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Private law analogies in international law with special reference to international arbitration.

"....populi respectu totius generis humani privatorum locum obtinent".

Grotius, Mare Liberum, Cap. V.

"The Law of Nations is but private law "writ large". It is an application to political communities of those legal ideas which were originally applied to relations of individuals".

Holland, Studies in International Law, p.152.

PREFACE.

This monograph, which the author submits as a Thesis for LL.D. degree of the University of London, deals with a controversial subject. In fact, the problem of application of private law in international law is so controversial that in the course of the writing of this Thesis doubts were frequently arising in the mind of the author whether the subject ought to be dealt with in a University dissertation. These doubts have rather increased than diminished since he decided not to confine himself a a mere registration of opinions of publicists and writers of text-books, but to examine whether the current opinion is in accordance with the practice of states, and whether it has been really incorporated into the science of international law.

Now, "the current opinion" certainly does not encourage any deviation from the well-beaten path of a whole-scale regestion of analogies to private law. It has become customary for publicists writing on important questions of international law to base their argument on the assertion that the contrary opinion, which they attack, is a result of a misleading and mischievous analogy to private law. The monographic literature on the theories of state succession and of state responsibility is a lucid example of this procedure. It is accepted as a well established fact that

the recourse to private law, which was, perhaps, justified in the formative period of international law owing to the then prevalent patrimonial conception of state, has subsequently impeded the growth of international law, and ought to be discouraged. The modern positivist tendency which excludes any other source of international law except custom and treaty is, of course, chiefly responsible for the acceptance of this view.

Is this rejection confirmed by the practice of states and by the history of international law? Or is it an a priori interpretation in terms of a one-sided theory? These were the questions which the author set himself to answer. It occured to him that the recourse to private (and Roman) law is not only a characteristic feature of the formative period of international law, and that there is something more in it than a peculiarity of one historical period. A critical examination shows that the use of private law exercised, in the majority of cases, a beneficial influence, which lasts until to-day, upon the development of international relations and international law - to mention only its influence on the theories of acquisition of territorial sovereignty, of the freedom of the sea and of the responsibility of states; that in other cases - like prescription, succession, the measure of damages arising out of an international tort -

international law ultimately adopts solutions given by private law, without paying regard to the so-called "special character of international relations"; that it adopts, even now, notions of private law - as sale of territory, lease, mandate - whenever exigencies of international life seem to demand such a solution; that in international arbitration the recourse to private law on the part both of states and of tribunals is a frequent, one would say permanent, feature of the proceedings and - so far as the arbitrators are concerned - in a great deal of cases of the awards themselves.

It is especially in these arbitration cases that the inadequacy of the positivist treatment of the problem comes clearly to light. States and tribunals have recourse to analogy because international relations give rise to such analogies, and because international law is not developed enough to supply a solution in such cases. But the science of international law gives here no guidance to judges and arbitrators, because it rejects, under the influence of the positivist theory, any analogy whatsoever. The same happens when in a treaty the parties use conception of private law. The positivist method of the international law of to-day does not render, in such cases, any assistance to the work of interpretation, simply because it refuses to acknowledge that recourse to private law ever takes place.

If, on one hand, the practice of states and the history of international law did not seem to the author to confirm the so widely accepted view, he had, on the other hand, no hesitation in rejecting it in its character as a postulate of the positivist school. International law of to-day is no longer under theexclusive domination of the positivist school, which needs must share the fate of the modern doctrine of sovereignty. And this doctrine is to-day, to say the least, in the centre of a searching and vigorous examination. Neither can the positivist doctrine remain unaffected by those new tendencies in legal philosophy which aim at giving a fresh impulse to the creative work of juristic interpretation.

The conviction that he is engaged in the investigation of an important part of international law, hitherto obscured by a powerful, obdurate and, it is believed, now vanishing doctrine, helped the author in a work which almost equalled that of writing a treatise. For there is almost no part of the international law of peace which is not affected by this problem. On the other hand, the undertaking to illustrate the subject and to verify the propositions put forward in the Thesis by reference to the judicial settlement of international disputes nearly resulted in the writing of a digest of international arbitration.

The author saw clearly, in the course of his work, that he is liable to make himself misunderstood by advocating the

recourse to analogy to private law whenever such a course seems practicable, and by discussing the subject from the point of view of this general proposition. But he took the risk - in the hope that a careful reading of the dissertation will show: a) that such a restricted application of private law is not a postulate of interpretation only, but a rule put forward in accordance with the practice of states and the development of international law; b/ that it is by no means intended to show that international law in all its parts is or ought to be shaped in accordance with the private law pattern.

These few introductory remarks may also be regarded as a statement on the part of the author "in what respects his investigations appear to him to advance the study of law". Whatever the merits of the dissertation may be, he ventures to think that it represents an attempt to deal with the problem of private law analogies in its application to international law as a whole, and not to this or other particular question. Even if the view presented here is not accepted, the dissertation is bound to prove that a further detailed and independent study of this problem will greatly assist the judicial work of international arbitration and that of interpretation of treaties.

The Thesis "embodies the results" of the author's "own research", but he is indebted to his advisor in studies, Dr.Arnold D. McNair for friendly advice and helpful suggestions.

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P a r t I.

Private law analogies as a problem of the history if international law and of legal philosophy.

CHAPTER I.

I N T R O D U C T I O N.

(Private law analogies as a problem of the science of international law. - The plan of the monograph.)

1. There are, broadly speaking, three classes of cases in which international law comes into contact with private law. There are, firstly, those instances in which rules governing the relations between states as political entities endowed with attributes of rulership are shaped in accordance with a private law rule. When the question of sovereignty over a given piece of territory is decided by the application of the doctrine of prescription; when the extent of political rights of a state over a part of its own territory is defined in accordance with the alleged existence of a servitude; when before an international tribunal the conduct of a state is judged according to a private law rule of evidence; when the question of payment of moratory interest for delay in payment of a war indemnity is decided on the basis of analagous private law rules - in all these cases the usually so called public character of the respective rights and duties is obvious.

The points of contact between international and private law.

There are, secondly, instances in which states contract economic business with each other without any direct relation to the exercise of their political rights of rulership, for instance: when a state grants to another a loan, when a purely

economic servitude is granted or when one state acquires for economic purposes property within the territory of another- in all these cases there is, naturally, a possibility of private law being applied.

The third class includes cases in which private rights of individuals are determined in a public treaty, for instance, when subjects of one state Holding leases in perpetuity from another are granted ~~the~~ freedom of taxation,(1) and the question arises as to the meaning of the particular rule of private law defining private rights.

In the last two cases states enter into relations which but for the fact that the parties to it are states would belong to the domain of private law. What private law is to be applied in these cases? The question is, obviously, not one of analogy. It is either a question of a choice between this or the other system of private law, a choice in accordance with clearly defined principles,(2) or a question of a general private law, a kind of a modern ius gentium based on comparative law and logical deductions.

2. The problem is different in the first and, partly, in the second instance. The following question arises here:

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1) See f.i. "Treaty of Commerce and Navigation", of April 1896, between Japan and Germany (Martens, Treaties, N.R.G. III. ser. vol. 23. p. 269): for other instances Ruegger (cited below pp. 434.)

2) They do not belong, however, to international private law; for an exposition of these principles : Ruegger, Privatrechtliche Begriffe im Voelkerrechte, Niemeyer's Z.f.I.R., 1920, pp. 462-502.

may private law rules be introduced at all in this field of relations so different from those obtaining between individuals under the reign of municipal law? This thesis, which is concerned with the relation between private law and international public law is primarily devoted to the investigation of this aspect of the problem. - Now, there is hardly a question of greater practical and theoretical importance to which less systematic attention has been paid than the question of the use of private law concepts in international public law. I say: systematic attention. For given the close relation, historical and logical, between the two branches of law, it was impossible for international writers not to define occasionally their views on the admissibility of some particular concept of private law. But even then their investigation remains restricted, in the majority of cases, to the application of Roman law rules.

Private law in international public law

And yet, the question occurs repeatedly in the framing of international law as a science, in the interpretation and the construction of treaties, and in the judicial adjustment of controversies between states. It is not only the vast subject of treaties and the analogy to private law rules governing their formation, validity and termination (the juridical nature of treaties, influence of fraud, error and duress, rules concerning the pacta in favorem tertii, the clausula rebus sic stantibus, leesio enormis, the rules of interpretation); and not only the theories of acquisition of territory (the Roman law rules of possession and occupation). There are few branches of the international

law of peace which are not affected by this problem. The international law of tort and the theory of state responsibility; the measure of damages; the question of interest, moratory and compensatory; the theory of succession; the doctrine of prescription; quasi contracts; international servitudes; leases; international mandates of the art. 22 of the Covenant of the League of Nations; the private law rules of arbitration, procedure and evidence, especially those of estoppel, of res iudicata and of the burden of proof - they all come within the scope of the problem. To those instances cases may fairly be added in which rules originally created in close contact with Roman and private law , developed subsequently without leaving any visible trace of their private law origin, (the historical influence of the concept of property on the formation of the theory of sovereignty, the influence of the Roman law rules of possession on the conception of the freedom of the sea, on the theory of the maritime belt and of the sovereignty of the air). May these concepts be introduced into international public law and if so, may the rules emanating from them be applied in the same manner as they are in private law?

The problem is closely connected with the conflict between the positivist and natural law tendencies. The reign of the positivist school at the end of the nineteenth century is undisputed. It is predominant, we may fairly say - to-day. The modern reaction against "the devastating domination" of the purely positivist frame of mind is, comparatively, of a recent date and is confined to the application of municipal law.

And although there are most clear indications to the effect that this modern tendency of philosophy of law is gradually extending its influence to the field of international law, the positive character of the latter cannot be questioned [1].

The problem is closely connected with the controversy between the positivist and the natural law tendency.

The chief postulate of the positivist school can be expressed in one word: self-sufficiency. It rejects the taking over of rules and precepts from sources other than international custom and treaties. Such borrowing, it is alleged, destroys the independence of international law and hampers its free development. That this independence has in fact been threatened by the gigantic edifice of human thought and experience embodied in private law, is obvious. Hence the uncompromising attitude adopted by international law writers rejecting any permanent and organic connection between the two branches of law. The same forces which were fighting the influence of the law of nature advocated with vigour the purification of international law from its private law ingredients. This attitude is made less conspicuous only by the fact that the majority of writers do not deal with the question as a problem in itself. Only occasionally does the positivist disapproval of private law analogy find a more or less lucid expression.

