a *"gestione,"* a special *bureau* for such interests. It was obviously to the last category that the establishment of a special agency to look out for the interests of a foreign sovereign as beneficiary in an estate offered for probate in Italy belonged, and it was on this basis that Gabba approved in principle the Florentine decision. As to the decision of the Court of Cassation of Naples of 1886, the same reason for the assumption of jurisdiction did not appear. Even supposing that the act of providing for an insane citizen was not a political act, it was at any rate an isolated obligation, not one connected with a general business enterprise, or a specific patrimonial interest of another nature. In this it is to be sharply distinguished from the case just analyzed, although the decisions were similar.

**Attachment of Legacy**

The following year the Court of Appeal of Lucca again dealt with a problem connected with the Samama legacy.[10] In this case an unsatisfied bond holder attempted to garnishee funds accrued to the credit of the Bey of Tunis from this legacy. One Hamspohn was the holder of a treasury bond of Tunis dated December 26, 1867, which contained a statement over the signature of the Bey that the bearer should be reimbursed in the amount of the face value of the bond within one year. On July 5, 1869 a special financial commission was set up to consolidate and liquidate the Tunisian public debt. The bearers of the bonds in question had been invited to deposit them before a certain date to receive in exchange new paper. On October 6, 1880, the commission having fulfilled its functions, the Bey issued a statement that he recognized no debt not inscribed with the commission and evidenced by new titles. The plaintiff's bond had not been deposited. He claimed that this fact resulted only in the forfeiture of certain priorities enjoyed by the new bond holders, but that the debt remained good. The Bey on the other hand maintained that the debt was extinguished as a result of the above transactions.

[10] Hamspohn *v.* Bey di Tunisi, March 14, 1887, Foro Italiano, 1887-I-474.

Under these circumstances, Hamspohn had attached funds of the Bey in Leghorn originating from the legacy, and brought suit on the bond. Two separate phases of the suit were considered by the Court of Appeal of Lucca: confirmation of the attachment, and the merits of the issue.

The court answered the contention of the Bey of Tunis that the property was not subject to attachment, by distinguishing beween public property, or that destined for public use, of which the state did not have the absolute right of enjoyment and disposition, such as the receipts obtained from taxes, and patrimonial property of the state, private and alienable, covered by the provisions of the civil code on acquisition, enjoyment and transfer of property. These latter were freely subject to attachment whether the Italian or a foreign state were involved. In other words the ordinary rules regarding sequestration and attachment applied. An attachment of the property of a debtor was permitted by article 924 of the Code of Civil Procedure when the creditor entertained a just fear of the flight of the debtor or of fraudulent transfer of his resources, or when there was danger of the creditor losing the security for his debt. The court held that in the case at bar the bond constituted *prima facie* evidence of the existence of the debt, but that the requirements of the above article were not met. As a state could not flee and as the loan was not hypothecated upon any special fund, there could be no danger for the creditor unless the general financial condition of the debtor had fallen off since the assumption of the obligation. But the finances of Tunis were more flourishing than twenty years before. Hence the attachment was dissolved.

On the merits the case likewise went in favor of the Bey, but rather on domestic than international-law points. The appellants claimed that the immunity urged by the Bey could be accorded only fully sovereign states, not such as Tunis which was a dependency of Turkey and a protectorate of France. The court declined to go into this question as it did not accept the principle of sovereign immunity from suit as an absolute one admitting no exceptions. Instead it reiterated the familiar doctrine of the distinction between the state as a civil and as a political entity. It then proceeded to investi-

**Issue of Government Bonds**

gate whether the government of Tunis had acted in the former or the latter capacity in the emission of the bond upon which the suit was brought. In determining this to be a purely civil act it made some very nice differentiations. The demand was the payment of a debt—a civil matter. The bond was merely documentary evidence of a contractual debt arising from a voluntary loan by a private individual to a government, negotiable by delivery, in demanding the payment of which the bearer was exercising an essentially civil right. The court refused to accept the contention that a treasury bond must be considered as resulting from an act of sovereignty. This might be true of the consolidated public debt, established by law as a direct method of satisfying the expenses of the public service, administered publicly under the immediate supervision of the legislative power. But treasury bonds issued to private individuals, upon actual payment of the face value, repayable in full with interest at maturity, were merely bills of exchange which the state drew upon its own treasury, to provide for temporary shortages of the exchequer, and which, as funds for the exact payment of expenses, formed an expedient of financial administration. When the state entered into such contractual relations with private persons, even for purposes of the public service, it assumed the same obligations, acquired the same rights and subjected itself to the same laws as private persons. And this was true not only in the modern state where the "Prince" was the first magistrate, but also where the state was incarnate in the Prince. In a word, the issue of the bond in question was a civil act placing the Bey of Tunis in the position of any foreigner so far as subjection to the jurisdiction of Italian courts was concerned. However, to assume jurisdiction over non-resident foreigners in actions *in personam* the court had to establish the existence of obligations arising from contracts or acts which took place in Italy, or which were to be performed there.[11] As these requirements were not met by the circumstances of the case under consideration, the competence of the lower court to hear the case on its merits was denied and the appeal failed.

Thus both on the question of the validity of the attachment

[11] Article 105, § 2 of Code of Civil Procedure.

and on the liability of the foreign government to suit, the above case went off on civil-law issues, but the pronouncements of the court in reaching its decisions are clear on the international-law points as well: patrimonial property of a foreign state is not immune from garnishee process; a foreign state is not exempt from suit for its civil acts; the issue of treasury bonds may be a civil act.[12]

**Annexation and Succession to State Obligations**

An interesting opportunity to compare the "older" trend of judicial opinion with the more recent "Italian doctrine" is afforded by two cases decided in 1880 and 1896 respectively. Both were handled at one stage or another by the Florentine Court of Cassation, and both dealt with the subjection of a foreign state to domestic courts in situations complicated by the principles governing the succession to state obligations in cases of annexation. The decision of the Court of Cassation of Florence of May 17, 1880 is more noteworthy from the fact that its reasoning was not to be followed in similar instances arising later, than from the actual holding of the court.[13] In 1857 the Ravignani brought suit before the Tribunal of Verona against the director of the Venetian Railroad, claiming indemnification for losses suffered from the construction of the railroad by the Austro-Hungarian government. After the union of Lombardy-Venetia with the Italian Kingdom, the plaintiffs pursued their claim against the Italian government principally, and against the Austro-Hungarian government in the alternative. The latter denied the jurisdiction of Italian courts over it. The tribunal declared itself incompetent with regard to the Austro-Hungarian government and condemned the Italian government to pay the indemnity. The Court of Appeal of Venice, on the other hand, absolved the Italian government and condemned the Austro-Hungarian. It considered that the original responsibility of Austria-Hungary for damages incident to the construction of its railway had not passed to Italy, since the former had not ceased to exist as a state itself, despite the succession of Italy to the sov-

**Eminent Domain**

[12] See notes of Gabba on this decision, Foro Italiano, 1887-I-475-78; and Journal du Droit International Privé, XV (1888), pp. 180-191; XVI (1889), pp. 538-554; XVII (1890), pp. 27-41.

[13] Ravignani *v.* il Governo Austro-Ungarico e il Governo Italiano, Giurisprudenza Italiana, 1880-I-1-1167.

ereignty of Lombardy-Venetia, nor had the Treaty of Peace of October 3, 1866 served to transfer this obligation to the new government. Article 10 specifically said that the Austrian Government would pay all outstanding indemnities for expropriation of property connected with the period when the railroads in question were administered by the state.

The Ravignani and the Austrian Government both appealed. The Court of Cassation differed with the court of appeal on its doctrine of succession, but agreed that the Austro-Hungarian government had retained the obligation of indemnification by the terms of the above treaty. Hence the Italian government was not responsible. But the Italian courts had no competence to interpret the Treaty of Peace as regarded Austria-Hungary. In fact, diplomatic conventions, in so far as they determined the rights and obligations of the contracting governments among themselves, could not be the subject of the decision of any [national] court. If such questions arose between them they could be settled only through diplomatic channels. If in a treaty one of the governments assumed obligations toward private individuals, the latter, whether they were its subjects or foreigners, should apply to its courts, and might not sue it before the courts of the other government. The Court of Appeal was held to have violated these principles of public law in condemning the Austro-Hungarian Government to carry out the terms of the Treaty in favor of the Ravignani. Hence its decision was reversed.

This decision of the Court of Cassation does not in terms deny the competence of Italian courts over foreign states, but it does refuse to permit the use of Italian courts for the enforcement of an obligation assumed by a foreign state in a formal treaty, and this despite the fact that the obligation involved a private right of an individual, and grew out of a non-political activity of the state. This decision will bear careful comparison with those immediately below.

**Contract for Fortifications**

On May 17, 1866, an Austrian subject, Fisola, residing in Venice, at that time part of the Austro-Hungarian Empire, entered into a contract with his government to construct certain minor fortifications and redoubts on the Venetian littoral. The work had been undertaken and some payments on account

had already been made when the Venetian province was ceded to Italy. Fisola obtained a certificate from the Austrian authorities in Trieste, stating the amount due him, but referring him to the Italian Government for payment. The Italian Government refused to commit itself until certain diplomatic negotiations then in progress should be terminated. After the lapse of fifteen years Fisola had to show for his claim only a statement of the Austrian Government that by article 8 of the Treaty of Vienna of October 3, 1866 Italy had taken over the responsibility for such debts as his.[14]

In the meantime, Fisola had become an Italian citizen and had died. Another Fisola represented his infant children and pushed the claim on their behalf. He brought suit against both the Italian and the Austrian states before the Tribunal of Venice, in order to get payment from one or the other. The action was directed principally against the Italian and secondarily against the Austrian government. The Austrian government entered a plea to the jurisdiction and on the merits denied its responsibility in view of the above-mentioned provision of the treaty of peace. Italy, however, insisted upon the pertinence of another article—article 6—whereby certain sums of money paid by Italy to Austria were "for the price of non-transportable material of war." Under this heading it was insisted the fortifications fell, and hence Italy disclaimed further responsibility as to payment for them.

In a decision of July 30, 1890 the Tribunal of Venice declared itself incompetent to entertain the suit against the Austrian state, and ordered the production of certain relevant documents by the Italian Government. Both the Italian Government and Fisola appealed. The Venetian Court of Appeals on July 13, 1892 rejected the appeal of Italy, but admitted that of Fisola, affirming the jurisdiction of the Italian courts with respect to Austria-Hungary. It held that there was a distinction between the civil and the political entity, and it recognized the double function of the state according to

[14] Article 8. "The government of his Majesty the King of Italy succeeds to the rights and obligations resulting from contracts regularly entered into by the Austrian Administration for objects of public interest especially concerning the territory ceded."

whether it was providing for an act of government, something which involved its political mission, when it could not submit to any control or jurisdiction by any other body, or whether, on the other hand, it descended to acts of administration and civil contracts where it assumed a private character and was subject to the rules of common law. If the state had acted *"utendo jure privatorum"* it could not withdraw itself from the judicial authority before which it was cited. It held further that it was a wrong assumption that the issue in hand was not a matter of civil law but one involving the interpretation of a treaty, which of course would be reserved for the diplomatic authorities. The discussion did not involve the relations between the two governments at all, but an article referring to the stipulations of the two governments with private persons, under the ægis of which the plaintiff demanded the payment of a debt due him. The case was remanded to the original court. This time both governments appealed, and the Court of Cassation of Rome, sitting in joint session, heard the case.[15]

The Court of Cassation agreed with the Court of Appeal in its general reasoning and went on to say that there could be no doubt but that the relation originally existing between Fisola and the Austrian Government was one resulting from a civil contract and that the government therefore assumed toward Fisola the obligations and duties of any other private person. Hence Fisola would have had the right to sue that government for payment of the debt he claimed directly from it. The nature of this action in debt of Fisola could not be altered by the terms of the treaty of peace between the Italian and Austrian Governments. Whatever the two governments agreed could not modify or influence the antecedent stipulation entered into between Fisola and the Austrian Government. And if Fisola in instituting the suit joined the Italian Government he did so anticipating the claim which the latter might make in virtue of a bargain contained in the treaty of peace, by which the debts of the Austro-Hungarian Government of the nature of this contract should be assumed by the Italian Government. Thus, Fisola sued the Italian Government in virtue of a treaty provision designed to regulate the

[15] Decision of October 12, 1893, Giurisprudenza Italiana, 1893-I-1-1213.

rights of private persons, and in so doing, as in the appeal, he properly applied to the judicial authority. It was not an action instituted to determine the rights and obligations of the governments between themselves on the basis of a diplomatic convention, but for the fulfillment of a civil obligation, originally assumed by the Austro-Hungarian Government for which the Italian Government might also be held. As to specific allocation of competence, there could be no doubt that the proper forum was the Tribunal at Venice, since the contract concerned immovable property to be erected and paid for in the Venetian province. The mere fact of a change in sovereignty over the territory could not alter the competence of the local tribunal. For these reasons, the appeal was rejected.

It has been objected that this decision of the supreme court of Rome disposes of the matter of assuming jurisdiction over a foreign state in a very off-hand manner, as though the moot issue of the subjection of a state when it had acted in a private capacity were much more firmly established in the trend of judicial opinion than was the fact.[16]

On February 18, 1895, the Tribunal of Venice, to which the case had been remanded, exonerated Austria from all responsibility for the debt and condemned the Italian Government to pay Fisola. It also decreed certain costs to Austria. Both governments as well as Fisola appealed. August 6, 1895, the Court of Appeal of Venice rejected all three appeals.[17] The international-law interest in the case now shifts from one concerning the jurisdiction of national courts over foreign states to one involving the right of the courts of a state to interpret an international treaty between that state and another. The court held that this was possible where private rights originated therefrom. On this basis it denied the possibility of interpreting article 6 of the Treaty of Vienna, it being purely an arrangement between two governments. Article 8, however, which it held applicable, applied to obligations assumed toward third parties, and hence was subject to analysis by the court. By this sophism it disposed of Italy's appeal.

[16] Anzilotti, comment on above decision, Giurisprudenza Italiana, 1894-I-1-145-158.

[17] Giurisprudenza Italiana, 1896-I-2-98.

The reason for Fisola's appeal was the complete exoneration of Austria which the tribunal held resulted from article 8 of the treaty, whereas the Court of Cassation at Rome had suggested that an independent action could always be maintained against Austria. This inconsistency the Court of Appeal resolved by asserting that Italy supplanted Austria *ipso jure* and irrespective of any treaty upon annexation of the province. It therefore affirmed the judgment of the tribunal.[18]

With the case now limited to the relations between Fisola and the Italian Government, the latter took it to the Court of Cassation at Florence,[19] where its contentions were again, and finally, denied. The inaccuracy of the court below in maintaining that Italy succeeded to rights and obligations in the annexed province by universal title rather than by the terms of the treaty, was pointed out, but it was not deemed of sufficient importance to invalidate the decision.[20]

The net result of this case for the matter under review would seem to be that, (1) the principle of the distinction between the state as a political and as a civil entity, being in the latter instance subject to the jurisdiction of the courts, was admitted or assumed by the Court of Cassation of Rome, without any serious effort being made to justify this assumption; (2) the private act of the state as a civil entity was deduced from an international treaty interpreted by the court against the contention of the government which concluded it, thus establishing the vicarious responsibility of one state for the acts of another. The trial court, having been reversed in its decision

[18] For criticism of the attempt of Italian courts to interpret a treaty between two nations, contrary to the will of one of them, see note by Anzilotti, Giurisprudenza Italiana, 1896-I-2-97-120.

[19] May 25, 1896, Giurisprudenza Italiana, 1896-I-1-662.

[20] *Cf.* the case of Mina *v.* Ministeri della guerra e delle finanze, October 27, 1870, Legge, 1871-II-170, where the Council of State held that the judicial authorities were not competent to hear a suit brought against the Italian government, on the basis of a debt incurred for military supplies by the Austrian forces in Lombardy, and claimed to have been assumed by Italy under Article 8 of the Treaty of Vienna of October 3, 1866. In the course of its decision the Council said that in addition to the maxim that the interpretation of international questions was outside the competence of the judiciary, in the instant case the claim involved a doubt whether the real debtor were the Italian or the Austrian government. The latter could never be sued before the judicial courts of the Kingdom of Italy, either by the plaintiff or by the Italian government.

that it was not competent to hear a suit against a foreign state, reformed its judgment in favor of the foreign state on the merits, and awarded it costs. Thus the assertion of jurisdiction did not result in any condemnation of the foreign state.