There are only two groups of writers of whom it can be said that they face the matter in a general and compre-

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1) On the modern revival of the "naturalist" tendencies in international law s. following chapter pp.

hensive manner. The question has been dealt with in extenso by the most representative publicists of the German (and Italian) science of international law during the last decade of the nineteenth century, notably by Jellinek, Triepel and Nippold; it has been answered, on the other side, by English writers of the authority of Manning, Phillimore and Westlake who discussed with great thoroughness the relation between Roman law and the law of nations.

The problem in the formative period ' Gentilis divided attitude

This does not mean that the controversy is of recent date. The modern text-books of international law convey the impression that Grotius, his fore-runners and his successors in the seventeenth and eighteenth centuries were using private and Roman law out of a mere inability of perceiving the differences between the two systems. This is not so. Not only did they apply private law; they applied it after having faced the problem of the admissibility of such a procedure. No less a person than Albericus Gentilis, Grotius'most scientific predecessor, is confronted by the problem and, it seems, does not shrink from answering it. That he makes considerable use of the civil, notably Roman, law is to be expected [1]. But he defends his method by what seems to be a vigorous attack on the - even not yet firm-

1) Kaltenborn, Die Vorlaufer des Hugo Grotius, 1848, p.231; Holland, Albericus Gentilis in "Studies in International Law", p.22; Vinogradoff: Historical types of International Law, Bibliotheca Visseriana, Vol. I., 1923, p. 56; also Phillipson: The Great Jurists of the World, Gentilis, Journ. of Comp. Legisl., August, 1911.

ly established - historical — positive school.[1] He argues the case with great lucidity in the Advocatio Hispanica.[2] He says in the chapter " On holding to the civil law in appeals from a judge of the Admiralty" : " everyone submits to the civil law as to a sort of law of nations". He cites authors in support of the contention that the principles of the law of nations come from the Roman civil law. But it is interesting to note that a little later on in chapter XXIII - he is overcome by the anxiety of many future writers, and when answering the question "whether the purchasers of plunder may keep it for themselves", he urges gravely that civil law must not be cited rashly and that "what applies to a state must not be extended beyond the state absurdly."[3] He explains this attitude by pointing out that while the ancient world constituted a single state the world of today is divided into "separate jurisdiction or principalities". We shall see that those two Alberici - the forerunner of the positivists and the defender of civil law meeting the objection of the positivists by the proud statement of a true jurist: pacta nos non quaerimus, aut ~~out~~ ex factis ius constituimus, sed ex iure examinamus

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1) De iure belli, b.I., c.1.; b. I., c. 20. where he opposes the "nuda historiarum recitatio"; or - in b. I, c.3. -"...ius etiam, illis prescriptum libris Iustiniani, non civitatia est tantum, sed est gentium, et naturae, et aptatum sic est ad naturam universam, ut imperio extincto, et ipsum ius diu sepultum surrexerit tamen, et in omnes se effuderit gentes humanas."

2) c. XXI.

3) Translation by F.F. Abbot, the Classics of International Law, ed. by J. B. Scott, p.110; also introduction p. 19a.

facta - are typical of the position taken up by his successors.[1]

The father of international law is only a too lucid example of this confusing dualism. There is almost no chapter in the three books on the "law of war and peace" in which he does not reject this or the other rule, because it belongs only to the civil law and not the law of nations.[2] Text-books quote eagerly his refusal to acknowledge that "the contracts of kings and peoples are to be interpreted according to Roman law; except when the Roman law has been accepted as belonging to the law of nations; which is not lightly to be presumed".[3] His view on prescription is cited as another example of his independence in framing the rules of international law. We shall have to examine whether this independence can really be expressed in the terms of the modern rejection of private law analogy. But be it as it may, the problem - if not in its substance, yet certainly in its form - was answered in the negative in his great work. Here, as in many other questions, he gave an inspiring lead to future writers.

Rejection of Roman and civil law analogy by Grotius.

It would not serve any useful purpose to follow the opinions of the numerous body of writers in those two centuries.[4]

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1) For the use of private law by Zouche: p.XIV of Holland's introduction to the translation of "Iuris et iudicii fecialis explicatio ", Scott's ed.; by Wolff and Zacharia : Bulmerincq, Die Systematik des Voelkerrechtes, 1858, pp. 38 and 106, respectively.
2) f.i. L.II.c. IV.s. 10,12,13 ; c. V.s. 7, 10,15,29; c. VI.s. 1.2.4; c. VII.s.1,2 a.s.o.
3) L. II.c.XVI. s. 31.
4) For these s. Bulmerincq op. cit.

But it is of interest to note how much the utterances of the most representative publicists of this period remind one of the way in which modern positive writers deal with the subject. The influential expounder of the law of nature in its application to states and the commentator of Grotius, Johann Gottfried Heineccius, opens his great treatise "On the law of nature and nations" with a preface solely devoted to a vigorous attack upon Roman law as a source of authority in international law: "Ea tamen[2] nihil auctoritatis habitura sit in definiendis integrarum gentium litibus et controversitis, equippe, quae inter se non alio iure, quam quod ipsa natura inter homines homines parleque constituit, reguntur, quod in foederibus, pactionibus, conditionibus populorum... versatur." And it sounds like a translation from the leading German positivist of 150 years later[3], when objecting to the application of Roman and Canon law, he says: "Qui vero si gens quaedam cum Turcis, vel Sinensibus, vel Japonibus de violatis foederum legibus expostulat[4]". and by Heineccius[1]

Bynkershoek states coolly, without entering upon a theoretical discussion that the Roman law " will not decide questions which belong to the law of nations"; he argues[5] and by Bynkershoek.

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1) Elementa iuris naturae et gentium, translated into English in 1789; the learned translator did not, however, deem it necessary to translate the preface "because it is principally designed to show that Roman law can now have no other authority in deciding controversies between independent states, than as it is founded upon principles of natural equity".

2) ..iurisprudentia Romana. 3) Comp. Triepel, Voelkerrecht und Landesrecht, p. 223.

4) Praefatio, VIII.

5) De dominio maris dissertatio, c. IV.

in another work from a purely positive point of view: [1] "The Roman and Pontifical law can hardly furnish a light to guide our steps; the entire question must be determined by reason and the usage of nations. I have alleged whatever reason can adduce for or against the question; but we must now see what usage has approved, for that must prevail since the law of nations is thence derived."

The positivist militans of this time J. J. Moser is consistent to the end in his antagonism to Roman law. It is a ridiculous petitio principii - he says - to decide disputes between thee peoples according to the law of Iustinian". [2]

Rejection of private law by the modern positive school

The object of the attack changes in the nineteenth century so far as Roman law is replaced by private law in general. The positivist school on the continent, and especially in Germany, shows an ever-growing tendency to eliminate it altogether as a source of international law. It begins with warnings against exaggerated use of analogy. It does not yet exclude it as a matter of principle, as something essentially different from the system to which it has now to be applied. Moreover, writers explicitly admit the possibility of such an analogy - within certain limitations. Meyer says in his "Abschluss der Staatsvertraege ": [3] The

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1) De foro legatorum, c. III. s. 10.
2) Deutches Staatsrecht, 1773, II. p. 214; comp. also Triepel p. 216.
3) 1874, p. 36.

rules of international law are often only abstractions from private law. Such application of private law rules to the legal intercourse of nations is to be found notably with regard to treaties." And he adds: "arguments from private law are per se permitted, although they ought to be used with caution."[1] Of the same opinion is Bergbohm (he concedes only a conditional identification of international treaties with private law contracts)[2], Meyer

The rejection, however, of private law on the ground of general juridical principles is already at this time beginning to be advocated by such leading writers as Holtzendorf and Bulmerincq. The first rejects not only Roman law "the analogies to which are more misleading than enlightening"[3], but also private law analogies in general: " Methods of private law cannot per se and in all cases be applied to public international law".[4] And he adds, referring to international law: "It can hardly be maintained that international law in deciding disputes between states (which areindependent) can follow the analogy of private relations between individuals (permanently subjected to authoritative legislation)".[5] Bulmerincq is even more emphatic; he urges that the adoption of private law

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1) loc. cit.
2) Staatsvertraege und Gesetze als Quellen des Voelkerrechtes, p. 79.
3) Handbuch des Voelkerrechtes, 1885, I. p. 72.
4) op. cit. p. 126.; 5) loc. cit.

doctrines by international law has impeded the growth of the latter and should never have been undertaken. There is an essential difference between the two branches of law: the difference of the subjects of the respective legal relations.[1] We see here already the beginning of a more systematic treatment of the problem. But there is no attempt yet to explain what appears to be the crux of the problem: how do, after all, conceptions of private law come and remain in international law, and how does it happen that even the most sweeping positivism is unable to eliminate them; for instance, the vast field of treaties?

The "universal institutes of law and the reason of the thing" Jellinek.

There - as in many other directions - the important step has been made by Jellinek. This great lawyer used to make only casual excursions into the domain of international law. But where he did so, he succeeded in effecting far-reaching changes in international law theory.[2] He rejects in principle any analogy whatever. There is no justification - says he - for applying conceptions of a self-contained system of law as a ius cogens in a quite different plane of law.[3] Analogy - he says - can only then be permitted when it is expressly recognised as a source of law by a given system of law. But how

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1) Praxis and Theorie der Kodifikation des Voelkerrechtes, 1874, p.130.
2) His theory of self-limitation was, f.i., one of the most influential doctrines in modern international law.
3) Rechtliche Natur der Staatsvertraege, 1880, p. 51.

to explain the actual similarity of rules, for instance, that between the law of private contracts and of international treaties? The explanation rests in the fact that both private and international law contracts are "universal conceptions of law", conceptions of general jurisprudence to which by the very nature of things similar rules must apply. But these rules are not taken from private law", although private law has raised the universal elements of contract into the scientific consciousness ."[1)]

This view was not an original one. It had ~~only~~ been expressed as far back as 1845 by H.B. Oppenheim in his "System des Voelkerrechtes ". "Private law analogy is to be rejected or when used .... to be applied cum grano salis "[2)] But - he adds - this does not apply to the relation of international law to the philosophy of law. The notion for instance, of property cannot be altered, no matter who is the subject of this right. Also the nature of contract cannot be different in international law, for instance , the rule that only a free declaration of will constitutes a binding obligation; the same relates to the rule "pacta tertiis nec nocent nec prosunt" or "nemo plus iuris in alterum transferre potest quam ipse habet".[3)]

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1) loc. cit. 2) op. cit. p. 8.
3) We shall see that even these obvious rules of "logic and sound reason" are disputed by modern positivists.