**Dependent Entities**

In deciding suits brought against entities not clearly entitled to enjoy all the prerogatives of sovereignty, the first concern of courts ordinarily granting immunity from jurisdiction to sovereign states must be to determine the status of the respondent. If, however, according to national judicial opinion even in the case of sovereign states the recognition of immunity depends upon the nature of the act in question, this becomes at best a mere preliminary and is frequently omitted entirely. Thus in the second case involving the Samama legacy and the Bey of Tunis,[21] the Court of Appeal of Lucca expressly refused to go into the issue of the right of the Bey of Tunis to urge sovereign immunity in his own defense. In a suit brought against the state of São Paulo in Brazil,[22] the Tribunal of Florence seems to have assimilated this member of a federal republic to other foreign states and then to have reduced them all to the status of "foreigners" as to their private dealings. The action was on a contract for publicity work to counteract the current opinion as to the condition of emigrants in São Paulo. In assuming jurisdiction for the purposes of a suit on this contract to be performed in Italy, the court said that as the modern conception of a state involved that of a civil person as well as that of a political entity, there was no doubt that the autonomous state of São Paulo in the federal Republic of Brazil, like any foreign state, ought, as regarded its acts performed *jure gestionis,* to be considered as a "foreigner" in Italy.[23]

**Foreign Sovereign**

On July 20, 1905 the Civil Tribunal of Milan heard one of the rare modern cases involving a foreign sovereign. It held that the distinction between sovereign and private acts that

[21] *Supra,* p. 230.

[22] Somigli *v.* Stato di San Paulo nel Brasile, June 8, 1906, Rivista di Diritto Internazionale, II (1907), p. 379; Revue de Droit International Privé, VI (1910), p. 527.

[23] *Cf.* decision of Belgian Court of Appeal at Brussels, November 22, 1907 *re* state of Bahia, where the assimilation of this political entity with states in international law is yet more clearly evidenced. *Supra,* p. 204.

prevailed as to foreign states was applicable to foreign sovereigns as well, and that the privilege of immunity might be renounced by the party so long as the public order of his state was not involved.[24]

On March 11, 1921 the Court of Cassation at Rome decided a suit brought against the ex-Emperor Charles I of Austria.[25] While heir-apparent he had been sued in an Italian court for an alleged breach of a civil obligation. Appeal was taken to the Court of Appeal at Ancona, which appears to have decided against Charles.[26] The latter took the case to the Court of Cassation. He claimed that upon his assumption of the throne during the process of the action, he became invested with privileges and immunities such that he was not subject to the jurisdiction of foreign courts either as to the institution or the continuation of a suit against him. The court held, however, that whatever these privileges and immunities might be, they could not be invoked in a state like Italy, which subjected its own sovereign to the civil courts for obligations of a patrimonial character. The acts under discussion were not done by the emperor as the head of his state, but were obligations originating from contracts or undertakings that had taken place in Italy. Hence he was held to have been properly subjected to the jurisdiction of Italian courts, not only as heir apparent, but as emperor as well.[27]

The courts of Italy have twice entertained actions, the facts of which were conducive to hopes for a decision based squarely upon the ground of the exclusive jurisdiction of national courts over all real property within the state. This doctrine seldom

[24] Introvini Cesare *v.* S. A. R. il Principe Danilo Petrovich Niegiosch del Montenegro, Civil Tribunal, Milan, July 20, 1905, Monitore dei Tribunali, XLVI (1905), p. 776.

[25] Carlo d'Austria Este *v.* Nobili, Giurisprudenza Italiano, 1921-I-1-471.

[26] No report of this decision of June 23, 1917 has been found.

[27] It may be recalled that the Resolution of the Institute of International Law at Hamburg, 1891, concerning the competence of courts, (*Compétence des tribunaux dans les procès contre les États ou souverains étrangers*) dealt with suits against foreign sovereigns, and provided in § 2 of Article III that suits resulting from obligations contracted prior to the accession of the sovereign were governed by the ordinary rules of competence. This would seem to be another possible ground for the assumption of jurisdiction in this case.

fails to be referred to by the courts as "universally admitted," but no case in any country in the world is ever cited in support of the statement. Nor did the Italian courts in the cases under consideration base their decisions on the principle. In the first case, decided by the Civil Tribunal at Rome on February 13, 1924,[28] it was mentioned as appropriate to the situation, but as the action was not one *in rem* the actual decision seems to be based upon the more usual factor of the conduct of a business. The facts were these: During the World War, France, as an ally of Italy, set up and maintained an aviation base upon Italian soil at Gallipoli. In connection therewith it entered into a series of relationships with local Italian firms for the furnishing of supplies and repairs, for manufacturing parts, hiring apparatus, *etc.*, having for this purpose, its own representatives on the spot. One of these firms brought suit against the French government some years after the war in connection with an obligation undertaken in the conduct of this enterprise. The French government refused to submit to the jurisdiction of Italian courts. The trial court insisted upon the inaptitude of any reliance on the part of the plaintiffs upon the Italian Code of Civil Procedure. It said that not only were the distinctions drawn in civil law between the various aspects of the state extremely delicate and imperfect, so as to result in great perplexities which were not clarified in an attempted application to foreign states, but that there was no justification for applying any but international law. According to this the exercise of jurisdiction must be based upon the consent of the foreign state. This might be implied as well as express, but it was not to be deduced from the simple fact that an act, such as the one in question, could be accomplished by a private individual: for instance a contract entered into or to be executed in the country of the court. There might, however, be concrete and specific manifestations of consent, concurrent in time with the establishment of the relationship. The very fact of acquiring and possessing real property which comprised part of the territory of another state with which

**Maintenance of Aviation Base**

[28] Storelli *v.* Governo della Repubblica francese, Giurisprudenza Italiana, 1924-I-2-206; Rivista di Diritto Internazionale, XVII (1925), p. 236.

it entertained diplomatic relations implied consent to submit as to that property to the jurisdiction of the state within which it was located. A similar situation arose whenever a state established on the territory of another a business permanently carried on there by means of its own representatives. In such a case, it was the foreign state which transplanted itself to the national territory, whence it must be presumed that it intended to submit to the exercise of jurisdiction by the courts, which was one of the most characteristic acts of sovereignty of a state. Properly understood this consent became effective immediately so that it was impossible to consider a subsequent disavowal with the object of preventing the exercise of this jurisdiction.

Applying this line of reasoning to the facts of the case at bar, the court held that the continuity and multiplicity of the relations entered into by France in connection with the flying field amounted to the conduct of a business in Italy; and not a business which could be carried on indifferently in Italy or elsewhere—but one so affiliated with the soil that it acquired a certain Italian character. The establishment of such an enterprise could not but be interpreted as consent to submit disputes which might arise in connection therewith to the jurisdiction of Italian courts. For these reasons the plea of the French government to the jurisdiction on the basis of sovereign immunity was rejected.

**Purchase of Real Property**

The second case to be decided in Italy concerning real property of a foreign state was Perrucchetti *v.* Puig y Casaurano.[29] This was an action arising out of the purchase of property for the purposes of the Mexican embassy, brought against the ambassador who had consummated the purchase. Immunity was claimed on the double ground of the immunity of a foreign state and of a diplomatic representative. The court took the view that diplomatic privileges could not extend beyond the limits of diplomatic activities, and that the foreign state, which could by no means claim immunity for all its activities abroad, could not acquire this immunity by using as an agent for a non-diplomatic purpose, a person who happened to be invested with diplomatic privileges. For in mak-

[29] Civil Tribunal, Rome, June 6, 1928, Foro Italiano, 1928-I-857.

ing a purchase of land on behalf of his government, the ambassador was not exercising a diplomatic function, but was merely acting as an ordinary agent of his state. As such he had entered into a contract in Italy in behalf of the Mexican state. This contract fell within the domain of purely private law. The purpose for which Mexico bought a piece of real estate could be of no significance to the vendor, nor could it serve to remove the contract from the domain of private to that of public law. As the Court of Cassation had held that a foreign state was subject to the jurisdiction of local courts for private acts, the Tribunal assumed itself to be competent in this case.

It is difficult to see in contracts entered into for national defense by an Allied state during a catastrophic war or in the purchase of land for an embassy anything comparable to the efforts of a state to make good a claim upon an inheritance, but if the mere nature of the act is taken as the criterion, then a contract is a civil or commercial act, be it for the equipment of a military flying field, for the construction of fortresses or for the supply of shoes for the army. This theory is set forth in a decision of the Court of Cassation at Rome of March 13, 1926, wherein it clarified its two previous decisions on the question of the assumption of jurisdiction over foreign states.[30] It brought out definitely that it is the *nature* of the act, not its *purpose* which is the controlling factor in determining whether the state *utitur jure privatorum.* This decision, dealing with a contract for the supply of leather for army boots and the attachment of the funds deposited as security for payment should be compared with that of the French Court of Cassation of January 22, 1849,[31] and that of the United States Circuit Court of Appeals, Second Circuit, January 11, 1918, in Kingdom of Roumania *v.* Guaranty Trust Co. of New York.[32] In the latter Judge Ward, delivering the opinion of the court, said, "It seems to us manifest that the Kingdom of Roumania

[30] Governo Rumeno *v.* Trutta, Giurisprudenza Italiana, 1926-I-1-774; Foro Italiano, 1926-I-584; this case is also reported under date of February 11, 1926 in Monitore dei Tribunali, LXVII (1926), p. 288.

[31] Gouvernement Espagnol *v.* Lambège et Pujol, Court of Cassation, France, January 22, 1849, Dalloz, Pér., 1849-I-5, *supra,* p. 151.

[32] 250 Federal 341.

in contracting for shoes and other equipment for its armies was not engaged in business, but was exercising the highest sovereign function of protecting itself against its enemies." [33]

**Army Equipment**

The facts of the case were these: one Gabriele Trutta, an Italian citizen, made a contract of sale with the Roumanian government for a large number of tanned leather soles for the use of the army. The purchase price was to be paid in Roumanian treasury bonds to be deposited in a bank in Rome. Trutta expressly agreed that he accepted the jurisdiction of the Roumanian tribunals, specifically that of Ilfov, renouncing the right to invoke his foreign citizenship. Trutta claimed that certain instalments of the goods had been delivered, but that payment had not been effected. He feared the loss of his security and asked and obtained permission to attach the bonds in the Roman bank. The Roumanian Government was then cited to appear before the tribunal, but it defaulted. The tribunal validated the attachment. Roumania appealed, denying the competence of the court, but the court rejected the appeal. Then the Roumanian government took the case to the Court of Cassation, denying the jurisdiction of Italian courts. The Court of Cassation held that jurisdiction had been correctly asserted. It said that the current conception of state sovereignty rejected the concept of absolutism which had inspired the doctrine of an earlier time. Today absolute sovereignty of a state would be tantamount to absolute isolation. State sovereignty might receive strict limitations without being changed in its essence, and not every act of a state involved its sovereignty. The state, although always *par excellence* a person of public law, united with its public-law capacity a private-law capacity, which it possessed from the mere fact of its existence, confirmed by the recognition of its international juristic personality, it being impossible to conceive of an association of men, endowed with political autonomy and sovereignty, which did not enjoy the capacity of performing acts of legal validity and of availing itself of legal rules, even with respect to private law. In the exercise of its private-law capacity, its public-law personality remained unimpaired, for the state did not involve its sovereignty, but

[33] Page 345.

acted like an individual. Acts which were but the exercise of ordinary human activity, were subject to the jurisdiction of the courts of another state by their very nature, irrespective of any dispositions of the local law or of international conventions to this effect. It was entirely arbitrary to assume that by the mere fact of concluding a contract with a foreign state, the private citizen renounced his national jurisdiction and subjected himself to that of the other contracting party. The opposite conclusion was more probable. Nor could it be said that there was an international custom forbidding the exercise of jurisdiction over foreign states acting in a private capacity, and as for national legislation, such a doctrine was quite contrary to that of Italy. Furthermore there was no doubt that the contract of sale, concluded as it was with one not a subject of the Roumanian government, did not involve the public power of the latter, but was essentially the act of a civil personality. The fact that the inducement to buy was the necessity of providing for the army in no wise altered the nature of the sale, for the method adopted for making this provision was one foreign to the exercise of sovereignty and proper to the ordinary mode of action of individuals. The express acceptance of Roumanian jurisdiction by Trutta in the contract of sale was interpreted as referring only to the situation where he should be made a defendant.

The court applied the same general reasoning to support the attachment of Roumanian property. It emphasized that the bonds were "patrimonial" property, not destined for the public service of the state. As such they were subject to attachment.[34]

This decision of the Court of Cassation gave rise to much discussion.[35]

[34] The court held, however, that the Court of Appeal had not applied the criteria required by the Code of Civil Procedure, and hence from the point of view of civil law, the attachment was not valid.

[35] See the following articles: Appiani, *Giurisdizione nazionale in confronto di stati esteri in materia di diritto privato,* Diritto Commerciale, XLV (1926), 2, pp. 78-81; Amati, *Il sequestro conservativo contro gli Stati esteri e la giurisdizione italiana,* Giurisprudenza Italiana, 1926-I-1-773-780; Elena, *L'attività giurisdizionale nei confronti degli Stati stranieri,* Diritto e Pratica Commerziale, V (1926), 2, pp. 310-314; Graziadei, *Ancora sulla immunità degli Stati stranieri dalla giurisdizione,* La Corte di Cassazione, III (1926), cols. 1661-1665.

**Tort Action**

An interesting case involving a tort action against the French Government arose as an aftermath of the war. Tort actions are rare, and the courts find it difficult to discover circumstances that imply consent to be sued. In this case the reasoning of the court is not very clear cut, but the issues are interesting. By the Treaty of Saint-Germain,[36] certain Austro-Hungarian vessels of war were allocated to France with the provision that they were to be destroyed and the resulting material used exclusively for commercial or industrial purposes. On September 20, 1920 a contract of sale of certain of these vessels was signed in the French embassy at Rome by the representatives of the French government and of the firm of Serra. The vessels were to be towed to Spezia by the French naval authorities and were there to be demolished within a year by the Italian firm. The latter turned them over to an independent contractor for the actual work of demolition. At the very beginning of these operations, however, an explosion occurred on one of the vessels killing two laborers and injuring others. It was established that the explosion was due to a bomb which had been inadvertently left lying about partly concealed by rubbish. The widows of the two victims recovered the insurance carried for their workmen by the contractors according to law. Criminal proceedings were instituted against the representative of the firm of Serra and the representative of the contractors but were dismissed for lack of criminal culpability. Thereupon the widows brought suit against Serra and the government of the French Republic before the Tribunal at Spezia.[37] The Tribunal assumed jurisdiction over the French Republic "supporting its own convictions with reasons of justice, with rules of procedural laws and also with political and economic motives." France appealed, but the Court of Appeal at Genoa affirmed the decision of the Tribunal.[38] France claimed that the Tribunal had deduced

[36] Articles 136-143.

[37] Ceretti e Simonini *v.* Serra e Governo della Repubblica francese, July 26, 1924, Temi Genovese, XXXIII (1924), p. 429.

[38] Governo Francese *v.* Serra e C. *v.* Ceretti e Consoci, May 4, 1925, Giurisprudenza Italiana, 1925-I-2-440; Monitore dei Tribunali, LXVI (1925), p. 777; Temi Genovese, XXXIV (1925), p. 231; Giurisprudenza di Torino, LXII (1925), col. 1450; Rivista di Diritto Internazionale, XVII (1925), p. 540.

its competence purely from Italian civil procedure, whereas it contended that the alleged lack of competence resulted from international law. The court recognized the usual immunity for sovereign acts, but denied it in regard to matters of private law. It maintained that, as to the latter, the reasons which had induced the state as a political entity to descend from its high plane to deal with private persons were immaterial. When a foreign state exercised a purely patrimonial activity and in the administration of its affairs, acted *more et jure privatorum*, it appeared in no different light than any foreign juristic person. Hence as to it, the exercise of jurisdiction by the local authorities could not be restricted by international rules, but should be restrained within those limits which every state assigned to its judicial organs in regard to foreigners. In matters of private law, the question of jurisdiction was merely one of procedural law. Where the activity of the state as a political entity ceased, the applicability of international law also ceased. Furthermore the court denied that there was any established rule of international law whereby immunity was accorded states when engaged in private activities. In the absence of an international rule, the court was inclined to apply that prevalent in Italy. Were the requirements of the local law met? Yes; for the obligation whose fulfillment was claimed originated either in a contract of sale concluded in Italy and to be there carried out, or in an injury which took place in Italy involving the responsibility of France for damages. From yet another point of view France could not be heard to claim immunity from suit: In the contract of sale was a provision that Serra was to pay the cost of registering the contract in Italy should such registration prove necessary *"pour cause de poursuites judiciaires dues à sa non exécution dans l'une quelconque de ses parties."* This the court considered was sufficient in itself to have vested jurisdiction by consent of the French government. For these reasons the appeal of the French government was refused.

The reasoning in this case seems to be somewhat confused, and the method of reporting it does not tend to clarification. A tort action was brought by the widows of the two victims against the French government and the owner of the vessel as those ultimately responsible for the explosion; the court

found implied consent to this suit by third parties in the fact that the foreign government acted *jure gestionis*, and express consent in the fact that it made certain provisions in case it were sued *on the contract by the other party to it.* It is submitted that it is anomalous to consider any previously expressed agreement as consent to be sued for an illegal act which could not properly be contemplated by the parties. Breach of a contract, on the other hand, obliging one party to respond in damages to the other, might properly be contemplated, and consent to submit to a given jurisdiction might well be incorporated in the contract itself. But consent to be sued on the contract could not be extended to consent to be sued in tort by another party on an issue entirely distinct.