But it needed Jellinek's authority to establish firmly this theory of the legal universality of some notions common to both branches of law. Nippold follows closely this line of argument, and, adopting Jellinek's view on the question, he concludes the chapter on the relation between international and private law with the following strong words: It is an obvious task of the theory of international law to discard the looking over to other branches of law, to constitutional or private law, for this is equally as unjustified, as the artificial filling of the unfortunately small building of international law with natural law ideas or political maxims".[1] As a precaution and a remedy against this mischievous borrowing he advises the creation and an adequate development of a general legal science, of a general jurisprudence, including conceptions common to all branches of law. From this source could international law draw the necessary reinforcements without having recourse to private law analogy.

Oppenheim

Nippold

But it was left to Triepel not only to put into discredit the private law analogy, but also to banish it almost completely as a problem of the international law of today. He does not deny that the theory of international law has, in the past, taken over large parts of private and especially of Roman law. In common with other writers he explains it as

1) Der voelkerrechtliche Vetrag, seine Stellung im Rechtssystem und seine Bedeutung fuer das intern. Recht, 1894, p.91.

being due to the domination of the natural law tendency in the formative period of international law and by the fact that the Roman law - the ratio scripta - wass regarded as approaching very closely the law of nature. But he denies that international law of to-day has accepted those principles. This was undoubtedly the case in the international practice of the time in which the patrimonial conception was predominant. But this conception is not only unworthy of our time - as Bluntschli says- but it simply no longer exists.[1] There remain only, he continues, those cases in which states stand in economic relations to each other, for instance, when they lend money to one another, when they take over a collective guarantee for a loan, when they are in actual economic partnership and so on.[2] What rules are here to apply if treaties do not provide for them and if there is no custom forthcoming to fill up the gap? Triepel denies that there is any need to apply any of the existing systems. Neither does the Roman law form an exception to the general rule. Why should it be resorted to when one or both parties have nothing or little in common with that system of law? It is better not to adopt any rule at all, than to proceed according to discretion. The damage is not great. There remains always that eternal source of all law:

1) Das Voelkerrechtliche und Landesrecht (translated into French in 1920); s. esp. the chapter dealing with the reception of private law, 210-225.
2) for instance s. pp. 222,3.

reason and morality, on which we may fall back whenever the necessity arises. The reason of the thing is such that when, for instance, private law rules of contract and international law rules regarding treaties happen to be identical, they are not so as a result of analogy or reception, but in consequence of the very nature of things. The "universal law institute" of Bergbohm, Nippold and Jellinex.... This is also essentially the view adopted in modern text-books. "International law - says Liszt - is an independent branch of law ...; that does not mean that the rich spiritual output of private law can not be used for the purposes of international law. What really takes place here is a developing of general notions and principles common to all law (general jurisprudence) [1] The recent writers of the positive school, still predominant today in Germany, do not fail to support their views on this or the other contested subject by referring to the devastating influence of private law. It is a commonplace to speak with regret of the damage done to international law by obsolete private law analogies. [2]

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1) Voelkerrecht, 1918, p. 38; comp. also Ullman, Voelkerrecht, 1908,p.248. (treaty as an universal institute); also C. Hofer, der Schadenersatz im Landkrieg, 1913, who devotes a whole chapter to the influence of private law; the author, however, marches the well-trodden path adopted by the text-writers, pp.16-23.

2) Strupp, das voelkerrechtliche Delikt, 1920,p.137,n.1.; Niemeyer, Voelkerrecht, 1923,pp. 126; Ruegger op.cit.p.427; Schoenborn, Staatensukzession, 1913 throughout; Keith quoted below: Anzilotti, Responsibilita, quoted below.

The English publicists writing in the nineteenth century confined themselves to one part of the investigation only; that of the value of Roman law as a source of international law. But, within these limits, their answer to the question is - with scanty exceptions - in the affirmative. They adopt the private law of the Romans not only as a source of international law in the historical sense, as an evidence of the part played by Roman law in the building up of the law of nations, but also as a source for filling up its numerous gaps. Unlike the continental writers they never discarded the idea that Roman law is the source most likely to contain the reason of the thing on any question of international law. From Wiseman writing in 1656 on the "Excellencies of Roman law" to Westlake, writers are almost unanimous in their opinion regarding the inherent capacity of Roman law to serve as a source of inter - national law in all cases where there is no customary or conventional rule at hand. It is regarded, indeed, as that general or universal science of law which the continental writers consider to be an urgent task of the jurisprudence of to-day.

Roman law to adopted as a source of international law by English writers.

William Oke Manning, one of the early writers of the nineteenth century, sees in the revival of the study of Roman law a guarantee for the future development and systematic ordering of international law in England.[1] He does not hesitate to explain the fact "of the systematic writers on the law of nations having

Manning

1) Commentaries of the Law of Nations, 1839, preface, p.VI.

all been foreigners" by the absence of a well ordered study of Roman law.[1] Sir Henry Maine is even more emphatic. He writes in 1856 in the Cambridge essays: "Englishmen .. will always be more signally at fault than the rest of the world in attempting to gain a clear view on the law of nations ... There cannot be a doubt that our success in negotiations is sometimes perceptibly affected by our neglect of Roman law." He describes it as an absurdity that England should appear on the stage of international affairs unequipped with the knowledge of Roman law. - Sir Robert Phillimore speaking of the reason of the thing as a source of international law pays a weighty tribute to Roman law:.. "To all nations, whatsoever and wheresoever, this law presents the unbiassed judgment of calmest reason tempered by equity, and rendered perfect, humanly speaking, by the most careful and patient industry that has ever been practically applied to the affairs of civilised man."[2] Roman law is for him the reason of the thing. It is a direct source of international law. He goes so far as to assert the admissibility of recourse to Roman law in the case of the interpretation of

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1) It is interesting to note how closely the idea of an universal jurisprudence is being connected by Manning's editor in 1875 with the affirmative view on Roman law:" It may be expected that one of the indirect consequences of the revived study of Roman law in England and of the growing desire to have the Law of Nations republished in a systematic form, will be the introduction of a common language of universal application in the wording of treaties. " (p. 129.)
2) Commentaries upon International Law, 1879, I.p. 34.

treaties between European and Asiatic nations.[1] Westlake enumerates as sources of international law: custom, reason and Roman law. He says: " the rules which flowed into international law from this source are now incorporated with the customary law of nations, and such is the respect still generally entertained for Roman law which has been called written reason that this part of the customary law is never contradicted even by the seekers after international right."[2] These publicists may fairly be regarded as representative of the general attitude of English writers on this question. The inquiry, interesting from many points of view, how and why writers of a nation having so little in common with Roman law remained staunch advocates of its applicability to international law can not be enlarged upon in this connection.

The American writers do not seem to have devoted much attention to theoretical discussion of this subject, but they share, on the whole, the view of English publicists. This certainly applies, for instance, to Taylor who thinks it is impossible to comprehend what is now known as international law without some understanding of Roman jurisprudence" for the simple reason that it is the philosophical basis of the entire system ",[3] and to Halleck who, like Manning, connects the problem of Roman law with the demand for a universal

Similar attitude of American writers.

1) p. 36.op.cit. 2) Intern. Law.I.p.15.
3) A Treatise on Intern. Public Law, 1901.p.20,21.

jurisprudence. He says: "It will generally be found that the deficiencies of precedent, usage, and express international authority may be supplied from the rich treasury of the Roman civil law. Indeed, the greater number of controversies between states would find a just solution in this comprehensive system of practical equity which furnishes principles of universal jurisprudence applicable alike to individuals and states.[1)2)]

We are, so far, confronted by two opposing views: (a) by the positivist theory rejecting in the name of independence of international law every use of private law analogy and, generally, of Roman and private law, (b) by the Anglo-American view which, taking into account the incompleteness of positive international law, regards Roman law as a kind of general jurisprudence to which recourse may be had for filling up gaps, as well as for the purposes of construction. Neither of these views may ultimately prove acceptable, but it must be admitted that both groups try to answer the question as a whole. This cannot be said of the French school. Bonfils[3)], Despagnet[4)] The French and Italian school.

1) Halleck, Intern. Law, 1908, p.60.
2) Recent writers are, however, more critical; s.f.i. Hershey; Essentials of Inter. Law,p.24.n.14.; or Fenwick,Int.Law, 1924, p, 245.n.1.
3) Traite, 1922,pp.65.; he discusses the relations to polit. economy, to commercial law, to geography, mathematics and physics...
4) Cours, 1910,pp.55.; in the monographic literature the intransigent attitude of the positivist school finds, however, able expression: s.f.i. Gidel, cited below; Merignhac, Traite, 1905, pp.79.

and others deal at length with the sources of international law and with its relations to international private law, to constitutional law, to morality, to international courtesy, to politics and diplomacy, but no mention is made of private law proper. The same may be said of the Italian writers, although notable Italian publicists like Anzilotti and Cavaglieri, strongly deprecate any use of private law analogy, the first in his theory of responsibility of states, the second on his monograph on state succession.[1] This is only natural when we take into consideration the great influence exercised by German positivists on the Italian school of international law.

That, on the other side, the influence of the English conception is not confined to English speaking countries may be seen in the work of Rivier, the only French writing publicist who deals with the matter in a comprehensive manner.[2] He seems to accept the application not only of Roman but, generally, of private law rules - although he advises caution in the procedure: "Il faut proceder avec prudence et mutandis mutatis, en tenant compte toujours du motif de la règle et des conditions qu'elle suppose. ainsi que des obstacle que peuvent mettre a son applications d'autres principes admis en droits des gens." In dealing with themeaning of the phrase "general principles of jurisprudence" used in arbitration

1) Anzilotti, cited below; so also Cavaglieri (Ch.IV.)
2) Principes de droit des gens, 1896,p.34,vol.I.;p.123,vol.II.

treaties he is clearly of the opinion that in the absence of the declared will of the parties, the rules of Roman law, being common to various peoples of the international community must necessarily be applied.[1]

2.

Under what conditions can the rejection of private law be justified

The demand, so successfully put forward by the positive school, for the "splendid isolation" and the independence of international law from private law can be regarded as well-founded only under the following conditions: (a) It must be shown that the writers advocating such independence are able to maintain it in their own systems of international law without introducing the rejected private law in a disguised form or under a different name; (b) that this refutation corresponds with the legal conviction of states as manifested in treaties and in the practice of states; (c) that the judicial settlement of international disputes takes place and is possible without any resort to private law rules and analogies. For, should an ad hoc examination of the writings of publicists show that this iconoclasm is only a matter of form and not of substance, and that it is opposed to the practice of states and international tribunals, then, obviously, the theory is as inconsistent with the very principle of the positivist teaching as it is misleading. This chapter is devoted to the examination of the first

1) II.175.; comp. on the other hand, Nys, I.p.206.; Calvo, Droit Int., 1896, vol. 1.p.165.

of the three questions; it will also indicate the manner in which the following chapters will deal with the two other aspects of the problem.

No attempt can be made here to give a dogmatic - historical account of the use of private and Roman law in the formative period of international law. This task, although it cannot be persued here, is certainly an urgent one. The usual sweeping statement to the effect that the early writers profusely and indiscriminately made use of private law does not convey any notion as to how far in individual cases this analogy influenced not only the writings of publicists but also the practice of states. What is intended here is a critical examination of the attitude of some representative writers who advocate or are supposed to advocate the elimination of private law.

We have already pointed out how Gentilis the first writer of recognised influence and the forerunner of Grotius is by no means in the position to maintain the position of one "who broke away from his predecessors ... in giving up largely the attempt to cast the law of nations in the mould of Roman civil law "[1]

It is, however, Grotius himself who is most frequently quoted as having first drawn attention to the dangers of private law analogy. We have seen that a long and convincing series of proofs in the form of extracts from his writings can be produced in support of this contention "[2] But there is, on

Grotius' attitude examined

1) F.F. Abbot, Introd. to the translation of the Hispanicae Advocationis libri due, Scott's ed.p.19a.
2) p. 8.

the other hand, no doubt that his work "bristles with analogies",[1] and Gessner's statement to the effect that Grotius' chapter on treaties reads like a Roman private law treatise mixed with natural law ideas[2] is being approvingly cited by many authors. But this contradictory attitude is amazing only when we lose sight of the fact that his warnings are directed not so much against private law ~~but~~ as against civil law, the two terms being by no means identical. Neither does he mean by it Roman law as it is commonly understood in English speaking countries. What he means by it, is municipal law in contra-distinction to the laws prevailing between nations. We see that at the very beginning of the work when he speaks of the "civil law both that of Rome and that of each nation in particular"; or when he speaks of ambassadors who are "not bound by the civil law of the people among whom they live "[3]; and of the "representatives of provinces, towns, and others who are not governed by the law of nations but by civil law"[4]; or when he mentions civil law pardoning certain crimes committed under necessity.[5] It is obvious therefore

His civil law not to be confused with either Roman or private law.

1) Dickinson, the Equality of States in Intern. Law, 1920, p.50.
2) Holtzendorf, III.p.11.; Walker, A history of the Law of Nations, p. 168,334.
3) L.II. s. XVIII.c.4.
4) L.II.c.VIII.s.4.
5) L.II.c.XXIV.s.III.

that those numerous statements by Grotius - and they appear almost in every chapter, if not in every section - in which he repudiates the use of civil law cannot have the meaning attributed to them now, that of rejection of private law as such. He used civil law in thesense of municipal law, of rules aiming at the "tranquility of one community". And for this civil law he could have no use in his law of nations by which he understood rules applied to the intercourse b e t w e e n states and peoples.

But the most important consideration is this: Although he did not identify the law of nature with the law of nations, he most certainly regarded the first as the obvious source from which we may fill the gaps of the "instituted " law of nations. And the gaps were certainly bigger than the actual rules. In this light the blunder of the earlier writers in imputing to Grotius the said identifications, after all, not so misleading. And what were the sources of this natural law? They, in turn, were in most cases identical with those rules of private and especially of Roman law which appeared to him of a sufficiently general character, and at the same time as suitable for the purposes of international law. He did not accept private law as having per se an obligatory force in international law but he certainly was taking over - under a different name - its rules and teachings whenever he doemed it to be an evidence of the law of nature applicable to the given case. What the right hand of the builder of a more positive system formally rejected, the left hand of the great expounder of natural law,

His unreserved acceptance of private and Roman law as an evidence of the law of nature.

of justice and convenience was adopting with pretty far-reaching thoroughness.

We have noticed how closely Bynkershoek followed Grotius in the rejection of Roman law. But the same Bynkershoek is, on the other hand, justly recognised as one whose recourse to Roman law was very infrequent. He does not fail to supply an explanation of this apparent inconsistency: "Non quod in iis quae sola ratio commendat a iure Romano ad ius gentium non tuta sit collectio"[1] Natural law or the reason of the thing becomes thus the form in which reception of private law takes place. "Quamvis non de populi Romani sed de gentium iuris prudentia agamus, non abs re tamen erit de iure Romano quaedam praemonuiisse, cum qui id audit vocem fere omnium gentium videatur audire"[2]

The "general jurisprudence" of the positivist school.

In a much more difficult position did those positivist writers find themselves who rejected not only private law but also natural law. Consistency would have led them to very considerable cuts in their systems of international law. But naturally enough, they could not afford such a consistency. They put in the place of the emphatically rejected natural law "the reason of the thing," "the demands of logic" and "the principles of general jurisprudence." It is not without good reason that those writers who are anxious to eliminate the application of private law regard it as essential for the development of international law that a science should be created which should

1) Quaest. iur. publ. L.I.c. III.
2) De foro legatorum, c. VI.; Phillimore 1. 31.

embrace the general concepts of law common to all systems, international and municipal, private and public: this science to be called general jurisprudence. We have seen that it is from this source that they explain the identity of the rules governing international treaties and private law contracts.[1] So far so good. There remained, however, the danger that this general jurisprudence might become a purely abstract philosophy of law - the very natural law from which they wish to purify the science of international law. General jurisprudence must therefore, runs the argument, be an empirical one, drawn by means of a generalising induction from the existing systems of law. But here the real - and insoluble - difficulty begins: a system of general jurisprudence meant as a generalisation from existing systems of law, national and international, has only a meaning, if there are in existence developed systems of law - private and international - which can can form the constituent elements of the higher synthesis. But is is obvious that in cases in which international publicists resort to the so-called general jurisprudence, international law does not contribute anything towards this synthesis ; it simply draws from this source when it finds - and it finds it very often - that its own rules, which it was called upon to develop in a comparatively short time and in conditions where the border line between law and mere force is often not distinct enough, afford no answer. When, for instance, Liszt says that the sedes

1) p. 13, 14.

materiae of condition (treaties under a condition) is general jurisprudence, he needs must mean general jurisprudence of private law. When in international disputes rules of general jurisprudence are referred to - what is meant is that not a rule of one particular system of private law is to be applied, but such a rule - necessarily a private law rule - as has gained recognition by the ~~number~~ greatest number of civilised nations. This is so simply because international law has not, in the particular case, developed any rules of its own. This is pretty obvious. For there would be no need to have recourse to general jurisprudence, if there were an international law rule ready at hand. The natural law performed, in the older days, the function of a bridge between international and private law. The law of nature was the cover under which international law drew from the rich source of private, notably Roman, law. In the days of the predominance of the positivist tendencies it is "general jurisprudence" which is fulfilling this function.

Now, general jurisprudence is a very useful and necessary notion for the purposes of international law as science and for the purpose of judicious settlement of international disputes so long as it remains clear that what we understand by this conception are rules which international law as such does not yet contain, but which have actually evolved in the various systems of municipal law. Naturally enough it is rules of private law of which we think in these cases; we do not think in this connection of general principles of criminal or administrative

"general jurisprudence" meaning - less and confusing unless adopted as genera jurisprudence of private law.

law. Any other meaning of the term is liable to cause confusion and to be grossly abused. Is the notion of succession a general conception of all jurisprudence? What may safely be said is that it is a general notion of municipal, notably of private law. Its application to international law is denied by a great number of positive writers of to-day even by those who regard it as a universal concept.[1] The principle res transit cum onere suo is regarded by the great majority of writers as an obviously general principle,[2] but this is doubted by some positivist publicists; and the radical opposer of private law H. B. Oppenheim would be surprised to hear that the application of the principle nemo plus iuris in alterum transferre potest quam ipse habet, which even he regarded as a clear example of necessary juridical logic, is of doubtful application in international law. It has been put forward by a venerable generation of jurists that treaties being contracts - a universal legal conception derive their rules not from private law, but from general jurisprudence; it is now seriously alleged by a leading authority that there is substantially nothing in common between the two conceptions[3] It would seem that freedom of consent is a condition of validity of contracts in international and private law which must be recognised by every legal order but this is almost unanimously rejected by international law writers. And although

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1) Schoenborn, op.cit.pp.3. 2) Oppenheim 1.p.
3) Niemeyer p.

the prevalent opinion concedes the vitiating influence of mistake and fraud - precepts of general jurisprudence - there are writers who deny that the respective private law rules are applicable to international treaties.[1] The recognition by a Hague tribunal of interest as a general mode of fulfillment of obligations to which in appropriate cases the responsibility of states is reduced, has been severely criticised by positive writers - although other positive writers allege that modes of payment and fulfilling of obligations are general - and not private law - forms. Prescription regarded by the majority as a general legal precept common to every community is denounced by others as a purely private law notion. It seems that the rule of the onus of proof resting upon the claimant party should belong to general jurisprudence , but this rule - according to a widespread opinion - is in international law subject to the principle that the burden of proof rests upon him who alleges some measure of restriction of the sovereignty of another state. Recently again the notions of "necessity" and "self-help" are described as conceptions of general jurisprudence, or order to avoid the unpopular analogy to private law. - These instances show that "general jurisprudence" either amounts to a general jurisprudence of municipal and specially of private law, or where it assumes a different meaning in the intention of those using it, results in a discretionary attempt at a modern natural law with all the vagueness of the old but without its appeal to our sense of right.