**Expropriation of Real Property**

A case of very great interest, both from the originality of the claim put forth and from the surprising doctrine enunciated by the Courts of Appeal of Naples and of Rome was a suit by an Italian subject against the Greek government for an accounting regarding property expropriated by Turkey from the plaintiff's ancestors in 1400! The prominence of the attorneys on both sides, as well as the fact that it presented one of the rare instances in which the defendant state was deemed to have acted in its sovereign capacity, lent importance to the case.[39] The facts seem to be as follows: In 1825, the provisional government of Greece, recognized by the Powers, issued a circular in the city of Rome, addressed to its exiled refugee citizens, stating that to those families which had been despoiled of their property by Turkish usurpation it offered the return of "the property which legally belongs to you." Subsequently, in 1881, by a treaty with the Ottoman Empire, the Greek state acquired territory in Epirus and Thessaly which had been under Turkish domination. At that time a commission had been established to pass upon any claims of private individuals to the property involved. One Di Capone represented himself as the only descendant of a family which had been despoiled by the Turks of feudal estates in Epirus at the beginning of the fifteenth century.

[39] Stato di Grecia *v.* Di Capone, Court of Appeal, Naples, July 16, (21), 1926, Rivista di Diritto Internazionale, XIX (1927), p. 102; Rivista di Diritto Processuale Civile, IV (1927), II, p. 222.

This claim had not been presented to the Commission in 1881, but in 1912 Di Capone brought suit against the Greek state before the Tribunal at Naples for an accounting regarding this property. The Greek government failed to make an appearance. Regarded as an action for an accounting concerning the administration and sale of property to which the plaintiff claimed title, the suit appeared to be within the limits of private law, and the Tribunal declared itself competent. In a decision of June 10, 1912, it ordered the Greek government to make the accounting, and in the meantime to make an advance payment on the sum due for the usufruct of the property since 1881. Notice of this decision was duly sent to the defendant, and the specified sum of money was paid. No appeal was taken during the time allowed for a decision to become *res judicata* according to Italian law. Then, suddenly, fourteen years later, the Greek government brought an appeal before the Court of Appeal of Naples. The court held that the decision of the tribunal was a nullity, which could never have become *res judicata,* since there had been an absolute lack of jurisdiction in the tribunal, which had attempted to review the sovereign acts of a foreign state. With like reasoning it held that as there was no "sentence" in the proper meaning of the term, there was no point of time from which the period allowed for an appeal could run. Hence its judicial denunciation was always possible. It was admitted that a foreign state was not subject to the sovereignty of another state in those cases in which the former was to be regarded as an international political entity, acting within the sphere of its sovereignty. Only when its sovereignty was not involved, but purely its private activity, might a foreign state be subjected to the jurisdiction of another state. The appellee contended that Article 105 of the Code of Civil Procedure should apply, since there had been a contract, or an act giving rise to a civil obligation, which had taken place in Italy, *i.e.* the issue at Rome of the circular promising restitution of property. But the court pointed out that there was no mutuality in this undertaking, from which it might be regarded as a civil obligation, and that Rome was not in 1825 a part of Italy. Hence even if the whole conduct of Greece in regard to this affair were considered as non-

political, yet Italian courts could not assume jurisdiction over it. The court, however, declined to admit the private nature of the acts of the Greek government. It insisted that Greece had made a certain proclamation to its exiled subjects and their descendants, as a political move, regarding property to which it had itself acquired title by an international treaty. For this governmental act, a unilateral legal undertaking of a state with respect to its subjects, political and economic in character, the state could in no sense be held subject to the organs of a foreign jurisdiction.

This decision was violently criticized.[40] On February 25, 1930 it was annulled by the Court of Cassation.[41] Di Capone maintained that the Court of Appeal of Naples had itself lacked jurisdiction to hear the appeal from the fourteen-year old decision of the Tribunal, a formal prerequisite of appellate competence being that the appeal be brought within the period prescribed by law.[42] With this the court agreed, holding it sufficient ground for the absolute annullment of the decision of the Court of Appeal. The court did not go into the international-law problem of determining whether the undertakings upon which the suit was based were political or private in character, because it was of opinion that even if the trial court had erred in considering them private and so subject to its jurisdiction, still no appeal would have been possible after fourteen years. This was not to say that the Greek state had no remedy; it might raise the issue of the nullity of the decision when its execution was attempted, or it might bring an original suit to establish its nullity, but the method chosen—an appeal—was not legally possible. The case was remanded to the Court of Appeal at Rome for reform of the decision. This court, however, in a decision of March 26, 1931 practically reiterated the reasoning of the Court of Appeal of Naples,[43] and

[40] See notes by Cavaglieri, Rivista di Diritto Internazionale, XIX (1927), pp. 107-112; and Siotto Pintór, *Lo Stato estero, il giudice italiano e la sentenza immutabile,* Rivista di Diritto Processuale Civile, IV (1927), II, pp. 222-238.

[41] Foro Italiano, 1930-I-1171; Monitore dei Tribunali, LXXI (1930), p. 603.

[42] Sixty days, reduced to thirty by Law of September 15, 1922. Article 485, § 2 of Code of Civil Procedure.

[43] Foro Italiano, 1931-I-701.

again held that the decision of the trial court was a nullity as involving an examination of acts of a foreign state relating to the exercise of its sovereign power. An appeal against such a decision might be taken even after the lapse of the legally prescribed period. (It will be interesting to see whether this case again comes before the Court of Cassation.)

**The U.S.S.R.**

In 1925 the problem of the immunity of a foreign government from suit was presented to the Court of Cassation (at Rome) in a somewhat novel guise.[44] Prior to the *de jure* recognition of the U. S. S. R. by Italy by the treaty of February 7, 1924, there was in Italy a representative of the "Commissariat for Foreign Commerce of the Federated Republic of the Soviets" and a "Delegation of the Commissariat for Foreign Commerce of the Caucasus" which were subsequently superseded by the "Commercial Representative of the U. S. S. R." With the second of these agencies one Tesini had contracted for some silk cocoons, and had made a deposit in an Italian bank in guaranty of payment. Upon their arrival in Venice the cocoons were diverted by the vendors to a Milanese firm in whose hands they were garnisheed by Tesini under authority obtained March 3, 1923. Confirmation proceedings were set for May 21st. In the meantime, however, on March 8, 1923, the two commercial delegations of Russia brought a cross-action before the tribunal of Milan where the other action was pending, asking that the attachment be declared null, or at any rate be revoked, that the goods be placed at their disposal, *and that the plaintiffs pay them an indemnity*. This last request was clearly an independent action as it exceeded the limits of a defense against the original suit.

**Counterclaim**

The tribunal did not merge the two suits, but dealt first with the cross-action, and, while suspending a decision on the merits, admitted an offer of proof by Tesini as to the truth of the circumstances relied upon to justify the attachment.[45] The Russian authorities appealed, but the Court of Appeal affirmed

[44] Decision of June 12, 1925, Rappresentanza Commerciale dell' Unione Repubbliche Soviet *v.* Ditta Tesini e Malvezzi ed altri, Giurisprudenza Italiana, 1925-I-1-1024; Foro Italiano, 1925-I-830; Monitore dei Tribunali, LXVI (1925), p. 604.

[45] Decision of May 21, 1923.

the decision of the lower court admitting the offer of proof.[46] The Commercial Representative of the U. S. S. R. took the case to the Court of Cassation, and, relying upon the perfected international status resulting from the *de jure* recognition accorded by the treaty of February 7, 1924, claimed a violation of the general principles of international law, according to which a state must abstain from subjecting to the jurisdiction of its courts states recognized by it. The Court of Cassation pointed out that the canons of international law invoked by the appellants were opposed to their contentions. It admitted the general principle that the courts of a state were incompetent in respect to foreign states, but as this exemption was a *privilege* of a foreign state, it should not be insisted upon when it would redound to the state's disadvantage. In other words, a state should be permitted to renounce it. The renunciation might be express or tacit. The typical case of implied renunciation was evidenced by the state itself becoming plaintiff before the local courts. But it was no less certain that the state impliedly renounced its immunity from jurisdiction, as regarded the whole series of acts involved, when it proceeded to engage in the territory of another upon a commercial or industrial enterprise. Under these circumstances immunity from jurisdiction would amount to an absurdity, because it would absolutely prevent foreign states from exercising any commercial or industrial activity.

In the case before it, the Court found an implied renunciation of immunity on both grounds. It was true that the Russian state had not brought the original suit, but neither had it confined itself to a strict defense of the action against it, but had instituted judicial proceedings before the Milan Tribunal for the recovery of damages. The appellants tried to persuade the court that as the renunciation of an immunity was under consideration, the immunity itself would first have to be established. It argued that at the time the cross-action was entered, *de jure* recognition had not yet been accorded it by Italy, and hence the privilege of immunity did not attach; whence it followed it could not be renounced. The court, however, refused to be persuaded. Furthermore it declined to

[46] Decision of April 30, 1924.

recognize any distinction between an economic and a political aim of the enterprise being conducted in Italy. Even if Russian foreign commerce had been monopolized and elevated to a state function, objectively in respect to third parties and to the state where the trade was conducted, it remained essentially a commercial operation.

**Attachment of Commercial Property**

Hence, on the theory of implied renunciation of immunity, the court rejected the first ground for the recourse to Cassation. However, a second ground put forward by the Russian state was violation of article 3 of the Treaty with Italy of February 7, 1924, which had entered into force on the following March 23rd. This article forbade the judicial attachment of goods forming the object of contracts made by its commercial representatives, in view of the fact that the U. S. S. R. agreed to assume the responsibility for all the negotiations of its commercial representatives in Italy.[47] This treaty had come into force at a time when the provisional order of attachment had not yet become definitive, as the lower courts were awaiting the production of the new evidence, before deciding upon the validity of the attachment. Since, according to Italian civil procedure an attachment can be perfected only by confirmation by the competent court, which confirmation was now rendered impossible by a treaty which had become the law of the land, the attachment was automatically dissolved. Hence on this ground, the judgment of the lower court was annulled. Here, too, as in so many other cases, despite the explicit statement of the principle of subjection of a trafficking state to the jurisdiction of the local court, there was no condemnation of the state.[48]

On May 6, 1930, the Court of Appeal of Genoa decided another case involving the Union of Socialist Soviet Republics.[49] The facts were as follows: the Cinema Committee of

[47] *Cf.* the "consular stipulation" by means of which the United States secured freedom from arrest abroad for its Shipping Board vessels.

[48] See Graziadei, *L'immunità degli Stati stranieri dalla giurisdizione ed il Trattato italo-russo 7 febbraio 1924,* La Corte di Cassazione, II (1925), cols. 1463-1479.

[49] Rappresentanza commerciale dell'Unione repubbliche sovietiche socialiste *v.* Cibrario e National City Bank of New York, Monitore dei Tribunali, LXXI (1930), p. 899; Foro Subalpino, VII (1930), col. 882; Giurisprudenza Italiana, 1930-I-2-437; also cited as May 16, 1930, Foro

the Commissariat of Public Instruction of the R. S. F. S. R. entered into a contract with Cibrario, an Italian then resident in Moscow, for the supply of apparatus, films and other cinematographic material to the value of nearly seventeen million rubles to be procured from specified producing firms largely in the United States. Through the Moscow branch of the National City Bank, the equivalent of eleven million rubles was deposited in New York from which to meet the advance payments to the vendors and Cibrario's commission, fixed at 6%, 1% in advance and 5% on the value of each bill of lading as presented. The contract was to be fulfilled within six months. Cibrario went to New York in December 1918, but allowed more than six months to elapse without making any shipments. Nevertheless, he succeeded by the presentation of false documents in obtaining from the National City Bank in New York some $900,000. For this transaction he was arrested in New York.[50] Released, he left for Italy, sending his ill gotten gains to various European banks. The Commercial Representative of the U. S. S. R. then brought suit against Cibrario in Italy and joined the National City Bank, through its Genoa branch. It demanded the restitution of all sums received from the Soviet government, and damages and costs. Before the Tribunal of San Remo, the defendants successfully pleaded that under the provisions of the treaty of February 7, 1924 by which the government of the U. S. S. R. was recognized by Italy, the Commercial Representative was not accorded capacity to sue in Italy in the interests of the U. S. S. R. on a contract entered into prior to its own establishment. On that ground, the Tribunal on April 2 [11], 1929 dismissed the action and condemned the plaintiffs to pay costs.[51] An appeal was taken before the court at Genoa. Here Cibrario, rightly fearing that the decision of the Tribunal would not

Ligure, III (1930), 1, col. 478. See note by Scerni, *Sulla competenza dei Tribunali Italiani nei confronti delle società commerciali estere aventi succursali in Italia,* Foro Ligure, III (1930), 3, cols. 270-280.

[50] See R. S. F. S. R. *v.* Cibrario, Court of Appeals, New York, March 6, 1923, 235 N. Y. 255, in which the Russian government attempted to sue Cibrario in New York, but was held to have no standing before the courts as it had not been recognized by the United States.

[51] Foro Subalpino, VI (1929), col. 588.

be affirmed on these grounds, contended that Italian courts were without jurisdiction as regarded the U. S. S. R. inasmuch as an examination of the claim in question would involve a violation of the international-law principle of the immunity of one state from the jurisdiction of another. In denying this contention, the Court referred both to the fact that the representatives of the U. S. S. R. appeared as plaintiffs and that the acts upon which the suit was based were not sovereign acts. As to the first point, the immunity from jurisdiction was a privilege and as such was capable of being renounced. Its efficacy extended only to instances where the foreign state was being sued, not to cases where it offered to submit itself to the local jurisdiction in order to establish its own rights; for an immunity could not resolve itself into a diminution of personal capacity. As to the second point, the court pointed out that the exemption from jurisdiction did not obtain when the foreign state in the transactions giving rise to the suit had not exercised a function of a sovereign entity, but had conducted itself *more privatorum,* as in the case before the court. It availed nothing to suggest that the Russian government had exercised a sovereign function in ordering the cinematographic material inasmuch as it was to be used for purposes of political propaganda. Sovereign capacities might have been involved *vis-à-vis* Russian subjects, since they were forbidden to engage either in such political propaganda or in foreign commerce, but they were not involved as to others who contracted freely to the end of furnishing the state with the means to exercise this sovereign prerogative. According to the thesis of the appellee, the purveyor of corn for army quadrupeds would be participating in a sovereign function. This was manifestly a confusion between the end in view of one of the contracting parties in making the stipulation, which concerned him alone, and the actual engagement entered into with the other party, which concerned them both. Whatever might have been the aim of the Russian government, so far as Cibrario and the bank were concerned, the transactions represented simple commercial operations, having an essentially private character.

Having thus determined that the tribunal had correctly as-

sumed jurisdiction over the case, the Court decided that the commercial representatives of the U. S. S. R. did have the capacity to sue in Italy under the treaty of February 7, 1924 even on issues which arose prior to that date. As to the action against the National City Bank, Italian courts had no jurisdiction; the mere presence of a branch did not suffice to establish "residence." Other exceptions of the appellees were rejected, and the decision of the lower court reformed accordingly.

The case was then taken to the Court of Cassation,[52] which affirmed the decision of the court below. It agreed that one of the consequences of the recognition of a state as a juridical person admitted by international law was that it might exercise in the recognizing state all judicial activities that the local law permitted, and according to Italian law the state had power to apply to the courts through its own representative organs for the safeguard of its legitimate interests. Furthermore, the Italian-Soviet treaty specifically provided that the Commercial Representatives of the U. S. S. R. should be accorded facility to safeguard its foreign commerce. This necessarily implied the right to sue in Italian courts, which right extended to suit on issues which arose prior to the establishment of the Commercial Representation, because recognition of the juridical personality of a state was merely declaratory, not constitutory. The court made no reference to the commercial nature of the transaction giving rise to the suit.[53]

State-owned means of transportation—railroads and merchant vessels—form a group especially adapted for the application of the Italian doctrine. Indeed railroads were mentioned in the Hamburg project of the Institute of International Law, as giving rise to one of the exceptions to the general immunity of foreign states from suit.[54]

[52] Decision of November 13, 1931, Foro Italiano, 1932-I-23.

[53] See note by Cavaglieri, *Capacità processuale di un governo estero,* Foro Italiano, 1932-I-24-31.

[54] *Compétence des Tribunaux dans les procès contre les États ou souverains étrangers,* Article II, § 1, par. 3. Annuaire, XI (1889-1892), p. 437. For many states of Europe the subject is regulated by the Bern Convention of October 14, 1890, article 53 of which permits suit to be brought before the judge of the "domicile" of any one of two or more jointly liable railroads at the election of the plaintiff.