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1) S. chapt. III, p.

It is, however, the practice of states as expressed in conventional and customary international law that is best suited to give an answer to the problem in question. To the examination of this conventional and customary international law will be devoted chapters III, IV, and V. of this monograph. The attempt will be made to show: (a) how, historically, the development of international law has been facilitated, may, made possible by its close connection with private law; (b) to what extent international law of to-day draws its strength from this source. In particular, the theory will be examined which explains the great influence of private law by the patrimonial character of states in the formative period of international law. The question will be examined whether the causes are not deeper and whether they do not obtain to-day with an undiminished force.

Conventional and customary international law to be examined.

The classification of cases in which analogy occurs is a difficult task, as there is almost no part of the international law of peace which is not affected by them. The most suitable arrangement seems to be the following:

(a) We shall discuss firstly those cases of private law analogy which arise in connection with int rnational treaties, especially those instances in which a term of private law is used in a treaty and the answer has to be given as to whether the rules applicable to this term in its proper sphere are also applicable in international law. The instances will cover such

concepts as leases, mandates, due diligence.

(b) The second class embraces cases of private law analogy outside treaties: The influence of private law on the theory and practice of acquisition of territorial sovereignty, on the development of the conception of the freedom of the sea, of the maritime belt, of the sovereignty of the air, of prescription, of succession, of private law rules applying to interest and to the measure of damages, to quasi-contracts.

(c) Thirdly, instances will be discussed in which there are applied private law rules of procedure, as estoppel, res iudicata, rules of evidence and arbitration.[1]

The treatment of the subject is often being obscured by reducing it to an instance of mere historical interest. The writers agree that private law notions and rules have been applied by states in their dealings with each other, but they affirm at the same time that these cases belong to a period, the political conceptions of which have now become totally obsolete. There is certainly a great deal of truth in this statement. Cessions of territory in the way of gift, deposit, sale, exchange, pledge, marriage contracts and testamentary dispositions as practiced in the seventeenth and eighteenth centuries are no doubt largely the outcome of discarded conceptions. Take, for instance, the treaty of partition of 1700 which distributed among various states of Europe the dominions of the Spanish crown upon the demise of its monarch.[2]

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1) see c. 5. 2) see Phillimore 1. 269-276. Triepel p. 221 Guenther, Europ. Vr. vol II p. 93. 153

Such and similar treaties can certainly be explained by the patrimonial theory of this time. But it cannot, on the other hand, be denied that the sovereign states of the nineteenth century have by no means discarded some of these ways of dealing with each other. Sales of territory are as frequent at the close of the last century and later as they were a hundred or two hundred years ago.[1] In addition, a new private law form of acquiring rights over territory has been introduced in the course of the last thirty years into international law: the lease of territory. The importance of this is not impaired, it will be attempted to show, by being regarded by an overwhelming majority of writers as examples of simple or disguised cession. On the contrary, we shall have to examine whether this simplyfying theory is justified as a legal or even as a political construction.- The practice of states adopts conceptions the justification of which is otherwise strongly contested by a number of writers. The boundary dispute between Great Britain and Venezuela (1897) leads for instance to the adoption of the principle of prescription as a guiding rule for the tribunal. And as recently as peace treaties the practice of states again makes use of a typical private law term in order to effect what some writers again call a disguised cession: the conception of mandate. These and similar instances

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1) See for instance the sale of "dominion" and "sovereignty" over the West Indies by Denmark to the U.S. (ch.4. p.)

are frequently obscured by the fact that writers - or politicians- regard them as deprived of any legal meaning, and destined primarily to smooth the way of diplomatic negotiations. It is, however, the task of a strictly legal method to elucidate the juridical - not only the political - nature of these and similar conceptions and to establish how far private law did supply in a given case the elements of development of international law and the new forms of legal relations necessitated by the complicated requirements of international life.

7. But the most instructive instances of the growing importance of the problem and of the need for its systematic treatment are offered by the cases of international arbitration. In the same measure as the municipal courts of law pass judgment not only upon the claims of the parties but also - incidentally - upon the soundness of this life, so there is no better opportunity for testing the practicability and justification of certain international law doctrines and conceptions than those cases of international arbitration which come into contact with those conceptions and doctrines. Now, it is safe to say that there are very few cases in the judicial settlement of international disputes in which the tribunal is not called upon to deal in this or other form with this question.

International arbitration instances.

The long array of cases illustrative of the problem in question starts with the British - American arbitration commissions constituted under the Treaty of 1794. The chief issues in the deliberations of the commissions - the measure of

damages and the right of the tribunal to pass over its own jurisdiction - receive here a solution for which it took a century to become recognised as an established rule of international law. The most important cases of minor arbitrations in the nineteenth century were dependent for their solution upon application of private law analogies. Croft, Yuile and Shortridge, Colonel Lloyd Aspinwell, Fabiani, Canada and Willuim may be mentioned as arbitrations in which the questions of interest, damages, prescription, admission and estoppel played an important part. 1) It is, however, in the big and well-known arbitration cases that evidence in support of the general proposition put forward on those pages will be sought. The Geneva tribunal in the so-called Alabama arbitration of 1871 had to deal not only with the meaning and scope of "due diligence" as applied to states, and with the relative importance of the different forms of culpa: the question of the measure of damages, of the admissibility of interest and of the burden of proof in international law proved of no less importance for the decision on the main issues of the dispute. In the Behring Sea arbitration of 1892 between the United States and Great Britain, the question of the application in international law of conceptions of possession and property, as applied to the possible object of an international right, was widely discussed and answered in the judgment; the theoretical problem of the development of international law

1) s. chapter VIII.

in its relation to private and natural law occupied Counsel for both parties to a considerable extent, as did the question of damages, of prescription, of the burden of proof and, partly, of estoppel. In 1899, in the British Guiana Boundary arbitration between Great Britain and Venezuela the doctrines of prescription, of estoppel and especially of the Roman law rules of occupation played a great part in this lengthy case. In the Pious Fund Case of 1902 between the United States and Mexico the questions of prescription , of estoppel, and of the extent of the application of the maxim of res iudicata in international law were the main points which the court had to decide. In a series of decisions of the commissions adjudicating, in 1903, claims of an nations against Venezuela the problem of interpretation of treaties, which, indeed, occurs in almost every arbitration, and the application of the private law rules of interpretation, as well as the question of prescription, of interest and of damages are discussed in the individual cases decided by the respective commissions. In the Venezuelan Preferential Claim Case of 1904 the application of private law rules of bankruptcy, of hypothecation, of negotiorum gestio, of estoppel and - in a smaller degree - of causa and consideration, of the onus of proof and the meaning of "equity" seemed to be of paramount value in the arguments of the ten states taking part in the proceedings. The general problem of the applicability of Roman law in international law was discussed at length in the cases and arguments of several states. In the arbitration between Japan on one side, and Great Britain

France and Germany on the other side, in 1905, the tribunal was again called to decide on a question belonging primarily to the domain of private law - the question of leases. In the Alaska Boundary dispute of 1903 between the United States and Great Britain the problems of prescription, of private law rules of evidence, of interpretation (merger) and of the authority of Roman law were argued at great length. In the Orinoco Steamship Company arbitration of 1910 between the United States and Venezuela private law rules regarding the nullity of judgment and essential error were the real point at issue. The Grisbadarna case between Norway and Sweden decided in 1909 afforded again an opportunity of discussing and applying the problem of prescriptionand of Roman law rules of possession. The important case of the North Atlantic Fisheries arbitration between Great Britain and the United States (international servitudes) showed again - both in the arguments of the parties and in the judgment of the Hague Court - that the question of private law analogies in international law must be dealt with in a systematic manner. The Russian Indemnity Case between Russia and Turkey decided in 1912 by the Hague Court is a classical instance of a deliberate application - not only in the arguments of the parties, but also by the tribunal - of private law rules, especially those governing moratory interest; the case itself was decided by application of a private law rule amounting virtually to estoppel. Even the Casablanca arbitration of 1903 between France and Germany - apparently lying totally outside the domain of public

law - gave rise to a discussion on private law analogy with regard to the meaning of self-help in private and in public international law. In the Island of Timor case of 1914 between the Netherlands and Portugal the principles of interpretation as applied both in private and international law were discussed and the respective rules included in the judgment. In the first judgment of the Permanent Court of International Justice, in the case of Wimbledon, of 1923, the question of servitudes once more occupied the tribunal in the determination of the character of the German obligation to grant free passage to vessels through the Kiel Canal. Of special interest is a number of instructive cases decided by the American and British Claims Arbitration Tribunal constituted under the convention of 1910. They will be analysed in a separate chapter. Some of them may be mentioned here: The Lindisfarne (damages, interest, admission, William Hardman (estoppel, equity, sources of international law and use of private law), Eastry (estoppel) , The King Robert (estoppel , interest, assignment in international law), Yukon Lumber (estoppel), Union Bridge Company (damages, lost profits, applicability of common law rules of trover and trespass), The Frederick Gerring (possession, property), The Favourite, The Wanderer, The Kate (estoppel, damages for prospective profits), The Tatler, The Sidra, Lord Nelson , Newschwang (damages, prospective profits). - The Mixed Claims Commission between the United States and Germany constituted under the agreement of 1922

furnishes some interesting instances in this connection, as does also a number of cases decided by the Supreme Court of the United States.