State-owned Railroads

On June 4, 1929 the Court of Appeal of Milan decided a case brought against the Swiss Federal Railways.[55] The Commune of Tronzano on Lake Maggiore brought suit against the railway for damages caused by forest fires originating from sparks escaping from its locomotives. Under a treaty between Switzerland and Italy regulating the operation of the international line, Pino-Luino, the Swiss Railways were responsible for the service on this stretch and the Italian for the maintenance of the way and the stations. It was claimed that the locomotives were not properly equipped with spark guards. The respondent entered a plea to the jurisdiction, claiming that the Federal Railways were a branch of the administration of the Swiss Confederation and hence not subject to the jurisdiction of the Italian courts. On the merits it claimed that the engines not equipped with spark guards did have other means of preventing the issue of sparks from the smoke stack and that the loss was *damnum absque injuria*. The lower court rejected all the contentions of the Railway. The latter appealed. The Court of Appeal denied that the railway was immune from its jurisdiction as a branch of the public administration of Switzerland. The state was principally an organ of political authority and it was easy to understand that in the exercise of this function, with which was connected the concept of sovereignty, it could not be subjected to any sort of authority by another state, for otherwise the very conception of sovereignty would be destroyed. But alongside this activity of an eminently public character, the state exercised another, of an eminently private nature, which in modern times, due to the growing importance of the economic factor, was developing to hitherto unthought-of lengths. The state no longer disdained to become an industrialist or a merchant. Whereas the state could exercise its political functions only within its own territory, these private functions might be exercised abroad as well, under the same conditions as by a private citizen. The nature of the activity did not change just because it was undertaken by a state rather than by a private individual; and since the high public function re-

[55] Ferrovie Federali Svizzere *v.* Comune di Tronzano, Foro Italiano, 1929-I-1145.

mained entirely out of the issue, and not being involved could not be attainted, there was no reason whatever for according to a state any prerogative in regard to another state when it had none in the economic field where its private activity took place. As to the alleged existence of an international custom requiring immunity to be accorded the state under all circumstances, the court held there was no proof of it: It had never been codified; an attempt to include a statement to that effect in the German Judiciary Act in 1885 had failed;[56] certain states, like the Argentine, had adopted the opposite principle,[56a] and finally, in many states where the principle of immunity was proclaimed it was done more for political reasons, which knew no law, than by force of an obligatory custom. The course of Italian judicial opinion ever since the adoption of the constitution had been against such immunity, and a legislative provision of 1925 against the seizure of foreign state property without the consent of the Ministry of Justice,[57] by being made strictly subject to reciprocity, constituted an implicit repudiation of the principle of immunity. For these reasons the court held that the Swiss Federal Railways had been properly subjected to the jurisdiction of Italian Courts. On the merits it decided that it was within their sole discretion as to what means should be employed to prevent the emission of sparks. So long as some means were employed to that end, they could not be held responsible by the courts for damage due to sparks.[58]

**The United States Shipping Board**

The juridical nature of the United States Shipping Board, which has perplexed the courts of many nations, is for Italian courts the clearest of manifestations of a state acting in its private capacity, through the means of an autonomous entity, for speculative purposes, entirely unconnected with the right of sovereignty, in this case for the exercise of navigation and

[56] *Cf.* p. 65, *supra.*

[56a] Article 34 of the Argentine Civil Code provides that foreign states as well as their provinces and municipalities are to be considered juridical persons. Article 42 provides that juridical persons may be sued in civil actions, and their property may be levied upon.

[57] See *infra,* p. 262.

[58] See the note on this decision by Siotto Pintór, *Aspetti vecchi e nuovi della questione dell'immunità dello stato estero dalla giurisdizione interna,* Foro Italiano, 1929-I-1146-1152.

maritime commerce. Hence, it is a foregone conclusion that the United States Shipping Board could not sustain a plea to the jurisdiction in Italy. This is suggested, although not directly established in the following cases, one of which dealt with an intervention on the part of the Shipping Board, and the other with a counterclaim. The first was a decision of the Court of Appeal of Genoa of March 27, 1925.[••] The *"Capillo,"* owned by the Shipping Board, operated by the Pioneer Corporation of New York, was chartered by the latter for a single voyage from Baltimore to Genoa to Weston Dodson Co. The delay of the *"Capillo"* in sailing with its cargo of coal resulted in various claims in connection with which the vessel was attached in Genoa. The United States Shipping Board voluntarily intervened and appeared as owner of the vessel. While insisting upon being paid for demurrage, in accordance with the Italian Commercial Code, it attempted to claim immunity in the actions against the ship, alleging its identity with the United States government. The Court of Appeal at Genoa refused to recognize this identity and held itself competent in the suit against the Shipping Board. It pointed out that the Shipping Board had voluntarily intervened, and thereby impliedly consented to submit to the jurisdiction; that the Shipping Board was an entity distinct from the government of the United States, organized for commercial purposes; that the government itself would be subject to the ordinary rules of jurisdiction for acts undertaken *jure privatorum.* There is little of international importance in the above decision, as the consent was obvious, and no recourse to the characteristic Italian doctrine was necessary to vest jurisdiction.

**Counterclaim**

On December 2, 1925, another case was heard involving the United States Shipping Board, this time by the Court of Appeal at Naples.[••] Suit was brought on certain insurance policies taken out in Italy covering vessels of the Shipping Board operated by a commercial company, title to which was retained by the Shipping Board. The policies had been made out in

[••] U. S. S. B. *v.* Società Italiana Cementi *et al.,* Giurisprudenza Italiana, 1925-I-2-271.

[••] Società riunite di assicurazione e riassicurazione *v.* U. S. S. B., Monitore dei Tribunali, LXVII (1926), p. 336; Diritto marittimo, XXVIII (1926), p. 266.

such a way as to render the Shipping Board and the National Oil Co., the operators, jointly liable for the payment of the premiums. The suit turned on technical points of commercial law, international significance attaching only to the fact that the Shipping Board tried to establish its immunity from a cross-action by the insurance company for the payment of premiums. The court denied its identity with the United States government, sketching its origin, and emphasizing its exclusively commercial purpose, despite its recognized public (*"statale"*) character. Through this organ, the government of the United States undertook acts of "patrimonial administration" and hence a claim of immunity was out of place. True, the state in its guise of a political entity, as a subject of *comitas gentium*, could not be subjected to the jurisdiction of another state, for jurisdiction was essentially the power to command and coerce, and could be conceived of only in connection with subordinates, never with perfectly equal and autonomous entities. If, however, the acts undertaken by the state organ were of a patrimonial nature, then the state assumed the guise of any juridical person, and could not withdraw itself from the otherwise proper jurisdiction of another state for disputes growing out of such activity. In view of the above, the court held itself competent, and the provisions of Article 105 of the Code of Civil Procedure applicable.

**Mail Packets**

Whereas government-owned merchant vessels were accorded no immunities under the Italian doctrine, special consideration was sometimes accorded to mail packets. Thus Article 14 of the Convention between Italy and France of November 20, 1875, stipulated that such vessels plying in the Mediterranean service, whether owned, subsidized or chartered by the state were under no pretext to be liable to seizure or sequestration.

The general problem of the treatment of government-owned merchant vessels would now appear to be regulated by the terms of the Brussels Convention of April 10, 1926.[61] The Convention itself has not yet been ratified by most of the sig-

[61] International Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels. United States Department of State, Treaty Information Bulletin No. 18, March, 1931, p. 67. See also Appendix.

natory states, but Italy has "given execution to" it by a law of January 6, 1928.[62]

**Attachment of Property**

The attachment of property is a frequent preliminary to suit in Italy. It is permitted by Article 924 of the Code of Civil Procedure upon *prima facie* evidence of the existence of a debt, when the creditor entertains a just fear of the flight of the debtor or of fraudulent transfer of his resources, or when there is danger of the creditor losing the security for his debt. This attachment, originally authorized by summary procedure as an emergency protection for a creditor, must be confirmed subsequently by a court of competent jurisdiction. In dealing with foreign state property, the courts apply these same rules, when once they have established that the property is not immune on international grounds. In the second Samama will case,[63] funds accrued to the Bey of Tunis as beneficiary under the will were attached in Leghorn. The Bey attempted to establish the immunity of such property from seizure. The Court of Appeal of Lucca applied the same criterion to the nature of the property as it applied to the nature of the act upon which suit was brought to determine its immunity. Property destined for public use, of which the state did not have the absolute right of enjoyment and disposition, such as receipts from taxes, were free from attachment, but patrimonial property of the state was not. Hence, a legacy under a will was liable to seizure subject to the rules set forth above.

**Legacy**

**Government Bonds**

Similar reasoning was followed by the Court of Cassation at Rome in the Trutta case,[64] where bonds deposited by the Roumanian government as guarantee of payment for army leather were garnisheed by the plaintiff. The court emphasized the fact that the bonds were patrimonial property, not destined for the public service of the state and as such were subject to attachment under the conditions set forth in the Code of Civil Procedure. This pronouncement gave rise to considerable comment. One of the points made was that as to attachment, it was futile to apply the yard stick of the public or non-public nature of the property. In the trial of the case upon the merits it would appear whether the state had acted in its sovereign

[62] No. 1958. Raccolta Ufficiale, 1928, VI, p. 6406.
[63] *Supra*, p. 230.
[64] *Supra*, p. 244.

capacity or not. If it had, the case would be dismissed and the attachment dissolved. If, on the other hand, it had acted in a private capacity and the court assumed jurisdiction, the validity of the attachment should depend not upon the nature of the property, but upon the presence of the conditions prescribed in the code, *i.e.* the existence of a debt, with a justifiable fear of the creditor losing his security.[65]

**Soviet Russian Property**

Attachment of commercial property of the Soviet Government of Russia was subject to special considerations. By the treaty of February 7, 1924, by which recognition was accorded the government by Italy, it was expressly provided in Article 3 that in consequence of the fact that the government of the Union assumed responsibility for all the negotiations concluded by its Commercial Representatives in Italy, merchandise connected with such negotiations were not subject to judicial measures of a preventive nature [attachment]. This treaty was applied in the Tesini case above to effect the release of such property being held by a preliminary order of the court at the time the treaty became effective.

**Law of July 15, 1926**

A few months after this decision was handed down, a Royal Decree issued extending general immunity from court action to foreign state property, subject to reciprocity. Shortly after the Trutta case, namely on July 15, 1926, this decree became law. It was to the effect that no sequestration, pledge or acts of execution could be proceeded with against immovable or movable goods, vessels, credits, bonds, negotiable paper or anything else belonging to a foreign state without authorization from the Minister of Justice. Suits in progress at the time of the passage of the act were subject to its provisions. This law was to apply only to states which accorded reciprocity.[66]

[65] Amati, *Il sequestro conservativo contro gli Stati esteri e la giurisdizione italiana,* Giurisprudenza Italiana, 1926-I-1-773-780.

[66] Legge No. 1263, converting into law Regio Decreto-Legge No. 1621 of August 30, 1925. Raccolta Ufficiale, 1926, III, p. 2930. *Cf.* § 76 of the *Allgemeine Gerichtsordnung für die Preussischen Staaten,* 1793, and § 90, annex 202 of Pt. I, tit. 29 of the reënactment of 1815, providing that the Department of Foreign Affairs and the Ministry of Justice must be notified when the arrest of a foreign Prince was contemplated. So also the Austrian *Einführungsgesetz zur Jurisdiktionsnorm* (August 1, 1895), Article IX, § 3, provides that when it is doubtful whether the court has jurisdiction over an extraterritorial person, or whether extra-

Conclusions

This review of the Italian cases involving foreign states before national courts brings out several points. In the first place, there was no gradual development of the doctrine whereby no immunity was accorded a foreign state unless it was acting in a strictly sovereign capacity. The first decision to enunciate this conception is the most far-reaching of all. Secondly, the courts seem to go out of their way to express the doctrine of submission as to patrimonial acts. Thus they include a statement of the principle even in cases where the foreign state appears as plaintiff, or makes a general appearance as defendant, or when an ex-sovereign is sued for an act perpetrated before his accession to the throne. With greater justification, they frequently go at length into the international issue of jurisdiction and then throw the case out for lack of competence of the court or lack of liability of the defendant under the local codes. A third observation is that since the normal number of cases in which jurisdiction is assumed are decided in favor of the defendant state, and regulation on the part of the political branch of the government in the form of treaties still further protects the interests of the states, very few condemnations of foreign states occur, despite the frequency of the discussion of the general issue. Finally, the full significance of the emphasis on the nature rather than the purpose of the act giving rise to the suit should be pointed out. If the purchase of supplies for the army is held to be a private act because sales are objects of the civil law, it would seem that such provisioning could be considered as an act of sovereignty only were it accomplished by requisition, confiscation, prestation, exercise of the right of angary, or capture in time of war. Even the manufacture of these supplies by the state itself would not serve to divest this process of its commercial nature. If, furthermore, the issue of treasury bonds is held to

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territoriality is accorded a particular person, the court should get the opinion of the Minister of Justice, whose view is binding upon the Court. Article IV, § 2 of the Law of January 19, 1928 of Czechoslovakia provides that execution against property of extraterritorial persons can only take place with the assent of the Ministers of Justice and of Foreign Affairs and in the presence of a representative of the latter. (Sammlung der Gesetze und Verordnungen des Čechoslovakischen Staates, 1923, p. 123, No. 23.)

be a private act because the money is voluntarily loaned instead of extorted, it is apparent that the distinction drawn by the Italian courts is not so much between two phases of state activity—the civil and the political—as they profess, as between the modern democratic and the former absolutist method of carrying on the activities of the state.

The net result would seem to be that the foreign state is subject to suit for any act undertaken on Italian territory, or for any act consummated with one not its own subject within its own territory. For generally speaking, an act of sovereignty, to which alone immunity is accorded, can occur only either within territory or with persons over whom the state exercises jurisdiction. This theory fails to take into account the nice distinction made by Count d'Hautrive in 1811, who in replying to a suggestion of Napoleon said, *"Un souverain ne peut se faire obéir que chez lui. Tel est le caractère de l'autorité. Il n'en est pas de même de la dignité; elle doit être partout reconnue."* [67]

[67] Revue Pratique de Droit Français, VII (1859), p. 185.

# THE POSITION OF FOREIGN STATES BEFORE THE COURTS OF OTHER STATES

Whereas it is not possible to trace in all states a definite course of judicial opinion as to the position of foreign states before national courts, there are nevertheless groups of cases and even isolated decisions which throw valuable light upon the general problem. The very fact that the courts of a given country are not often called upon to deal with the issue and that they have no precedents of their own to follow, may result in a freshness of point of view or a novel method of approach very welcome among the somewhat hacknied decisions of the courts frequently called upon to handle such cases.

## AUSTRIA

THE cases decided in Austria illustrate the development from the strict doctrine of immunity which prevailed in early times to the distinction between sovereign and private acts of a state, which appeared with the World War. Specifically, the decisions afford unusually satisfactory material on counterclaims and on the status of real property within the state of the forum. As to the entity which was permitted to enjoy the immunity, Austrian courts applied about the same criteria as did their sister courts. Thus immunity was denied the Maltese Order of the Knights of Saint John, on the ground that there was no international-law basis for assuming it to be extraterritorial, and this status had not otherwise been accorded it.[1] On

**Knights of St. John**

[1] Decision of the Supreme Court, March 7, 1888. Entscheidungen des k. k. Obersten Gerichtshofes in Civilsachen, III (1888 [1889]), p. 128, pt. III, No. 56. For the method of according extraterritoriality to personages not entitled to claim it by international law, see the Ordinance of the Minister of Justice, August 10, 1851, by which the Prince of Lichtenstein residing with his wife and family in Austria were to be deemed extraterritorial and subject only to the *Obersthofmarschall-Amt* for all litigation involving them or their movable property.

**Hungary**

the other hand, in a decision of August 17, 1887, the Supreme Court upheld the immunity of Hungary.[2] The heirs of a contractor sued the Austrian, the Hungarian, and the joint Austro-Hungarian *fiscus* [3] for payment of some construction on the Lombardo-Venetian railway line. Upon a plea to the jurisdiction entered by the Hungarian government, the trial court dismissed the case so far as it was concerned. On appeal it was argued that the immunity customarily accorded to foreign states applied only to such as enjoyed international relations with other members of the family of nations. Hungary, it was contended, had only a constitutional-law relationship with Austria, international relations with other states being reserved to the Austro-Hungarian Empire. The court of appeal held that under the Compromise of 1867, the lands of the Hungarian Crown maintained their autonomous and independent legal position, with the exception of the three departments of Foreign Affairs, War, and Finance. With this the Supreme Court agreed, pointing out that the judicial functions of government were not among those turned over for joint administration. Hungary was a foreign *("fremdländischer")* state [4] being sued upon a contract claim; for such a suit Austrian courts were not competent.

**Socialization of Property**

In a decision of August 27, 1919, the Supreme Court again accorded immunity from suit to Hungary, then completely independent and under a communist government.[5] The

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Allgemeines Reichs- Gesetz- und Regierungsblatt, 1851, p. 517, No. 183. As to the competence of the Hofmarschall-Amt, which office was abolished by the Law of February 5, 1919, see Article III of Einführungsgesetz zur Jurisdiktions Norm.

[2] Zeitschrift für Internationales Privat- und Strafrecht, I (1891), p. 703.

[3] The Latin *fiscus* is used throughout this study in preference to the usual English translation, "Treasury," because the idea intended to be expressed is rather an aspect of the state than a department of its government. In the words of the Austrian Oberlandesgericht in a decision of June 20, 1887, in Zeitschrift für Internationales Privat- und Strafrecht, I (1891), p. 704: *"Der Begriff Staat, als Subjekt von Vermögensrechten gedacht, fällt mit jenem des Fiskus oder Aerar zusammen."*

[4] The subtle distinction between *"fremdländisch"* and the more usual *"ausländisch"* is impossible to suggest in translation.

[5] GZ. R II 152/19. Niemeyers Zeitschrift für Internationales Recht, XXVIII (1920), 506.

Austro-Hungarian Bank sought to enjoin the Hungarian government from recovering money then in the hands of the Viennese police. The claim was based upon the socialization of funds of the Bank by the communist government in Hungary, which funds had subsequently been illegally removed from the Hungarian Legation and recovered by the local police. The Commercial Representative of the Hungarian government had succeeded in having the injunction vacated by the lower court. The Supreme Court affirmed this decision. It said that in addition to the usual exceptions to the immunity of a foreign state from suit—voluntary submission and suits regarding real property—it might further be maintained that local courts were competent regarding purely private contracts to be performed within the state of the forum. But to the case at bar this supposition found no application, for the communist government, which exercised *de facto* authority in Hungary, and which engaged in international intercourse with foreign states, had come into possession of these funds by an act of force. This circumstance was the controlling one in the determination of the right to exercise jurisdiction, not the fact that the bank based its claim upon a private-law conception of title.

**Counterclaim**

The value of a counterclaim as a means of acquiring jurisdiction over a foreign state is well brought out in a case decided in 1863. Here an attempt was made to hold the balance of a shipment of grain for the account of the Turkish government until the settlement of a claim of the ship's captain for demurrage. The Supreme Court affirmed a decision of the Superior Court in holding that the Consul and Representative of the Turkish government could not be sued in the courts of Ragusa on an issue arising from this contract of affreightment, inasmuch as the grain was being shipped by the Turkish government in Cyprus to its agents in Antivari.[6]

While this case was still pending, the representative of the government of the Porte brought action against Captain A. for the delivery of the balance of the grain, whose attachment

[6] Supreme Court, May 22, 1863, Sammlung von Civilrechtlichen Entscheidungen des k. k. Obersten Gerichthofes, V (1876), p. 567, No. 2694.

the latter had sought. A. defended with a counterclaim in which he demanded payment for the demurrage. Relying upon the above decision of the Supreme Court, the Turkish government entered a plea to the jurisdiction as to the counterclaim, and in both lower courts the plea was allowed. The Supreme Court, however, distinguished this case, saying that the representative of the Porte, in bringing suit before the court at Ragusa, had voluntarily submitted to the jurisdiction of the court. This being a proper counterclaim and it being anomalous that two litigations involving the same freight contract should be decided by the courts of two different nations, the court held that the counterclaim should be entertained.[7]

**Execution**

When, however, the counterclaim had been decided in favor of the counterclaimant, and execution was desired upon 1,000 bags of grain, which were in the keeping of the Consul at Ragusa for the account of the government of the Porte, the Supreme Court, in accord with the lower courts, refused to permit the seizure. It held that the authority of the Consul to represent the Porte in the litigation with A. was limited to the judicial determination of the issue, and did not extend to execution. It also pointed out that the object upon which execution was desired was property of a foreign state, in Ragusa merely in transit. Execution against a foreign state was outside the domain of the civil law. The execution in question was the less permissible in that the grain was unofficially said to be a part of the military stores of a friendly power, and hence was to be regarded as an object withdrawn from commerce and not subject to the rules of private law.[8]

**Real Property**

The doctrine regarding the competence of the *forum rei sitæ* for suits involving real property is qualified by several distinctions and conditions. The claim must be a real claim,

**Construction of Legation**

one essentially involving the property, not merely fortuitously connected therewith; whereas the principle of extraterritoriality yields to that of the jurisdiction of the *forum rei sitæ,* the inviolability of legation buildings takes precedence over the latter. The first distinction is illustrated by the two following cases. The Minister of State X., in the name of State X., had

[7] Supreme Court, October 6, 1863, *ibid.*, p. 570, No. 2697.

[8] Supreme Court, September 5, 1866, *ibid.*, p. 571, No. 2698.

entered into a contract with the plaintiff for certain operations of construction in the legation building. The plaintiff had not been paid, and brought action in the lower court in Vienna. The action was dismissed for want of jurisdiction. The court held that as an action on a contract for labor, it was a private-law transaction, having no inherent connection with the immunities attaching to a legation building. It was, however, impossible to apply the law governing immovables, as the building was itself subject to extraterritoriality. The plaintiff was given leave to prove voluntary submission on the part of State X. This decision was reversed on appeal. A state entering into a private contract, involving for it not only rights but duties, could not be heard to complain of violated sovereignty if it were summoned to fulfill its duties before the courts which were open to it to enforce its rights under the contract. There was no express legal denial of jurisdiction over a foreign *fiscus*. The fiction of extraterritoriality of legation buildings was intended only to protect the mission. It was without effect as to real claims to real property, and *a fortiori* as to cases where international protection was not at all involved. Once it was established that State X. was subject to the jurisdiction of the local courts, the location of its property must be envisaged in the light of actual facts, not of this fiction. This decision was affirmed by the Supreme Court.[9] It denied the idea that state sovereignty involved an absolute lack of responsibility before the courts of all other states. If sovereignty were actually involved, well and good, but if the foreign state appeared in the home state as the exponent of private rights, and entered into contracts to be there performed, it entered into the juridical order of that state, and could not remain completely independent of it. In such a case even a foreign state had to submit to the jurisdiction of the courts of the local state. The case at bar was based upon a private claim not involving the sovereignty of the respondent state. Hence there could be no question of impairing its sovereignty. The reference to the extraterri-

[9] Decision of January 5, 1920. R II 282/19. Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, II (1920), p. 3.

toriality of diplomats was not in order, for the purpose of this doctrine was to prevent the Minister being hindered in the performance of his functions, an issue which was not involved in the case at bar.

**Accident in Legation**

When, however, the Czechoslovak *fiscus* was sued to recover damages for injuries received in its legation building in Vienna, due to an inadequately lighted stairway, the Supreme Court refused to assume jurisdiction.[10] The trial court at Hietzing had overruled a plea to the jurisdiction, holding that because the respondent owned property in the district of the court, the court was necessarily competent. The court of appeal reversed this decision and declared the proceedings nul and void, saying that the provisions of the Statute concerning the Exercise of Jurisdiction could be applied only when the litigation was in general subject to the courts of the country. The Supreme Court affirmed this decision. It said that even if the strict view were not accepted whereby a foreign state could never be subjected to the jurisdiction of local courts, irrespective of whether it was exercising its sovereign authority or appeared as a subject of private law in the transaction under consideration, unless it voluntarily submitted, nevertheless, ownership of the building in which the plaintiff suffered the injury could only subject the respondent Czech state to Austrian court jurisdiction in so far as the proceedings concerned this immovable property or was based upon obligations or contracts entered into regarding it. A mere claim for damages, like the one at bar, as to which it could not be said that the foreign state had entered into the juridical life of the home state and had thereby subjected itself in advance to the competence of its courts, was not sufficient to vest jurisdiction in the local courts.

**Nuisance**

There is an early nuisance case involving the German legation building grouped here with those involving real property, despite the fact that it is not evident from the report that the court considered this element in denying the competence of

[10] Decision of September 11, 1928. 4 Ob 240/28. Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, X (1928), p. 427, No. 177.

Austrian courts.[11] A. sought an injunction against the German Reich in the person of the individual entrusted with construction of the German legation building, claiming that he was disturbed by this construction in the enjoyment of the possession of his adjoining house. The complaint was admitted by the court of first instance, but was dismissed on appeal, as being a suit against a foreign state and as such not within the jurisdiction of Austrian courts. The appellant contended that when a foreign state acquired private rights in Austria and bought property upon which it was constructing buildings which interfered with the private rights of others, considerations of sovereignty and extraterritoriality ceased. The Supreme Court affirmed the decision of the court of appeal on the ground that a foreign state could not be regarded as a juridical person which according to the rules concerning the exercise of jurisdiction was subject to Austrian courts.

**Inviolability of Legation Property**

The inviolability of legation property is brought out in a decision of the Supreme Court of March 15, 1921.[12] As the result of a judgment entered for the plaintiff by the court of first instance and affirmed on appeal, the plaintiff applied to the court of first instance seeking the enforcement of a lien on the embassy building of State X. The motion for execution was granted, but was rejected by the court of appeal in reliance upon information received from the Minister of Justice to the effect that according to the practice of international law, the embassy building was inviolable, and that the requested execution was not permissible. The Supreme Court dismissed an appeal from this decision in which the appellants contended that there had been no ground for asking the opinion of the Minister of Justice under Article 9 of the *Einführungsgesetz zur Jurisdiktionsnorm* inasmuch as the issue was neither whether the courts had jurisdiction over extraterritorial persons or whether a certain person enjoyed

[11] Supreme Court, January 3, 1878, No. 15061, Sammlung von Civilrechtlichen Entscheidungen des k. k. Obersten Gerichtshofes, XVI (1881), p. 2; No. 6771.

[12] Ob. III 134/21. Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen, III (1921), p. 69, No. 32.

extraterritoriality, but simply whether execution of a judgment was possible. The Supreme Court said that it was obvious that the fate of the building depended upon the status of the owner, and that as it was owned by State X., and as execution upon the property of a sovereign state was a questionable matter, the views of the Minister of Justice had been properly applied for. As his opinion was legally binding upon the court and as it had been categorically opposed to the execution, the court had been right in rejecting the application for execution.

**Act "Jure Gestionis"**

Perhaps the decision most clearly setting forth the adherence of the Austrian Supreme Court to the so-called Belgo-Italian doctrine of discrimination between sovereign and private acts of a state is that of February 5, 1918.[18] The *Kriegs-Getreide-Verkehrsanstalt* in Vienna brought action against the Roumanian state for the recovery of advances made by it on account of grain to be furnished according to contract by Roumania. The trial court appointed a curator for the respondent state. The curator appealed, and the court of appeal declared the whole proceeding nul and void, and dismissed the action as inappropriate for litigation before the court in question. The court said that there was no doubt that Roumania was capable of being a party before the courts, for it had capacity to acquire private rights in Austria. That it could appear as a plaintiff could not be doubted; it might also appear as a respondent. The only question was whether it could appear in the latter capacity only when by voluntary submission or by the application of *lex rei sitæ* it had subjected itself, or whether there were other situations, such as counterclaims, or the case where the foreign state was exercising private rights, where it was to be treated like any other foreign juristic person when sued in the home country. The court concluded that international law did not permit jurisdiction to be assumed in the latter situation, and rejected the appeal. The Supreme Court, however, reversed this, and reëstablished the decision of the lower court. It said that the correctness of the prevailing doctrine that according to international law a state even in its private capacity could not be subjected to the jurisdiction of

[18] G. Z. Rv. I 14/18/1 u. 2. Allgemeine österreichische Gerichts-Zeitung, LXIX (1918), p. 111; Die Rechtsprechung, II (1920), p. 75.

local courts, was by no means unquestioned. Moreover, in the case at bar there was no fear of impairment of the right of sovereignty, which was the basis for the application of this principle. The claim rested on a private-law title, which the plaintiff asserted against the respondent state as against the other party to the contract, not on an act of sovereignty. In such a case, even a foreign state was subject to the local jurisdiction.

**Appointment of Curator**

The question of appointing a curator to represent the holders of foreign government bonds when default had been made on payments of interest or principal has not been dealt with uniformly by the Supreme Court. In 1877 a holder of Ottoman government bonds, not having been able to secure payment of the interest due by application at the bank indicated for the purpose, asked for the appointment of a curator under the law of April 24, 1874.[14] He was to represent the holders of the bonds, and try to negotiate with the Ottoman government or to induce diplomatic intervention. This request was rejected in all instances. It was held that the law as to curators applied only for the benefit of unknown holders of bonds having rights to defend in Austria. In the case at bar, it was a question of rights to be enforced against a foreign state, which was not subject to Austrian courts.[15]

Some fifty-five years later this issue again came up before the Supreme Court, but was handled in a different fashion.[16] A curator had been appointed to represent the holders of certain bonds emitted by the Hungarian government. This curatorship was subsequently abolished by decree of the lower court, affirmed on appeal. The Supreme Court agreed with the lower courts, and declared the whole proceeding in relation to the appointment of the curator nul and void. It admitted that the Austrian holders of the bonds in question had entered into a private-law relationship, that of creditor and debtor, with the Hungarian government, for a state could act abroad

[14] Reichsgesetzblatt, 1874, p. 95, No. 49.

[15] Supreme Court, September 4, 1877, No. 10658, Sammlung von Civilrechtlichen Entscheidungen des k. k. Obersten Gerichtshofes, XV (1880), p. 295, no. 6549.

[16] Supreme Court, September 3, 1930, 1 Ob 689/30, Die Rechtsprechung, XII (1930), p. 216.

only in a private capacity, it being impossible for it to exercise its sovereign authority beyond its own limits. Furthermore, it was conceivable that the law establishing the competence of the court of the place of execution of a contract might apply to a foreign state, although this point was much discussed in relation to cases where the foreign state had not expressly submitted to the local jurisdiction. The case at bar, however, rested on no such general principles, but was controlled entirely by a definite statute and treaty. The law of April 24, 1874, relating to curators,[17] provided for the cancellation of such a curatorship when it should become evident that it could not fulfill the purpose for which it was established. Such was the situation here, because, by article 12, of the Treaty of October 26, 1914, between Austria and Hungary the execution of foreign judgments was denied if the judgment purported to be in settlement of claims against the executing state. The conclusion was that no curator could be appointed or maintained against the Hungarian *fiscus* while the treaty was in force, and that the lower courts were right in so holding.

Although admitting that there might be instances where the foreign state subjected itself to the jurisdiction of Austrian courts by the mere fact of engaging in private enterprise in Austria, when a specific engagement in connection with such a business was relied upon to vest jurisdiction and this engagement was held by the courts to be inadequate for the purpose, they do not seem to have fallen back upon the general proposition. This is illustrated by a decision of the Supreme Court of January 20, 1926.[18] A director of the Czech state railway accepted a bid of a Viennese machine factory to supply it with certain machines. The form on which the bid was submitted contained a clause to the effect that in case of litigation, the courts of the country of the vendor should be competent. The machine factory sued the Czech *fiscus* for the price of the machines furnished, relying upon the above clause to indicate the submission of the foreign state to the jurisdic-

[17] Reichsgesetzblatt, 1874, p. 95, no. 49.

[18] X. *v.* Czech *fiscus*, Ob III 977/25, Zentralblatt für die Juristische Praxis, XLIV (1926), p. 382, No. 134.

tion of Austrian courts. The trial court, in a decision of September 10, 1925, said that by accepting delivery under the above circumstances, its jurisdiction had been agreed to, but the court of appeal, while admitting that the issue was one based purely upon a private-law transaction, took the stand that even so it was without competence. The Supreme Court refused to entertain an appeal from this decision, indicating merely that the document relied upon did not express the submission of the foreign state with sufficient certainty.

**Plaintiff**

In conclusion it may be said that the question of the capacity of a foreign state to sue seems to have afforded no difficulty in Austria. In a decision of the Supreme Court of February 7, 1894,[19] the Prussian *fiscus* was permitted to sue for court costs without any question being raised as to its right to do so. The lower court had stated that Prussia by bringing the action had subjected itself to the jurisdiction of the court. The Supreme Court, however, contented itself with a discussion of the relative competence of the judicial and administrative courts for such matters, by implication recognizing the right of Prussia to sue before the appropriate tribunal. In this the policy did not change with the new order, for in a decision of February 5, 1918, the court of appeal said that it could not be doubted that a foreign state as a subject of private law in Austria could appear before the courts as a plaintiff.[20]

## HUNGARY

**Collection of Lawyer's Fees**

The courts of Hungary and Czechoslovakia seem to have followed the example of those of the old Austro-Hungarian Empire rather than of the modern Austrian Republic. The conservatism of the Hungarian courts is well illustrated by the following decisions. Action was brought against Prince Lippe Schaumburg for the collection of lawyer's fees. The trial court in Pécs (Neunkirchen) had assumed jurisdiction, but was

[19] Z. 1288-IV. Senat. Entscheidungen des k. k. Obersten Gerichtshofes in Civilsachen, IX (1894 [1897]), p. 22, pt. III, No. 327.

[20] Die Rechtsprechung, II (1920), p. 75.

reversed on appeal by the Supreme Court.[21] It held that the status of the Prince as a person enjoying extraterritoriality was definitely settled by the declaration of the Minister of Justice to this effect. Against such persons suit could be brought only when they voluntarily submitted or when certain questions regarding real property were at issue.

**Contract**

In an action against the government of Turkey for breach of contract and damages, the Court of Appeals of Budapest likewise refused to assume jurisdiction.[22] The Turkish War Ministry had contracted with the plaintiff for the transportation of 500 carloads of goods from Trieste to Dedeagach, but had failed to place these goods at the plaintiff's disposal. The trial court dismissed the action and was affirmed on appeal. The court held that the issue was governed not by the Hungarian Code of Civil Procedure, but by the tenets of international law. It was not necessary that these principles be incorporated in a treaty; they might be manifested by a continuous international legal practice. In conformity with this practice, foreign states and sovereigns could not be subjected to the jurisdiction of local courts with respect to acts of a public character in which their sovereignty found expression, or even, save for certain definite exceptions, as to transactions of a private-law character. Hence Hungarian courts were without jurisdiction in the case at bar.