These instances to be analysed in the subsequent chapters show sufficiently that the problem is not of a purely theoretical character. But they show also- we may say partly in anticipation of the results of the analysis - how unjustified and superficial is the attitude of cautious warning or of wholesale rejection of private law as a source of decision or an element of development in the law of nations.

part of the law of land, and those Acts of Parliament which have from time to time been, made to enforce this universal law...are not to be considered as introductive of any new rule, but merely as declaratory of the fundamental constitution of the kingdom; without which it must cease to be a part of the civilised world".[1] It has been fully accepted by Lord Mansfield, wuoting an identical decision of Lord Talbot;[2] it has been accepted by almost all English and American writers who deal with this problem (Phillimore, Kent, Holland, Wharton, Wheaton). and by innumerable decisions of Courts.[3] Should the notion of the exclusively declaratory value of respective rules of municipal law be taken in the meaning which it obviously purports to convey then it is the best expression ever uttered of the supremacy of international law and its ultimate unity with municipal law.

It is now, however, accepted - expressly on the continent, and tacitly in England - that the rule applies no more. It was Triepel who, in order to illustrate the complete independence of both systems of law from each other, attempted to prove with great learning and thoroughness that the rule has been thrown overboard at least so far as Great Britain is concerned.[4] He availed himself especially of the well-known case of "Frankonia" in order to illustrate his contention. What is, perhaps true in this argument , is that that part of conventional international

1) Commentaries on the law of England, 15th ed. 1809.p.60.
2) Tricket et al.b. Bath, Scott's cases of International law, 1922 p.3.
3) For some instances see Triepel p. 138. 4) op.cit.p.134.-155.

which alters the rights of British subjects will not be enforced by British Courts before its adoption by Parliament. But to customary international law the old rule applies with undiminished force - provided always that the respective generally recognised rule has also been recognised by Great Britain.

It is interesting to note how this subjection of the state to a higher legal and moral purpose - and not its identification with these values - finds expression in the most representative expounder of the Hegelian - idealistic philosophy of state, T.H. Green. He says in his "Lectures on the principles of political obligation": The wrong resulting to human society from conflicts between states cannot be held to be lost in a higher right which attaches to the maintenance of the state as the institution through which alone the freedom of man is realised. It is not the state, as such, but this or that particular state which by no means fulfils its purpose, and which might perhaps be swept away and superceded by another with advantage to the ends for which the true state exists, that needs to defend its interest by actions injurious to those outside it.[1] We note the important advance made upon Hegel's central idea. The state has, it is true, the highest legal and moral values as its ultimate objects, but it is not identical with them. "Hence there is no ground for holding that a state is justified in doing whatever its interests seem to require, irrespectively of

Its place in political theory.

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1) p. 173

C H A P T E R II

INTERNATIONAL LAW and PRIVATE LAW

"The moral sense of humanity, which frequently underlay the much misunderstood "natural law", is asserting itself, and "reason" to use Westlake's term, is showing itself increasingly as a source of International law, both as a test of principle for the rules established by custom, as well as for the adoption of new rules demanded by the exigencies of international life."

Higgins, preface to the 8th edition of Hall, 1924, p. VIII.

"The duties and rights of states are only the duties and rights of the men who compose them"

Westlake,
Collected Papers, p. 78.

The doctrine of sovereignty appears in international law under two aspects; (a) as the theory of positive international law, in the meaning that it is custom and treaty as expressing the will of states which are its exclusive sources; (b) as the conception of state as being of an absolute legal and moral value, summum genus in politicis, for which international law exists lawfully only so far as it is subservient to its self-preservation and development. The first is a formal statement to the effect that the will of the state is in law the highest category, the prima causa; the second defines in terms of values the ultimate character of this formally highest entity as standing on a higher legal and moral plane than ordinary human interests.

the two aspects of the doctrine of sovereignty.

The theory of international law on this question stands to-day on the whole at a point at which it has been left by

Hegel with his conception of the state as an absolute end and of international law as an external municipal law.[1] The state is to him the realization of the moral idea.[2] The objective spirit through which alone "the individual has his objectivity, his truth and his morality."[3] "The state is the march of God in the world. Its foundation is the power of reason, realised as will. To form an idea of the state we must not have in mind particular states or institutions but consider thoroughly the Idea, the real God.[4] But this real God stops short of the frontiers of the state; there is no general rule of the international community. "With regard to the relation of states among themselves, their sovereignty is the basic principle; they are in that respect in the state of nature in relation to one another, and their rights are not realised in a general rule so constituted as to have power over them, but their rights are realised only through their particular wills".[5]

The absolute value of the state. The state subject to law only so far as it is identical with its purpose. Hegel.

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1) It is inaccurate to bring Bodin's theory of sovereignty into connection with the modern Hegelian concept. Bodin's theory does not, in its essential part, clash with a working international law - which cannot be said of that of Hegel. Comp. Verdross op.cit.pp. 13.
2) Philosophy of mind (Wallace's translation) p. 263.
3) ibidp. 314.
4) p. 320
5) p. 427; s. Duguit, The Law and the State, in Harvard Law review, vol 21, where Hegel's theory is discussed in detail.

The people as state is the spirit in its substantial reason and its direct reality, it is therefore the absolute power on earth.[1] There is therefore no other law for the state as the purpose of its own self as a whole, and the treaties concluded by it can be valid only so long as they correspond with this law.[2] Here is the origin of this famous saying of Hegel that the relation between states is a relation of "independencies" which stipulate between themselves but stand at the same time above these stipulations.[3] - It will be observed how those two tendencies:- the formally highest status underived from any other authority and the super-value and heterogenity of the state as compared with ordinary human interest - support and supplement each other.

It is this latter aspect which is stressed in a picturesque manner by Lasson who influenced the German political theory for over fifty years.[4] "The moral person which we call state is at the same time a sovereign person. It is an aim for itself... It is simply unbound and unlimited with regard to everything outside itself... The state can not, therefore, be ever subjected to a legal order or, speaking generally, to another will but its own... It is an unbound and unbridled will of selfishness".[5] The problem of order between states is for him not a question of law, but of mechanics. "Two states stand to each other like two physical forces." Lasson.

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1) Grundlinien der Philosophie des Rechtes, 1891, par. 258.
2) Op. cit. par. 331; par. 336.
3) Edit.p.191., to par. 330

4) Das Prinzip und Zukunft des Voelkerrechtes,1871. 5) Op. cit.p.15.

There is no doubt that it was especially in Germany that these theories gained almost universal recognition, but it would be a mistake to assume that it had no influence outside Germany. The influence of Hegelian philosophy upon English political thought can not , I think, be disputed. This is nowhere clearer than in the most typical representative of the English idealistic philosophy, Bosanquet, especially in his "Philosophical theory of the state".[1] His theory is, of course, based on the "will", the general will, the objective spirit which is something quite different from the volition of its agents or its subjects. It is, legally and morally a supreme body not only in relation to its citizens, but also in relation to everything outside itself; its acts are public acts and cannot be judged by values of private "organised morality". "It has no determined function in a larger community, but it is itself the Supreme community; the guardian of a whole moral world, but not a factor within an organised world. Moral relations presuppose an organised life; but such a life is only within the state, not in relations between states and other communities."[2] The same applies to the sphere of law, or, rather, there can be no violation of law by the state. Because "an act which violates its own law is not an act of state. And the state is not subject to the law of any other state."[3]

Bosanquet

The moral sovereignty of the state.

1) 1923. 2) op.cit.p.302. 3) p.303,n.2.

That there could be such a thing as international law - a law binding upon the state and independent of its will -is not even mentioned. How could it be if its public acts are acts "of a supreme power which has ultimate responsibility for protecting the form of life of which it is the guardian, and which is not itself protected by any scheme of functions or relations, such as prescribes a course for the reconciliation of rights and secures its effectiveness"? [1]

No writer, however, expressed this view with more frankness than Erich Kaufmann in his monograph on the clausula rebus sic stantibus. [2] Erich Kaufmann It is only the sincerity and consistency with which he draws the logical consequences from the Hegelian dogma that might, perhaps, appear appalling to some; the substance of his argument, the adoption of the clausula not only as a result of supervening impossibility of fulfillment or of the fulfillment of an express or implied resolving condition, is common to almost all writers on international law. Kaufmann does not see any possibility of a law between co-ordinated entities - he means states - unless the principle be adopted that only he who has the power, has the right. [3] The state must stand above its treaties; the law of co-ordination which is the basis of international law turns otherwise into that of sub-ordination. [4]

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1) p.304.
2) Das Wesen des Voelkerrechtes und die clausula rebus sic stantibus, 1911.
3) op.cit.p.151.
4) p.153.

International treaties, which are based on the interests of the contracting parties, must also be determined by these interests.[1] The only objective rule is the right of self-preservation which is the criterion of the international conduct of states; the right of self-preservation can never come into conflict with international law simply because international law is based on it. Hence the absolute validity of the clausula: Treaties should be binding and are binding only so long as the conditions of power and of interests have not changed in such a manner that the essential provisions of the treaty are no more in accord with the right of self-preservation of the contracting parties.[2]

The right of self-preservation as the primary source of international law.

It is also according to Jellinek, the greatest German jurisconsult in the domain of public law, the will of the state, that through the process of self-limitation creates international law. It is not possible, nor is it necessary, to discuss here in detail his theories. They are Hegelian in essence and based upon the will of the state. They have influenced in a powerful manner not only German jurists, but international publicists of Italy, France and Great Britain. We may best characterise them in Jellinek's own words defining the notorious clausula: "Whenever, upon investigation, international law is found to be in conflict with the existence of the state, the rule of law retires to the background, because the state

Jellinek

1) p. 181-2. 2) p. 204.

is put higher than any particular rule of law...International law exists for states and not states for international law" [1]

This is the theoretical basis of modern international law. It is not surprising that its expounders did not view with sympathy any larger reception of private law: it suggests subordination to an objective rule and not a loose co-ordination of wills; it suggests interests valued by law and measured by it, but certainly not constituting the formal source and the ultimate legal foundation of its validity; it suggests largely economic interests for the satisfaction of largely economic wants, and not interests of a public, higher, absolute value; it suggests, lastly, an imposing and manifold body of legal rules, legal thought and legal experience always ready to supplement a still undeveloped and rudimentary system - and not a self-sufficing organism of law, jealously guarding its own "positivity" and restricting the source of its validity to certain historical events evidenced by the will of states:- to custom and treaty.