## CZECHOSLOVAKIA

**Tort During Riot**

The courts of Czechoslovakia likewise seem to have been more conservative than those of the Austrian Republic in dealing with suits against foreign states. One of the earliest decisions in Czechoslovakia is that of the Supreme Court of December 23, 1919.[23] Previous to the dissolution of the Austro-

[21] X. *v.* Prince Lippe-Schaumburg, Supreme Court, October 6, 1875, No. 12772, Döntvénytár. Magyar Kir. Curia Semmitöszéki és Legfőbb Itélöszéki Osztályának elvi jelentöségü Határozatai, XIV (1876), I, p. 25, No. 73.

[22] X. *v.* Imperial Turkish *fiscus*, Court of Appeals, Budapest, August 1, 1916, Perjogi Döntvénytár, II (1917), p. 314, No. 445.

[23] R I 364/19. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, I (1919), 552; No. 343.

Hungarian Empire, Austrian troops while engaged in quelling a riot in Prague had shot the son of the complainant, who brought suit for damages against the Austrian Republic. The lower court dismissed the suit for want of jurisdiction, and its decision was affirmed on appeal. The Supreme Court pointed out that due to the independence and equality of states, a foreign state could not be required to obey the judicial rulings of the courts of the local state, and that where the obligation of obedience was lacking, the power to exercise jurisdiction failed.

**Tort by Coöperating Troops**

A somewhat similar case was that of a suit brought against the Republics of France and Czechoslovakia by a woman claiming an annuity for the death of her son who had been killed on June 2, 1919 by a truck belonging to the French military mission, but being used on this special trip in the service of the Czechoslovakian military authorities. The trial court at Prague dismissed the proceeding as against France for want of jurisdiction, but the Court of Appeal of Prague reversed this decision, holding that as the plaintiff relied upon the law relating to liability for the use of automobiles, the suit was based upon private-law obligations and that consequently the sovereignty of the foreign state was not involved. The case was sent back for revision.[24] Hereupon the court of first instance issued an interlocutory judgment as no one appeared for the respondent. The French legation refused to receive the order for judgment because the addressee was an extraterritorial person to whom the court could not send its notices through the mail. The court then appointed a curator to receive the order for judgment, and sent it to him. From this decision an appeal was taken. The Supreme Court vacated the judgment and dismissed the suit.[25] It said that the right of the local courts to exercise jurisdiction was only commensurate with the sovereignty of the local state, and hence it was not for them to deal with complaints against foreign states, except when the latter expressly submitted or

[24] December 29, 1919, R. III 104/19-6. Zeitschrift für Ostrecht, I (1927), p. 252.

[25] October 19, 1920. RI 863/20. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), 584; No. 712; Entscheidungen der obersten Gerichte der Tschechoslowakischen Republik, I (1920-21), I, p. 74; Zeitschrift für Ostrecht, I (1927), p. 254.

when the suit involved real property. As the courts were in the presence of neither of these two exceptions, it followed that they were without competence to decide this claim.

In the meantime the Supreme Court had dismissed two actions involving state railways. The first is of peculiar interest inasmuch as the respondent was the Saxon State Railway.[26] However, in none of the three instances did the court intimate that it was not quite a matter of course to treat Saxony as a "foreign state." A claim for damage resulting to goods shipped by the railway was instituted before a Czech court. Upon a plea to the jurisdiction, the claim was dismissed. On appeal, however, the distinction between the public and private acts of states was drawn, and the court, considering that no question of sovereignty was involved, held itself competent through the application of the ordinary rules as to the presence of property of the defendant within the district of the court. The Supreme Court reversed this decision. It refused to consider whether or not the Bern Convention of October 14, 1890, retained its validity for Czechoslovakia after the dissolution of the Austro-Hungarian Monarchy. It maintained that the Saxon Railway *fiscus* could be subjected to the jurisdiction of Czech courts for the case at bar only if it had voluntarily submitted. Of such submission there was no evidence. It pointed out that the competence accorded a given court by the presence of property of the defendant was posited upon the fundamental subjection of the defendant to the jurisdiction of the courts. Rules of domestic law could have no application to a foreign state not subject to the jurisdiction of the local state. For these reasons the decision of the Court of Appeal was reversed and the action was dismissed for want of competence.

**Implied Submission**

In the second of these cases, action was brought against the Austrian State Railways on a claim arising from a contract of October 26, 1918, shortly before the dissolution of the Austro-Hungarian Monarchy.[27] An attempt was made to evi-

[26] X. *v.* Saxon Railway *fiscus,* Supreme Court, August 31, 1920. R I 337/20. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II (1920), p. 481, No. 639.

[27] Supreme Court, October 12, 1920, R II 211/20, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, II

dence the consent of the respondent by its acceptance of an invoice, containing a provision whereby the respondent was to be deemed to consent to the jurisdiction of the local courts unless it expressly refused within a stipulated period. The district court of Olmütz dismissed the action because of lack of competence under the Statute concerning the Exercise of Jurisdiction. The court of appeal held this decision void and dismissed the claim, maintaining that a foreign state was not subject to the jurisdiction of local courts either for a sovereign or a private act unless it expressly submitted. Here there was no submission, and hence no competence. The Supreme Court agreed: except in cases involving real property the rules of civil procedure could not be applied against a foreign state, unless it voluntarily submitted to the local jurisdiction. In the case before it, failure to deny its willingness to submit to the local jurisdiction in accordance with the terms of the invoice could not be construed as voluntary consent, in view of the intervening break up of the monarchy, and the disordered conditions under which the new government—the present respondent—undertook the organization of its existence.

In connection with this case it may be remarked that by article 233 of the Treaty of St. Germain it is provided that if Austria engages in international trade it shall not be deemed to have any rights, privileges or immunities of sovereignty. This point does not seem to have been raised in the litigation, whether because the original contract was made at a time when the present Czechoslovakia was under the sovereignty of Austria-Hungary, so that the trade engaged in was not considered international, or, as has been suggested, because the local judges assumed the attitude that provisions of international treaties were of no import to them except in so far as they had been incorporated into national law, does not appear.[28]

A case dealing with the corresponding article 281 of the Treaty of Versailles was decided by the Supreme Court on

**Commerce**

(1920), p. 575, No. 705; Zeitschrift für Ostrecht, I (1927), p. 252; Entscheidungen der obersten Gerichte der Tschechoslowakischen Republik, I (1920-21), I, p. 6.

[28] See note on this decision by Egon Weiss, Zeitschrift für Ostrecht, I (1927), pp. 253-254.

January 16, 1923.[29] Action was brought by a Czech citizen against Germany for damages for injury sustained by him while a passenger on the German Railway within Czech territory. The respondent refused to accept service of process, and the trial court dismissed the proceeding. The court of appeal reversed this decision, saying that there was no doubt that prior to the revolution German Railways were subject to the local courts for accidents that occurred in Austria, and that Article 281 of the Treaty of Versailles definitely provided for such subjection. The Supreme Court admitted the appeal and affirmed the decision of the trial court. It said that prior to the revolution there were no *German* railways; the state railways were Prussian or Saxon, *etc.*, and that as to them the Supreme Court at Vienna had applied the rule of international law according to which a foreign state was not subject to the jurisdiction of national courts even when it engaged in private enterprise, unless it voluntarily submitted, or the issue involved real property within the state of the court. It was true that by treaty Prussian railways had been subject to Austrian courts for accidents occurring on the Austrian stretch of the line, but there had been no treaties with Saxony regarding any submission to the local jurisdiction as regarded its state railways. The German Railways were the legal successors to the Saxon, and could claim the same immunities in Czech courts, the successors to the imperial Austrian. But it was claimed that Article 281 of the Treaty of Versailles had altered all this. This the Court denied. It held that the transportation of persons did not fall within the term "international trade" as used in the Treaty. The objects of trade were always commodities, not persons, and international trade referred to imports and exports. Hence the treaty provision invoked was not applicable. Not only was there no general renunciation of immunity, but in this case Germany had expressly declined the jurisdiction of the local courts, which were therefore incompetent to hear the suit.

**Execution of Judgment**

A case of unusual interest involving execution of a judgment rendered against a foreign state arose in 1927. In accordance

[29] R I 1360/22. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, V a (1923), p. 46, No. 2162; Právník časopis věnovaný vědě právní i státní, LXII (1923), p. 197; Zeitschrift für Ostrecht, I (1927), p. 255.

with article 239 of the Treaty of Trianon, a Hungarian-Czechoslovakian Mixed Arbitral Tribunal had been established, which, during the last months of 1927 had rendered decisions condemning the Hungarian state to pay several million crowns on claims filed by Czech nationals. In 1924, however, an arrangement had been made for the financial reconstruction of Hungary under the auspices of the League of Nations, and the Reparations Commission had fixed the annual reparations payable by Hungary for the ensuing nineteen years, at the same time prohibiting it from making any additional disbursements whatever without its consent. In this situation, the Hungarian government requested permission to pay the above awards, and to charge the amount against the reparation annuity. Before a reply had been received, a bank in Prague, assignee of a Czech national in whose favor an arbitral decision had been rendered, impatient at the delay, brought action on this award for the attachment and forced sale of a building in Prague, owned by the Hungarian government. The Supreme Court, reversing the lower courts, held that this attachment against the property of a foreign state might issue. Local jurisdiction extended over the immovable property of nationals and foreigners alike, and as to foreigners, no distinction was to be made between a private person, a Prince, or a state.[30]

The building in question was used for the purposes of the Hungarian legation, although there is no evidence that this fact was known to the court. The Hungarian government immediately protested, through diplomatic channels, with the result that the Czechoslovakian government temporarily suspended the execution of the judgment. In the meantime, the Reparations Commission informed the Hungarian government that no payments were to be made on account of the decisions of the Mixed Arbitral Tribunal.

Three months prior to this decision of the Supreme Court, a law had been passed amending the rules regarding civil procedure and judicial execution and providing, *inter alia*, that actions of execution against extraterritorial persons and build-

[30] R I 305/28. April 26, 1928. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, X a (1928), p. 632, No. 8000; Sbirka Rozhodnutí nejvyšších stolic soudnich Republiky Československé, 1928, p. 632.

ings could be undertaken only in so far as this was permitted by the law of nations. In cases of doubt, the court was to request a declaration from the Minister of Justice, who should confer with the Minister of Foreign Affairs, and whose ensuing opinion was binding upon the court. Furthermore, such executions could take place only in the presence of a representative of the Ministry of Foreign Affairs.[81] Unfortunately, this law did not go into effect until June 1928, three months after the Supreme Court had handed down its decision.[82]

**Inviolability of Legation Property**

On December 28, 1929, there was handed down another decision of the Supreme Court wherein the order of execution was vacated.[83] None of the above facts was referred to, but the court explained that whereas a house let to a tenant, an agricultural estate, or a factory situated within the territory of the Republic, belonging to a diplomatic person, and used by him for purposes of private profit, would not enjoy immunity from execution, all objects which served directly or indirectly the purposes of a legation were immune *per se*. The court took pains to emphasize that it was only in such instances, where not merely the owner, but the property itself enjoyed extraterritoriality that international law forbade execution upon real property lying within the state of the forum.

## SWITZERLAND

**Lien**

The judicial practice of Switzerland affords several instances of the application of the doctrine of immunity to questions of execution. In an action for the enforcement of a contractor's lien on a building of the League of Nations for the supply of stone, the League voluntarily appeared before the tribunal of first instance, observing that it was an international organiza-

[81] *Gesetz vom 19 Januar 1928, betreffend die Abänderung und Ergänzung einiger Bestimmungen der Gesetze über das gerichtliche Verfahren in bürgerlichen Angelegenheiten und über des Exekutionsverfahren,* article IV, § 2, Sammlung der Gesetze und Verordnungen des čechoslovakischen Staates, 1928, p. 123, No. 23.

[82] For the general background of this case, see Deák, *Immunity of a Foreign Mission's Premises from Local Jurisdiction,* American Journal of International Law, XXIII (1929), pp. 582-594.

[83] R I 979/29. Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, XI b (1929), p. 1705, No. 9491; Zeitschrift für Ostrecht, V (1931), I, p. 52.

tion which by virtue of general principles of international law, and by the provisions of the Covenant enjoyed privileges and immunities exempting it from the jurisdiction of local courts. Its voluntary appearance was exclusively limited to the claim at issue. The tribunal dismissed the action, and on appeal the decision was affirmed. The Court observed that inasmuch as the buildings occupied by the League of Nations were inviolable under Article 7 of the Covenant, a judgment ordering the enforcement of the lien would as a practical matter be inexecutable, and hence, despite the voluntary appearance of the League of Nations, the court should refrain from pronouncing judgment against it in this case.[84]

Bond Issue

The leading case is that of Dreyfus against the Austrian Ministry of Finance.[85] Action was brought by a Swiss national for the payment of matured bonds, and back interest on the same, issued by the imperial Austrian government in 1914, payable in Swiss francs in Switzerland. Upon refusal of payment by the prescribed bank, property of the respondent state was attached in the bank. A plea to the jurisdiction was overruled by both lower courts. These decisions were affirmed by the Supreme Court. It held that the exemption of a foreign state from the jurisdiction of national courts was by no means general and without exception, although the practice of granting a state immunity for private as well as for sovereign acts was concededly widespread. In Italy and in Belgium a distinction was made whereby a foreign state in its non-sovereign character was subject to the jurisdiction of local courts, like any private person. In view of this legal situation, the jurisdiction of Swiss courts for the case at bar could unhesitatingly be affirmed. Austria expressly bound itself to pay in Switzerland and in Swiss currency. Hence Switzerland was the place contemplated for performance, and Swiss courts were competent, if not directly by agreement, then in the sense of *forum contractus*. The attachment was affirmed.[86]

[84] Schmidlin *v.* Société des Nations, Court of Appeal, Geneva, February 6, 1925, Revue de Droit International Privé, XXI (1926), p. 103; Semaine Judiciaire, XLVII (1925), p. 248.

[85] K. k. Oesterreichisches Finanzministerium *v.* Dreyfus, Supreme Court, March 13, 1918, Entscheidungen des Schweizerischen Bundesgerichtes, XLIV (1918), I, p. 49.

[86] *Cf.* Article II, No. 5 of Draft Regulation adapted by the Institute of International Law at its Hamburg session in 1891.

This decision, authorizing the seizure in Switzerland during the World War of property of one of the belligerent states, caused concern to the Federal Council, which had been entrusted with extraordinary powers under an emergency enactment of August 3, 1914, for the insurance of national security and the preservation of neutrality.[37] Accordingly it annulled the decision, and on July 12, 1918, issued a decree which forbade, subject to reciprocity, the sequestration of the property of a debtor or bankrupt state and forcible measures of execution against movable property of foreign states.[38] At the end of the war, with the deflation of the extraordinary war-time powers of the Council, it became essential that the principles enunciated in this decree be incorporated in a federal law, if the doctrine it espoused were to remain effective. A bill was introduced for this purpose by the Council,[39] but the legislature objected to the incorporation into national law of a provision of international law which was not universally recognized, and the bill failed. On July 8, 1926, the Decree of July 12, 1918, was formally abrogated,[40] thus leaving the position of foreign state property in Switzerland uncertain. Subsequent decisions, however, showed a tendency to find points of distinction from the Dreyfus case.

**Assumption of Bonds**

The case of the Hellenische Republik *v.* Obergericht Zürich[41] is in point. The Société du chemin de fer Ottoman Salonique-Monastir held a concession from the Ottoman government by which the government was to be entitled to buy back the line at the expiration of thirty years. By the Peace of Bucarest of 1913, the line of the railway came to be 8% on Serbian and 92% on Greek territory. These two states succeeded in those proportions to the rights and duties of Turkey as to this concession. During the World War they respectively confiscated the railways in their territory and ran them on their own

[37] Recueil Officiel des Lois et Ordonnances de la Confédération Suisse, XXX n. s. (1914), p. 347.

[38] Schweizerisches Bundesblatt, 1918, p. 775; Recueil Officiel des Lois et Ordonnances de la Confédération Suisse, XXXIV n. s. (1918), p. 791.

[39] January 29, 1923, Bundesblatt, 1923, p. 419.

[40] Recueil Officiel des Lois et Ordonnances de la Confédération Suisse, XLII n. s. (1926), p. 305.

[41] Supreme Court, March 28, 1930, Entscheidungen des Schweizerischen Bundesgerichtes, LVI (1930), I, p. 237.

account without compensation to the railway company. In 1925, an agreement was reached whereby the company released to the Greek government that part of the line situated in Greece for a sum calculated to cover the exercise of the option to buy back and compensation for the expropriation. The Greek government expressly assumed the obligation of the bonds of the original company from the date of the expropriation in 1915; payment from then on was to be made only in Athens. Certain Swiss holders of these bonds, which were overdue both as to principal and interest, brought suit against the Greek Republic. Attachment of property of the Greek government in a Zürich bank was obtained by summary process, and the Greek state appealed. The Court of Appeal refused to vacate the attachment, on the basis of the Dreyfus case, but the Supreme Court reversed this decision. It pointed out that in the Dreyfus case, it had not authorized the attachment only on the ground that there existed no rule of international law exempting foreign states from local jurisdiction even in legal relationships pertaining to private law. More significant had been the fact that it dealt with a debt-relationship established in Switzerland, and containing express provision for performance in Switzerland. None of these considerations fitted the case at bar: there was no evidence that the original bond issue had been opened for subscription in Switzerland; no place of payment had been designated in Switzerland, but on the contrary, Athens was stipulated as the only place for payment. For these reasons the Court held the Dreyfus case inapplicable as a precedent, allowed the appeal and dissolved the attachment.

## EGYPT [43]

The International Mixed Courts of Egypt follow those of Belgium and Italy in assuming competence to decide suits against foreign states so long as they conceive questions of

[43] Many of the following cases are analyzed and commented upon by Jasper Yates Brinton in an article entitled *"Suits against Foreign States,"* in American Journal of International Law, XXV (1931), pp. 50-62.

sovereignty not to be involved. This trend of judicial opinion only dates back some twenty years, however. Previously these courts had considered themselves radically incompetent to deal with cases involving foreign states, even when the latter were willing to submit to the jurisdiction by voluntarily intervening.[43] By 1901 this view had so far changed that when the Dutch cruiser *"Gelderland"* was in collision with an English merchantman in Port Said and her captain, in his official capacity, brought action for damages, the court spoke of the Dutch government as submitting voluntarily to the jurisdiction, "which it can indubitably do." [44]

The leading case under the new doctrine is that decided by the Court of Appeal on May 9, 1912.[45] Property real and personal situated in Egypt had been left to the Greek state, and the widow of the testator instituted proceedings to break the will. The Greek state was made a respondent, and entered a plea to the jurisdiction. The court overruled the plea and assumed jurisdiction. It was of the opinion that the only bases for the much discussed principle of the incompetence of courts as regarded foreign states appearing as defendants were sovereignty and independence, which traditionally prevented their being subjected to the jurisdiction of another state. As an exception, the principle of immunity must be strictly interpreted, and should not be extended beyond the reason for its existence. When, as in the case at bar, sovereignty was not involved, there was no reason for applying it. There was still less reason to extend it to litigation regarding real property or a succession in the country of the forum.

**Succession**

**Merchant Vessel**

The distinction which the court had in mind is brought out by a comparison of several cases in which government-owned vessels were involved. The *"Sumatra,"* a vessel owned by His Britannic Majesty, and commanded by Captain Hall, was in collision with the *"Mercedes,"* a Spanish ship in the harbor of

[43] Jean Vassanis *v.* Dame Marie Seka, Civil Tribunal, Alexandria, January 10, 1893, Bulletin de Législation et de Jurisprudence Égyptiennes, V (1892-93), p. 294.

[44] John Jones *v.* Baron Swerts de Landas Wyborgh, Court of Appeal, Alexandria, May 29, 1901, Bulletin, XIII (1900-1901), p. 334.

[45] Dame Marigo Kildani, veuve Haggar *v.* Fisc Hellénique, Bulletin, XXIV (1911-12), p. 330; Gazette des Tribunaux Mixtes d'Égypte, II (1911-12), p. 161.

Alexandria. Action was brought against Captain Hall in his official capacity, and he was condemned to pay damages. He appealed, alleging immunity on the score of the ownership of the *"Sumatra,"* despite the fact that she was engaged upon a commercial voyage under charter to Lord Inchape. The court refused to entertain the appeal, saying that it would be a negation of justice to grant immunity in the case of a quasi-tort, committed by an employee of a foreign state in the management of its private interests, entirely apart from its political activity.[46]

**Public Vessel**

On January 15, 1924, the Civil Tribunal of Mansourah held itself competent in the case of the seizure in the Suez Canal of a vessel belonging to the government of the Hedjaz. The ship was ordinarily armed and used for the defense of Red Sea ports, but at the moment of attachment had been disarmed and was employed for the conveyance of pilgrims from the Hedjaz to Egypt. The ship was arrested on an alleged debt due for expenses connected with the transportation of these pilgrims. In assuming jurisdiction, the court pointed out that the mere fact that the vessel was the property of the government of the Hedjaz would not exempt it from the jurisdiction of the Egyptian Mixed Courts, which were competent on the basis of the civil character of the alleged indebtedness.[47]

**Armed Vessel**

When, however, it was attempted to hold the British armed ship *"Huntcastle,"* commanded by officers of the Marine Corps, and serving as a transport for men and horses, responsible for the death of a man occasioned by manœuvres of the vessel in the harbor of Alexandria, the court declared its lack of competence to investigate the responsibility of the British government, or of its agent, for an alleged error committed by an officer of the ship in the performance of his duty.[48]

A question likewise beyond the jurisdiction of the Mixed

[46] Capitaine Hall, Commandant du vapeur *"Sumatra" v. Capitaine* Zacarias Bengoa, Commandant du vapeur *"Mercedes,"* Court of Appeal, Alexandria, November 24, 1920. Gazette, XI (1920-21), p. 23; Bulletin, XXXIII (1920-21), p. 25.

[47] Commandant Paolo Saglietto *v.* Mohamed Tawill Effendi, Gazette, XIV (1923-24), p. 251.

[48] William Stapledon *v.* le Premier Lord de l'Admirauté Britannique, Court of Appeal, Alexandria, June 28, 1923, Bulletin, XXXV (1922-23), p. 542; Gazette, XIV (1923-24), p. 253.

Courts to decide was the validity of a Spanish decree of naturalization.[49]

**Act of Confiscation**

On November 9, 1927, the referee Judge of the Tribunal of Alexandria denied the right of the National Navigation Co. of Egypt to attach two vessels of the Union of Socialist Soviet Republics anchored in Alexandria. The application was made due to the seizure on the high seas of the *"Costi,"* a vessel belonging to the plaintiff, flying the Egyptian flag, by a band of men alleged to be in the service of the U. S. S. R. who were clandestinely introduced onto the vessel. She was taken to Odessa and there condemned by a decision of September 2, 1927, as the *"Inkerman,"* formerly part of the Soviet Merchant Fleet, withdrawn therefrom by illegal acts. In denying his competence, the Judge said that however just the claim, and however illegal and reprehensible the confiscation, it was incontestable that in using the force of arms as well as the authority of its judiciary in getting possession of the *"Costi"* the Soviet state was manifesting its sovereign authority. The fact that the U. S. S. R. had not been recognized by Egypt, might have diplomatic and political consequences in the relations of the two governments, but it could not sanction the refusal on the part of the judges to accord to the U. S. S. R. the prerogatives it enjoyed as a sovereign state or to admit its undeniable existence.[50]

**State Railway**

As the courts assume jurisdiction over actions brought against foreign states themselves, they do not hesitate to do likewise when agencies of states are involved. Thus the Civil Tribunal of Mansourah in a decision of December 11, 1923,[51] considered itself competent to hear an action brought against the Palestine Railways for supplies furnished it, and the Court of Appeal at Alexandria in a decision of November 29, 1924,[52] retained jurisdiction over the National Savings Bank, operated

[49] Alexandre de Zogheb *v.* Michel A. de Zogheb, Court of Appeal, Alexandria, June 3, 1924, Bulletin, XXXVI (1923-24), p. 413.

[50] The National Navigation Co. of Egypt *v.* Tavoularidis et Cie. Tribunal, Référé, Alexandria, November 9, 1927, Gazette, XIX (1928-1929), p. 251. *Cf.* Schooner *"Exchange" v.* M'Faddon, United States Supreme Court, February 24, 1812, 7 Cranch 116.

[51] Palestine Railways *v.* Nicolas Moussouris, Gazette, XV (1924-25), p. 93.

[52] Giovanni Borg *v.* Caisse Nationale d'Espargne Française, Gazette, XVI (1925-26), p. 123.

by the Post Office Department as an agency of the French government. The court held that banking operations were essentially private acts, of a nature to subject the French state to its jurisdiction whether conducted directly by an instrumentality of the state, or by an organization with a juristic personality distinct from the state. Similarly, the management of a tobacco monopoly was held not to involve an act of sovereignty, as the state had extended its activities into the realm of private interests.[58] When the Turkish State Tobacco Monopoly acquired a tobacco concession in Egypt, it took over a private monopoly, and at first retained on its pay roll one Jacovidis, general agent for the latter. When he was later dismissed, he brought suit against both companies for unreasonable discharge. The Turkish government entered a plea to the jurisdiction, alleging that the monopoly was an agency of the state and as such immune from the jurisdiction of the local courts, and that Jacovidis was a functionary of the state whose retainment or dismissal was not a subject for consideration by the courts. The Court of Appeal of Alexandria held that the government was not acting in its public capacity in conducting a tobacco monopoly, and hence could claim no immunity in matters connected with this enterprise. Moreover, the employment of Jacovidis in the same position he had occupied under the private company indicated that he was not a functionary of the Turkish government, but merely an accessory to a business conducted *jure gestionis* by the state. The court not only assumed jurisdiction and rendered a judgment against the Turkish government, but in connection with an attachment of Turkish property which had been validated by the lower court, said that from the moment a foreign state was assimilated for given acts with a simple individual, there was no reason not to permit execution of the sentence obtained against it upon property which it possessed in the same capacity.

**State Monopoly**

The renting of a furnished villa by the Sudanese government was held not to be an act of public authority, but a contract of private law, for which the government was subject to the

**Rental of Villa**

[58] Monopole des Tabacs de Turquie *v.* Régie co-intéressée des tabacs de Turquie, Court of Appeal, Alexandria, June 22, 1930, Bulletin, XLII (1929-30), p. 212.

jurisdiction of foreign courts. Hence the judge was competent to order the making of an inventory required by the lessor upon the handing over of the premises.[54]

## ROUMANIA

**Succession**

The few Roumanian cases available show that the courts follow the tendency of distinguishing between the public and private acts of a state, and are willing to assume jurisdiction over the latter. In a case brought in 1906 by Queen Nathalie of Serbia against the Serbian State, the Supreme Court permitted the seizure of movable property of the Serbian State in Roumania.[55] From the very complicated facts of the case it appears that property in Roumania left by Prince Michael of Serbia had been willed by a life tenant to the Serbian state for the establishment of a fund for the development of Serbian art, industry and commerce. Queen Nathalie, representing the heirs of Prince Michael brought an action for possession of this property. The Court of Cassation in validating the seizure, said that the courts of one country were competent against a foreign state or sovereign when the issue involved a "real" or "possessory" action regarding movable or immovable property in the state of the forum, or when it involved a question of succession opened in the state of the forum. Hence sequestration of sums due to a foreign state was permissible to the extent that it did not prejudicially affect the financial system of the foreign state. Furthermore, a state having the right to claim immunity might renounce it, expressly or tacitly, even for acts of execution upon its property, and a transaction entered into by a foreign state with an individual in Roumania necessarily implied voluntary submission by the foreign state to the jurisdiction of Roumanian courts for all judicial acts, including attachment and seizure on execution.

[54] Zaki bey Gabra *v.* R. E. Moore, Esq., Tribunal, Référé, Cairo, February 14, 1927, Gazette, XVII (1926-27), p. 104.

[55] Statul Sârbesc *v.* Regina Natalia *et al,* Court of Cassation, Roumania, February 19, 1906, Dreptul, XXXVI (1907), p. 175.

**State Monopoly**

In a more recent case, the Commercial Tribunal of Ilfov held that Roumanian courts were competent to entertain a suit against the Polish state on a contract for the furnishing of cigars for the Polish Tobacco Monopoly with a bank in Bucarest.[56] The court held that the provisions of the Civil Code permitting Roumanian nationals to sue foreign debtors before Roumanian courts applied to foreign states, as to debts and as to acts performed not in their public capacity, but in that of private individuals. In distinguishing the two aspects of the state, the criterion was the *nature*, not the *aim* of the act. In the case at bar the sovereignty of Poland was not affected by the suit, and the courts were competent.

## GREECE

**Immunity as "Ordre Public"**

In Greece there have been at least three instances where suit has been brought against a foreign sovereign or state. In 1907 the Sultan of Turkey was sued on a claim arising from the lease of real property belonging to the Turkish Emperor in Greece. The trial court dismissed the action, although no plea to the jurisdiction had been made by the respondent. Before the Supreme Court, it was alleged that such refusal to entertain the action was unjustified. The Court held, however, that according to Article 26 of the Code of Civil Procedure[57] the courts were not competent in such an action, and that this was a matter of *ordre public*, it being absolutely immaterial whether the defendant raised objection to the jurisdiction or not.[58]

This decision would seem to imply that jurisdiction could not be assumed even if the foreign state were willing to renounce its immunity. A definite statement to this effect was

[56] Banca Română de Comert din Praga *v.* Statul Polon, Commercial Tribunal, Ilfov, October 18, 1920, Dreptul, XLIX (1921), p. 46; Pandectele Romane, I (1921-22), II, p. 243 (reported here under date of October 18, 1921, with note by N. P. Comnen).

[57] All foreigners in Greece who enjoy the right accorded to legations are exempt from the general jurisdiction of Greek courts.

[58] X. *v.* Sultan of Turkey, Areios Pagos, —1907, No. 41, Θεμισ, XVIII (1907-08), p. 547.

made in a decision of the Supreme Court of 1924, but it was mere dicta.[59]

**Auxiliary Vessel**

In 1919 the Italian vessel *"Vinci"* was attached on a claim for salvage. The Italian consul intervened and offered evidence that the vessel had been requisitioned by his government and was engaged in its public service as an auxiliary to the Italian fleet. The Court of Appeals of Athens held that under the circumstances the *"Vinci"* was entitled to all the privileges and exemptions of a public armed vessel. It was not engaged in maritime commerce—in which case the commercial law would apply—but in a public military service of the Italian state, and hence was not subject to attachment, both according to the general principles of international law and to Article 26 of the Greek Code of Civil Procedure.[60]

**Acts "Jure Gestionis"**

The distinction between private and sovereign acts hinted at in this case found definite application in a suit brought against the Union of Soviet Socialist Republics in regard to some cattle sold by them to a Greek national.[61] The Supreme Court agreed with the Court of Appeals of Athens [62] that when the U. S. S. R. chose to sell goods, it acted as an ordinary *entrepreneur* entering into a civil-law contract. When the other party to the contract was a Greek national who subsequently brought suit upon the contract before Greek courts, the latter were competent to settle the question at issue.

Thus the trend of Greek judicial opinion seems to have swung through a wide arc: from the impossibility of assuming jurisdiction over a foreign state even should it consent, to the exercise of jurisdiction on the basis of a consent implied from a commercial activity engaged in by the foreign state.

[59] X. *v.* Consul-General of Paraguay, Areios Pagos, —1924, No. 196, Θεμισ, XXXVI (1925-26), p. 49.

[60] The *"Vinci,"* Areios Pagos, —1919, No. 26, Θεμισ, XXX (1919-20), p. 359.

[61] Areios Pagos, —1928, No. 29, Θεμισ, XL (1929), p. 842.

[62] Decision No. 1681, Θεμισ, XL (1929), p. 486.

## RUSSIA

An examination of Russian cases reveals nothing more satisfactory than a forty-year-old decision of the Ruling Senate.[63] This case has the distinction, however, of dealing with a claim to possession of real property held by the respondent state in the state of the forum. In the early 80's the Italian government desired to lay out a cemetery near Sebastopol for the Sardinian dead of the Crimean War. An Italian officer, sent out to look over the ground, found a desirable site on the estate of one Agarkov. Negotiations for the purchase of this property were at once entered into, but proved abortive. A suggestion was made to the Russian Minister of Foreign Affairs that the land be expropriated by Imperial decree for the benefit of the Italian government. The Minister refused, considering that the matter should be left to private arrangement between the parties, as it seemed not to warrant such an extraordinary measure for the benefit of a foreign state. On October 8 [21], 1890, Agarkov began suit against the Italian government in the person of its Minister of War before the district court of Simferopol, claiming that despite the fact that no agreement had been arrived at, the Italian government had gone ahead and cut trees, built fences, erected a monument, and built a hut for the watchman. The plaintiff asked that the Italian government be ousted from possession. The court held itself incompetent and dismissed the suit on the following four grounds: 1) The Italian government had acted *jure imperii,* as a sovereign, and hence was exempt from the jurisdiction of the local courts; 2) the articles of the code of civil procedure according extraterritoriality to diplomatic representatives of foreign states applied to foreign states themselves; 3) the suit should have been brought not against the Italian government, but against the *de facto* possessor; 4) the plaintiff was guilty of laches in not bringing the suit earlier. The appellate court of Odessa having affirmed this decision, it was reversed by the Ruling Senate. Each ground for the

**Real Property**

[63] Agarkov *v.* Italian Government. April 7/20, 1893. Рѣшенія Гражданскаго Кассаціоннаго Департамента Правительствующаго Сената, 1893, стр. 170.

decision was held to be erroneous. 1) A government could act in its sovereign capacity only within its own territory. Hence no immunity from suit abroad could be posited upon the theory of sovereignty, and if a state, even for public purposes, involved itself abroad in relations affecting the civil rights of persons residing there—not being its own citizens—these persons might apply to the courts for the protection of their rights, and the courts could not refuse to hear them. Furthermore in the case at bar the non-sovereign character of the act was evident, since expropriation had been expressly denied and the matter left to private agreement, envisaging a contract. Rights and interests arising from the failure to reach such an agreement, could not be considered in any other light than as civil rights. 2) Even if it were admitted that extraterritoriality applied to foreign states, this was not to say that they enjoyed absolute exemption from the jurisdiction of local courts under all circumstances. Extraterritoriality was based upon the fiction that the subject of the extraterritoriality did not have his domicile where he was in person. Hence where the competence of the court depended upon the domicile of the defendant, this principle had to be given consideration. But not so as regarded suits concerning immovable property, which according to law had to be brought in the judicial district where the property was situated, irrespective of the place of domicile of the owner. The principle of extraterritoriality had no effect upon the determination of competence over such suits. It was for this reason that the wording of the law accorded extraterritoriality only in suits for money damages, which must ordinarily be filed in the place of domicile of the defendant. The principle could not be made to prevent Russian courts from assuming jurisdiction in a suit against a foreign government regarding real property. 3) The law did not require proceedings to be brought only against the agent, but specifically set out the liability of the principal. 4) Laches might prevent action under certain articles of the code, but so long as the statute of limitations had not run it could not deprive the plaintiff of his general right to sue. The lower court being wrong in all its conclusions, the judgment was reversed, and the case sent back for revision.