Why this modern conceptio of international law canno favour an larger adoption of privat law.

X. "Source of law - says Oppenheim [2] - is the name for a historical fact out of which rules of conduct arise into existence and legal force." This may be readily admitted. But there is nothing to indicate why these historical facts should be limited only to such expressions of the legal conviction

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1) System, p. 340 - Duguit op. cit.pp. 126.
2) vol. 1. p. 20. ; He follows here closely Bergbohn, Jurisprudenz und Rechtsphilosophie, 1892.

of states as custom and treaty. Natural law, principles of justice, general principals of law are also historical facts with a force no less, sometimes, than other objective events. We shall see, in the course of the analysis of modern arbitration cases, how constantly the "principles of justice" and "the general principles of law," which are in reality generally recognised principles of private law, are applied both by states and by international tribunals.[2] The practice of applying these rules is so uniform and constant t h a t i t c a n b e s a i d t h a t t h e r e i s a c u s t o m a r y r u l e o f i n t e r n a t i o n a l l a w t o t h e e f f e c t t h a t r u l e s o f l a w q u i t e i n d e p e n d e n t o f c u s t o m a n d t r e a t y a r e t o b e r e g a r d e d a s b i n d i n g i n i n d i v i d u a l c a s e s. This sounds paradoxical, but it is the only way in which the practice and the legal conviction of states can be put within the accepted formula. Only with the proviso that it is a customary rule of international law that objective international law may supplement the will of states, and that this

The positivist theory and[1] the practice of states.

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1) s. Kelsen, cited below, p. 92.
2) For ample references with regard to the practice of states see Castberg, La competence des tribunaux internationaux, R.D.T.L.C., 1925. pp. 168 - 172; Verdross, quoted below, pp 120-125; Salvioli, La corte permanente di giustizia internazionale, Rivista di dir . int., 1924, pp. 276 et seg.; Koster, Les fondements du droit des gens, Biblioth. V Visser. 1925, vol IV,pp.158-181, esp. 180-181.

objective international law contains binding rules never espressly accepted by them, only then, it is submitted, may the traditional formula be accepted. Otherwise it is impossible to grasp not only, as stated above, the practice of states, but also the main doctrines of the positive school of to-day.

This may be seen, for instance in the manner in which modern international law deals with the case of state entering into the family of nations. Is it asked to consent to the existing rules? May it repudiate all or a part of them? Oppenheim's answer - and that of the dominant doctrine - is quite clear: "It is not necessary to prove for every single rule of international law that every single member of the family of nations concented to it. No single state can say on its admittance into the family of nations that it desires to be subjected to such and such rules of international law and not to the others". [1] "On the other hand - he continues - no state which is a member of the family of nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the law of nations." There is certainly no one who would disagree with this statement. But it is obvious, I submit,

Oppenheim the digestive binding force of international law.

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1) vol. 1. p. 17; s. also his article in Niemeyer's Zt. vol. 25.p.8, where he says: a rule is also then a rule of general international customary law, if all states which have come into the position of applying this rule have recognised it by custom, and when the number and the importance of these states is so great that one may assume that cogent interests of the international community are in the background of this rule . - Quite the same is the opinion of Westlake; "The consent of the international society to the rules prevailing

that the mere consent of states is here no longer regarded as the necessary condition of the continued validity of an international rule.- The consent of a new state is not asked at all. It cannot repudiate even one rule. This is met by the fiction that its consent is implicitly given by the fact of the application for recognition. But this is no more than a fiction resorted to in order to conceal the objective binding force of international law independently of the will of the particular state.

The same principle is thus expressed by Bluntschli: "It does not depend upon the discretionary will of the state whether it should respect or reject international law... If international law were only the product of the free will of the individual states, then all international law would really be a law of contract, which means that no state would be under the obligation to another state to respect international law where its rules are not sanctioned by a treaty. It is not quite clear why treaties should bind states even after they have changed their will, why not every change of the will is not a change of the law "; or by [illegible]d

Bluntschli.

1)

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in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a state, it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted upon it, though it is a strong argument if you can do so. It is not enough to show that the general consensus of opinion within the limits of European civilisation is in favour of the rule"(Collected Papers, p.78); or".. even protest and resistance may be too feeble to prevent general consent from being concluded from a widely extended practice (ibid. p.83)".

1) p.60.

Heffter: "There is namely a law of nations emanating from the inward necessity and not requiring therefore an express recognition "; [1] or by Hall: "The ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature." [2]

Heffter

Hall

The impossibility of maintaining strictly the positivist standpoint of modern publicists is clearly shown by Liszt, the author of the widely read text-book. He is a convinced positivist, and his positivism find expression in the generally accepted statement: "International law is contract, not law." And yet, when he comes to speak of those fundamental rights mentioned by Hall, he is compelled to have recourse to "the conception of different states standing beside each other with limited scopes of authority", to "the very concept of the family of nations", to the "logical principle of the excluded third", in order to deduce from them a series of rules determining the rights and duties of states. [3] But nevertheless he repudiates expressly the idea that the fundamental rights are natural law fallacies, only - he says - without them international law would not be possible at all. - This is even more clearly the view of Bonfils, [4] Phillimore [5] and Westlake: " Reason is a source of international law not only for the seekers after international right, who will appeal to reason as a check on

Liszt

1) 1875, p. 5.
2) 1924.p.50.
3) 1918.p.59 .
4) 1922.p.22.
5) vol.1.pp.14.

custom, but for all." [1]

Let it be stated quite expressly: what is here submitted is not that states are so connected with each other and so inter-dependent that, in their own interest, they needs must acknowledge the objectively binding force of some international rules. That would be a merely sociological interpretation of interstate relations. What is urged is that modern positive international law is not in the position to build up a positive system in the restricted meaning usually attributed to it. Why this is impossible and why international law (as indeed all law) must be and is based on an objective rule, is being shown with ever-growing clearness by a number of leading publicists. I shall refer here to Kelsen, Krabbe and Duguit, the influence of whom upon the theory of international law is even now considerable. It will be examined, on the other hand, in what degree the essence of this tendency is contained in the classical English doctrine that the law of nations is a part of the law of the land, in the meaning that the respective municipal rules have only a declaratory value.

Modern criticism of the positivist theory

It is generally accepted - says Kelsen - that it flows from the very conception of international law, that it constitutes a community of equal states. "The conception of the co-existence of many states which, notwithstanding the actual differences in size, numbers of population and real power, are of the same legal value and united in one community of a higher order, is an essentially moral idea... but it is possi-

Kelsen

1) vo.l.pp.14.15.

lble only with the aid of a juridical hypothesis: that above the commonwealth described as state there is a legal order which defines the respective scope of power of individual states by forbidding the encroachment of one into the sphere of another..; a legal order which regulates the relations of states by means of rules equally applicable to all; international law does this - but only when its supremacy over the legal systems of individual states is recognised, when - to speak in the usual description - it is contemplated as a legal system standing above the states, that is when the legal systems of individual states are regarded as component parts of a universal order embracing them all."[1]

Thus, we see, the state ceases to be an absolute legal order; it becomes a legal system derived from the universal rule of law. It is subject to an objective rule of law, although not necessarily to a super-state in terms of a coercive system. This is the central position from which Kelsen attacks the traditional dogma of sovereignty. But his teaching interests us here only so far as it expresses the idea of a state, whose legal value is not absolute, but subject to and originating from the existence of an all-embracing international law.[2]

The doctrine basing international law on the sovereign

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1) Der Begriff der Souveraenitaet und die Theorie des Voelkerrechtes, 1920.p.205.

2) Attention may be drawn here to the strictly normative way in which Kelsen deals with the question. It is not a sociological argument in terms of social solidarity (Duguit) or the innate sense of right (Knabbe) or of a real world-sovereign endowed with actual force (Lansing) upon which he bases his theory of the supremacy of international law. He admits that, in juridical logic, international law rules

will of the state is no less vigorously attacked by Duguit ' who denies both the real personality and the "will" of the state. He points, in an argument almost identical with that of Kelsen, to the fact that the theory of fundamental rights, which reconciles the doctrine of sovereignty with the necessity of an international law, turns in a vicious circle. "In order that the personality should be able to have subjective rights it is necessary that it should be in relation to other personalities; it is necessary that there should be a society subjected to an objective law. It is impossible to explain objective international law by the existence of fundamental subjective rights of states, because such rights cannot exist without there being a society of nations subjected to an objective international law. [1] He repudiates - in accord with Kelsen and Krabbe - the idea that rules of international law are addressed to mystical entities called personified states: They are addressed - he says - to persons, to men, to individuals who are delegated by the state law to perform certain functions. [2] The will of those persons is not the creating cause of a legal relation, but only a condition under which an objective rule comes into application. [3] This objective supernational rule is based " on the international legal consciousness, that is, on the conviction of masses of

Duguit

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and the binding force of treaties may be deduced also from the will of the state and its constitution. It is for the jurist to choose one of the two fundamental hypotheses; that of the supremacy of state law or of international law. Both are possible. It is however, impossible to adopt both - from the point of view of the formal Kantian principle of unity of scientific method, upon which his theory of pure jurisprudence is based.

1) Traite de droit constitut. 1921, vol.1.pp.100,559;

2) Op.cit.p.560.

3) pp. 562. et seq.

men belonging to different states and entering into relations with each other, that it is just that a certain moral or economic rule should be sanctioned if necessary by the use of force. 1)2)

It is the same tendency which Krabbe has developed in his two fundamental works: 3) He meets the classical doctrine of the will of state as the exclusive force of international law with the unanswerable objection: 4) If this doctrine is true then international law "would immediately lose its validity for any state which revoked its sanction to it." 5) He finds the

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1) op. cit. p.105. This part of Duguit's teaching is quite independent of his rejection of the juristic personality of the state. comp. here the preamble to the Declaration of the Rights and Duties of Nations adopted by the American Institute of International Law, January 8th, 1916, ("Whereas, the nation is a moral or juristic person, the creature of law, and subordinated to law as is the natural person in political society) with the comment of E. Root, in addresses on international subjects, 1316, pp.416 et seq.