It is peculiarly unfortunate that the practice of Soviet Russia appears to afford no instances of suits against foreign states. It would be of the utmost value in a study of this subject to record the attitude of a state which has so completely socialized industry. Thus far, however, this old imperial Russian decision must be counted as the Russian contribution in the matter.

## POLAND

The available Polish cases exhibit conservatism in following the generally accepted principles regarding immunity. On March 2, 1926, the Supreme Court decided a suit brought against the Czechoslovakian Republic.[44] This was a suit to recover damages for an injury sustained in an accident caused by an automobile owned by the respondent. The trial court overruled a plea to the jurisdiction, applied the rules of domestic legislation as to the competence of courts regarding automobile accidents, and condemned the respondent state. The court of appeal at Cracow reversed this decision and was upheld by the Supreme Court. According to the latter, the relations between states were regulated by treaties and by the principles of international law; the provisions of civil codes had no bearing upon them, but were restricted to the regulation of private-law relations among the inhabitants of states. It was a fundamental principle that no state could exercise jurisdiction over another, unless permitted by an express rule of international law. This sanction was accorded where there was express submission, or where the proceedings related to real property situated within the state of the court.

Tort

An unusual attitude was displayed by the district court at Warsaw, which refused to entertain an action by a foreign complainant state on the ground that it might subsequently attempt to set up its immunity should the respondent bring a counterclaim by way of defense. These fears were allayed

[44] R. 133/26. Anna D. *v.* Czechoslovakian *fiscus*, Orzecznictwo Sądów Polskich, V [1926], 440; Zeitschrift für Ostrecht, I [1927], 275.

by the Supreme Court in a decision of February 10, 1928.[65] The claimant held six bills of exchange duly protested to the respondent, a Warsaw company, and applied to the court for leave to put into force the execution clause. According to Polish law, when this permission has been accorded the holder of commercial paper, in an *ex parte* proceeding, the debtor has the right of independent action against the creditor to prevent the execution taking place. The Supreme Court first considered whether it was possible for a foreign state to appear as a complainant before national courts. It concluded that international law, supported by custom, permitted a foreign state to bring civil suits, so long as nothing contrary to the law or public order of the state of the forum was involved. The U. S. S. R. had been recognized by Poland on March 18, 1921, and its application contained nothing contrary to public policy. Hence it had a right to institute proceedings before the local courts. The Court held it unnecessary to go into the question of the general immunity of foreign states from suit, since the U. S. S. R., by instituting a proceeding for the enforcement of its claim had thereby recognized the jurisdiction of the Polish courts in this case, and had agreed to submit to all the legal consequences connected therewith. Moreover, the special procedure on the execution clause, by which the debtor may institute a proceeding against the creditor was not a suit in the ordinary meaning of the word, but a means of defense against the creditor's claim. As such it was admissible against a foreign state, whether or not the latter, as a rule, enjoyed immunity from suit. For these reasons the leave to put into force the execution clause should have been granted.

**Counter-claim**

## DANZIG

In a suit against the Free City of Danzig for the delivery of some kettle-wagons, the Polish state asked leave to inter-

**Effect of Intervention**

[65] C. 1680/27. Commercial Representation of U. S. S. R. *v.* Towarzystwu Przemysłowo-Handlowemu Maurycy Fajans. Orzecznictwo Sądów Polskich, VII [1928], 364; No. 353; Zeitschrift für Ostrecht, III [1929], 2, 1227.

vene and take the place of the Free City of Danzig, declaring that it would thereupon refuse to have the merits of the case considered by the court.[66] By a decision of the trial court of May 27, 1922, its intervention was permitted, and Poland was substituted for the original defendant. It then entered a plea to the jurisdiction, which, however, was overruled. The Court of Appeal held that the general rule according to which a foreign state was immune from the jurisdiction of local courts was subject to an exception in the case of voluntary submission. This might be either express or implied. An implied submission was to be seen in the fact that Poland desired to be substituted for the original defendant Danzig. The situation was not altered by the fact that at the time Poland had warned that as soon as it should have been made a party defendant it would deny the competence of the court. For the request to be substituted for Danzig must be interpreted to mean that it was prepared to be treated in the same way as Danzig would have been. This amounted to a voluntary submission, for this suit, to the jurisdiction of the courts of Danzig. Poland was bound by its submission, which could not be recalled. In so far as it was induced to make this submission on the assumption that by a subsequent revocation it could free itself from the process, it had been the victim of an error of judgment, in no way affecting the irrevocable character of the submission: *"ignorantia juris nocet."*

## SAAR TERRITORY

**Plea of Immunity**

For damage to merchandise en route from Metz to Saarbrücken the German State Railway Administration was sued in the courts of the Saar Territory.[67] It entered a plea of lack of competence in the court *ratione loci.* This plea was rejected in an interlocutory judgment of May 10, 1921, from which no

[66] X. *v.* die Republik Poland, Obergericht, Danzig, May 26, 1923, Juristische Wochenschrift, LIII (1924), I, p. 710.

[67] X. *v.* Fisc des Chemins de Fer allemands, Supreme Court, Sarrelouis, February 12, 1924, Revue de Droit International Privé, XXI (1926), p. 69.

appeal was taken, and which in due course became *res judicata*. Subsequently the respondent railway said that it did not contest the case on its merits, and the trial court set the damages. The railway, not agreeing with the method of calculating the damages, appealed, and entered a plea to the jurisdiction as an organism of a foreign state. It claimed that as the principle of the immunity of foreign states was one which the courts were obliged to recognize "*d'office*," this plea might be raised even on appeal. The court, although admitting the general principle that foreign states were not subject to national courts, said that it had no application to the case at bar, for the decision of the lower court in which competence had been assumed had become *res judicata*. The defendant instead of appealing from the interlocutory judgment, had tacitly submitted to the competence of the Saar courts, by continuing proceedings before the courts. It was too late for them to enter a plea to the jurisdiction.

## LUXEMBURG

**Submission by Treaty**

In a suit brought on a contract whereby the General Imperial Direction of Railroads in Alsace-Lorraine took over from a private company—the plaintiff—the operation of its road in the Grand Duchy, the Luxemburg Court of Appeal held that this contract itself constituted an act in connection with the operation of this road in Luxemburg. For such acts the respondent was subject to the jurisdiction of the courts of Luxemburg in accordance with the terms of the treaty between the Grand Duchy of Luxemburg and the German Empire of November 11, 1902. Such a voluntary submission was everywhere recognized as binding. The court declared itself competent.[68]

[68] Société anonyme du Guillaume-Luxembourg *v.* Direction Générale Impériale des Chemins de Fer d'Alsace-Lorraine, Court of Appeals, Luxemburg, June 3, 1927, Pasicrisie Luxembourgeoise, XI (1921-29), p. 350.

## LEBANON

**Mandatory as Foreign State**

Before the Civil Tribunal at Beirut a Lebanon railroad company was sued for forestry taxes due on wood used by it in 1920. It contended that as the French government had taken over its management, the French government should be joined with it as defendant. The court held, however, that a foreign state could not be subjected to the judicial authority of another state, and that although Lebanon was under a French mandate, it was nevertheless distinct from the French state. Hence the latter could not be subjected to the jurisdiction of the local court without its consent, and there was no indication of consent being granted.[69]

## PORTUGAL

**Government-owned Merchant Vessel**

In Portugal there has been one case decided by the Supreme Court involving the position of a foreign state before the courts.[70] Here a vessel of the Lloyd Brasileiro, a government-owned organization, was attached by an agent of the line who claimed a lien for unpaid expenses incurred by the vessel on a previous voyage. The court of first instance dealt with the case on its merits and held the claim of the plaintiff to be without foundation. On appeal, the court refused to consider whether or not the existence of the debt had been adequately established, contenting itself with denying the jurisdiction of Portuguese courts to order the attachment of a vessel belonging to a foreign state. With this the Supreme Court agreed. It said that the only generally recognized exceptions to the immunity from the jurisdiction of national courts enjoyed by

[69] C. *v.* la Compagnie du Chemin de Fer Damas Hama, Civil Tribunal, Beirut, May 6, 1925, Gazette des Tribunaux Libano-Syriens, I (1925-26), p. 241.

[70] Henry Burnay & Co. *v.* Lloyd Brasileiro, Supreme Court, December 14, 1923, Gazeta da Relação de Lisboa, XXXVIII (1924-25), p. 88; Colecção oficial dos Acordãos doutrinais do Supremo Tribunal de Justiça, XXIII (1923-24), p. 32; O Direito, LVI (1924), p. 46.

foreign states were when they expressly consented, or when the issue involved real property in the state of the court, to which might possibly be added jurisdiction of the *forum hæreditatis*. None of these exceptions was relevant to the case at bar, however. Neither the fact that the vessel was engaged in commerce, nor that under similar circumstances such a vessel belonging to the Portuguese state could be attached sufficed to render this vessel of a foreign state liable to attachment, for the principles of independence, sovereignty and equality did not permit of states being subject to the jurisdiction of foreign courts.

## CONCLUSIONS

The foregoing study brings out certain conditions and limitations upon the general proposition that foreign states are immune from suit before national courts. In the first place a growing number of courts are restricting the immunity to instances in which the state has acted in its official capacity as a sovereign political entity. The current idea that this distinction is peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Roumania, France, Austria and Greece. The entity claiming the immunity need not be a "state" in the traditional sense, but it must be a person of international law. As to succession to property real or personal and as to real claims regarding real property within the state of the forum, the immunity does not hold. The exclusion of other matters from the jurisdiction of national courts may be considered to rest upon a lack of competence in the court, but it is more usually regarded technically as an immunity, although it is not essential that it be pleaded by the respondent. As an immunity it may be waived, either expressly or tacitly, at the time of the process or previously, but the renunciation once made cannot be withdrawn. As to what constitutes an implied renunciation, there are two distinct lines of judicial opinion: one, very conservative, followed by the United States, Great Britain, Germany, Czechoslovakia, Hungary, and perhaps Holland, the other less static, more influenced by the development of the economic activities of the modern state, espoused by the courts of many other states.

It is interesting to note that the swing toward the more radical doctrine of holding states responsible to the courts for their economic activities was given a great impetus by the appearance on the international stage of the Union of Soviet Socialist Republics. Courts that had never before assumed jurisdiction over an unwilling foreign state tore aside the veil and saw beneath the garments of the sovereign a powerful

economic competitor of national business firms, which should not be allowed to handicap private enterprise by the claim of sovereign prerogative.

The loathness of the courts to depart from the traditional point of view, however, led to the search for another method of rendering states subject to national courts. That at present under discussion is an international convention. Such a convention would no doubt be effective in producing uniformity of court action, and in reducing the sovereign immunities of foreign states to any degree decided upon. But the difficulties of drafting such an instrument are very great. The drafting committee would have to determine not the highest common factor, but the least common multiple of international practice. It would have to reconcile not only divergent opinions as to when a state ought to be exempt from suit other than in its own courts, but much more fundamental issues, such as whether the exemption was based upon lack of competence of the courts, or on a personal immunity of the sovereign state; it would have to take into consideration the absence of the principle of *stare decisis* in Continental law, and the vague understanding of *"jurisprudence constante"* in Anglo-American law; it would have to make allowances for the lack of the conception of a suit *in rem* in Continental law; it would have to square the civil and common-law effects of contributory negligence; it would have to bear in mind the differing doctrines as to the relation between national and international law, and the limitations of codes.

In view of the extraordinary complications that must be faced in the preparation of a treaty, it seems not improper to suggest that much of the difficulty in obtaining satisfactory decisions from the courts, lies in domestic laws and could be obviated by a careful reworking of the rules governing the competence of the courts. In many countries this has already been done, with salutory effect. For even where the international law is clear, it may be all but impossible to apply it, due to the requirements, or the shortcomings, of the public law.

Although the position of foreign states before national courts is neither uniform nor entirely satisfactory, the problem does seem to be working out to an adequate solution at least so far as Continental Europe is concerned.

# APPENDIX

## INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING THE IMMUNITIES OF GOVERNMENT VESSELS CONCLUDED AT BRUSSELS ON APRIL 10, 1926 [1]

The President of the German Reich, His Majesty the King of the Belgians, the President of the Republic of Brazil, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Chief of the Estonian State, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Possessions beyond the Seas, Emperor of India, His Serene Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, the President of the Portuguese Republic, His Majesty the King of Rumania, His Majesty the King of the Serbs, Croats and Slovenes, and His Majesty the King of Sweden.

Having recognized the utility of laying down in common accord certain uniform rules concerning the immunities of Government vessels, have decided to conclude a Convention to that effect and have designated as their Plenipotentiaries. . . .

Who, duly authorized therefor have agreed on the following:

### ARTICLE 1

Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government

[1] United States Department of State Treaty Information Bulletin No. 18 (March, 1931), p. 67. Translation made in the Department of State from a certified copy of the original French text transmitted by the Belgian Government.

vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

ARTICLE 2

For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately-owned merchant vessels and cargoes and of their owners.

ARTICLE 3

§ 1. The provisions of the two preceding articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.

Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:

(1) In case of actions in respect of collision or other accidents of navigation;

(2) In case of actions in respect of assistance, salvage and general average;

(3) In case of actions in respect of repairs, supplies, or other contracts relating to the vessel.

§ 2. The same rules shall apply to State-owned cargoes carried on board the vessels hereinabove mentioned.

§ 3. State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings *in rem*.

Nevertheless, actions in respect of collision and accidents of navigation, assistance and salvage, and general average, and

actions on a contract relating to such cargo may be brought before the tribunal having jurisdiction under Article 2.

ARTICLE 4

States may plead all measures of defence, prescription, and limitation of liability which are available to private vessels and their owners.

If it becomes necessary to adopt or modify the provisions relative to such means of defence, prescription, and limitation so as to make them applicable to ships of war, or Government vessels coming within the terms of Article 3, a special convention shall be concluded to that effect. In the meantime, any necessary measures may be effected by national legislation in conformity with the spirit and principles of this Convention.

ARTICLE 5

If in the case of Article 3 there is in the opinion of the tribunal a doubt as to the Governmental and non-commercial character of the vessel or cargo, a certificate signed by the diplomatic representative of the contracting State to which the vessel or cargo belongs, produced through the intercession of the State before whose courts and tribunals the case is pending, shall serve as evidence that the vessel or cargo comes within the terms of Article 3, but only for the purpose of securing a release from seizure, attachment, or detention, that may have been ordered by legal process.

ARTICLE 6

The provisions of this Convention shall be applied in each contracting State, with the reservation that its benefits may not be extended to non-contracting States and their nationals, and that its application may be conditioned on reciprocity.

On the other hand, nothing will prevent a contracting State from regulating by its own laws the rights accorded to its own nationals in its own courts.

ARTICLE 7

Each contracting State reserves the right to suspend the application of this Convention in time of war by a declaration notified to the other contracting States, in the sense that in

that event neither the vessels owned or operated by it nor the cargoes belonging to it shall be subject to attachment, seizure, or detention by any foreign court of justice. But the claimant will have the right to bring his action before the court competent by virtue of Articles 2 and 3.

ARTICLE 8

Nothing in this Convention shall affect the rights of the contracting States to take any measures that the rights and duties of neutrality may demand.

ARTICLE 9

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratification shall be made by means of a written notification, addressed to the Belgian Government, and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE 10

Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the Convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

ARTICLE 11

The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present Convention does not include any or all of the self-governing Dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing Dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provisions in respect of any self-governing Dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

ARTICLE 12

The present Convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the *procès-verbal* recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the Convention is subsequently put into effect in accordance with article 11, it shall take effect six months after the notifications specified in article 9, paragraph 2, and article 10, paragraph 2, have been received by the Belgian Government.

ARTICLE 13

In the event of one of the contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notifica-

tion to all the other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiration of one year after the notification has reached the Belgian Government.

ARTICLE 14

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should give one year advance notice of its intention to the other States through the Belgian Government, which would make arrangements for convening the conference.

Done at Brussels, in a single copy, April 10, 1926.

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