2) comp. also the modern natural law theories of Nelson, Rechtswissenschaft ohne Recht, 1917.; and Maussbach, op. cit.

3) Souveraenitaet des Rechtes, 1906, and "The modern idea of state" (translation) 1919.

4) The same question is put with great force by Kelsen, Duguit, Nelson and by Bar (Grundlage und Kodifikation des Voelkerrechtes, Archiv, f. Rechts- und Wirtschaftsphilosophie, VI, 1912, pp.145.)

5) p.234.

binding force of international law in the same source as that of national law - in its spiritual nature and in the fact that it is a product of man's sense of right [1]. "International law is distinguished from national law not in respect to its origin and foundation, but in respect to the extent of the community to which its commands apply" [2]. This view is remarkable because of the thoroughness of Krabbe's attempt to destroy the common and well established fiction of the obligations of the state as being quite different from the obligations of particular individuals c called upon by constitutional or international law to fulfil certain functions [3]. Who is the subject of international obligations?. "If they are of public interest, then those who are entrusted by constitutional law with the care of these interests are the subjects; for example, a judge who by virtue of a treaty has to validate the subpoena of a foreign court... Does it have a better sense, if the state as a community of interests is regarded as the subject of such obligations? ...There have been states without a judiciary, without legislation, without a postal service... New interests appear within the field of law; old interests, such as religious ones, are removed from it". It is not the question of subjects of international law which specially recommends itself here to our attention. It is the searching analysis of the functions of a state and their expression in terms of ordinary human interest

1) p. 236. 2) p. 236; p. 241 3) p. 241.

and obligations, detached from the absolute conception of a state standing above the law . It is not surprising therefore that he prefers to speak of a super-national law," since it expresses the idea that we are dealing with a law which regulates a community of men embracing several states and which possesses a correspondingly higher validity than that attaching to national law. " 1) 2)

These are the modern formulations not only of Wolff's civitas maxima, but also of a still older theory - of the classical English doctrine of the mere declaratory character of thos e parts of municipal law which give effect to internat-ional law. It is the idea to which Blackstone has given great and lucid expression:"... The law of nations... is here adopted in its full extent by the common law, and is held to be a

The classica doctrine of internation al law as part of th law of the land.

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1) p. 243.

2) There is no doubt that the science of international law is no longer satisfied with the sweeping rejection of what is called "natural" or "objective" international law. The general criticism of the doctrine of sovereignty tends naturally to destroy the theoretical foundations of the purely positivist international law. - See, f.i.,as an illustrative example: Le Fur, Le droit naturel ou objectif s'etend-il aux rapports internationaux ?, R.D.I.L.C., 1925, 1-2, pp. 59-80. The article is written as a reply to a question submitted by Prof. Niemeyer to a number of jurists. The first part of the question is: Is the theory of natural law as taught by Grotius in application to international law and as applied in the seventeenth and eighteenth centuries still in force- that is have international and national tribunals , as well as arbitral tribunals, to follow the principles of this theory in order to supplement and interpret international positive law as created by the will of the states? Le Fur's answer is decidedly in the affirmative.

part of the law of land, and those Acts of Parliament which have from time to time been, made to enforce this universal law...are not to be considered as introductive of any new rule, but merely as declaratory of the fundamental constitution of the kingdom; without which it must cease to be a part of the civilised world". [1] It has been fully accepted by Lord Mansfield, quoting an identical decision of Lord Talbot; [2] it has been accepted by almost all English and American writers who deal with this problem (Phillimore, Kent, Holland, Wharton, Wheaton). and by innumerable decisions of Courts. [3] Should the notion of the exclusively declaratory value of respective rules of municipal law be taken in the meaning which it obviously purports to convey then it is the best expression ever uttered of the supremacy of international law and its ultimate unity with municipal law.

It is now, however, accepted - expressly on the continent, and tacitly in England - that the rule applies no more. It was Triepel who, in order to illustrate the complete independence of both systems of law from each other, attempted to prove with great learning and thoroughness that the rule has been thrown overboard at least so far as Great Britain is concerned. [4]
He availed himself especially of the well-known case of "Franconia" in order to illustrate his contention. What is, perhaps true in this argument , is that that part of conventional international

1) Commentaries on the law of England, 18th ed. 1909.p.60.
2) Trichet et al.b. Bath, Scott's cases of International law, 1922 p.3.
3) For some instances see Triepel p. 138. 4) op.cit.p.134.-156.

which alters the rights of British subjects will not be enforced by British Courts before its adoption by Parliament. But to customary international law the old rule applies with undiminished force - provided always that the respective generally recognised rule has also been recognised by Great Britain.

It is interesting to note how this subjection of the state to a higher legal and moral purpose - and not its identification with these values - finds expression in the most representative expounder of the Hegelian - idealistic philosophy of state, T.H. Green. He says in his "Lectures on the principles of political obligation": The wrong resulting to human society from conflicts between states cannot be held to be lost in a higher right which attaches to the maintenance of the state as the institution through which alone the freedom of man is realised. It is not the state, as such, but this or that particular state which by no means fulfils its purpose, and which might perhaps be swept away and superceded by another with advantage to the ends for which the true state exists, that needs to defend its interest by actions injurious to those outside it.[1] He note the important advance made upon Hegel's central idea. The state has, it is true, the highest legal and moral values as its ultimate objects, but it is not identical with them. "Hence there is no ground for holding that a state is justified in doing whatever its interests seem to require, irrespectively of

Its place in political theory.

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1) p. 173

of effects on other men." [1] - Westlake's formulation - quite a Kantian one - is only a variation of this conception:" When a state has to act although a rule is wanting, it ought as far as possible so as to act that a rule might be framed on the precedent" [2] There is no right of action flowing from the alleged absolute character of the state: "neither in violating the rule nor in acting where a rule is wanted is a state at liberty to consider only its particular case, without reference to the conduct which would be best suited to the causes which most commonly arise".3) 4)

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1) p, 173; comp. Hobhouse "The metaphysical theory of state"; pp. 118.
2) p. 18.
3) There is, perhaps, no writer on international law who surpasses Westlake's broad , universalistic- one would say, pacifist- point of view. Discussing the argument that the special character of the state as an indispensable institution puts it higher than the ordinary standards of law and morality, he says: "But although it is certainly indispensable for the welfare of men that they should be associated in some tie, it does not follow that their welfare imperatively requires the maintenance in its actual limits, and with resources entirely unimpaired, of the particular state tie in which they happen to be engaged." (p.113,Collected Papers).- And this is his opinion on the "right of self-preservation": it (self-preservation) is no doubt a primitive instinct and an absolute instinct so far as it has not been tamed by reason and law, but one great function of law is to tame it." (ibid.p.112). - This conception of the state as a moral being subject to legal and moral rules is given clear expression by the American Woolsey (introduction to intern. law, 192.sec.15:) "It would be strange if the state, that power which defines rights and makes them real, which creates moral persons or associations with rights and obligations, should have no such relations of its own- should be a physical and not a moral entity".- There is nothing in this rejection of the moral and legal value of the state pro foro externo which necessarily involves the rejection of its ultimate authority pro foro interno, within its borders and for the purposes of its municipal law. The sovereignty of the state is quite acceptable if it is understood as a quality conferred by international law, by the highest legal order. The sovereignty of the state is in this case a delegated power. This is, for instance, the conception recently developed by Verdross (Die Einheit des rechtlichen Veltbildes)

This survey of some of the modern-and less modern- tendencies in international law and political theory was necessary, for the purposes of the proposition put forward on these pages, in order to establish (a) that positive international law can be accepted only in the broadest meaning as expressing the legal conviction of the international community, but not as restricted to certain historical forms(i.e. treaty and custom) in which this legal conviction of states finds its expression or, to put it again in the terms of the current theory: there is a customary rule of international law to the effect that the actual will of states as evidenced by custom and treaty may and must be supplemented, when necessary, by such rules and principles, until now unrecognised, which correspond to the nature of the legal relation, to rules of justice

The function of private law as supplying the legal form "general principles of law" and principles of equity.

1924: He does not speak of the supremacy of international law; he prefers to speak of one world-embracing legal order with the rules of international law at its top) although it must be admitted that sovereignty in the meaning of a quality conferred by a higher order conveys a contradiction. The sovereign power cannot, in law, be delegated. This sovereignty would have to be qualified as "internal sovereignty." In this case there is no need, for the purposes of international law, to have recourse to the attempts (s.Laski: Problems of Sovereignty, Foundations of Sovereignty) at a total rejection of the legal position of the state within the borders of a historically given community. If states cannot be regarded as sovereign creators of international law, they can be regarded as indispensable units, with special competence, of the international community.

4) It seems that the present tendency is to develop the English political theory, especially with regard to international relations, on the lines both of the universalistic conception as given expression by Blackstone, and of the sociological rather than the idealistic-Hegelian theory of state. Professor Hobhouse's "Metaphysical theory of the State" will, it is believed, rank as one of the most powerful works in this direction.

and to general principles of law. We shall see that those rules of justice and general principles of law are, in the overwhelming majority of cases, clearly formulated by rules of private law.

Here lies its importance . It is for no other purpose that the question of the positive character of international law was discussed here at considerable length than for the sake of illustrating the view that- given once "equity" "justice", "reason", "reason of the thing", "general principles of law" as recognised rules of international law- it is private law which gives shape and definite form to those general sources. Here lies the organising and ordering part played by it. Those "general principles" threaten otherwise to degenerate into altogether subjective natural law or legal philosophy. In the general principles of the universally applied private law they find, in theory and in practice, a system of rules built upon experience and upon infinite intellectual labour. It may or may not be accurate when some authors say that, for instance, the adoption of rules governing fluvial accretion is not analogy to private law, but simply application of common sense. But even granted the accuracy of the statement, it does not say anything elsethan that it is a rule of private law which embodies here a principle of common sense. (Most rules of law embody a principle of common sense. But it takes sometimes years, or centuries, of wars and waste to give to an obvious principle of common sense the authority

of a rule of law. International law furnishes many instructive instances.) Private law supplies its formul tion, its definite shape, its justification in the world of experience. That is just its functio as a source of legal reason.

(b) That the metaphysical character of international relations as placed above the law, because identical with the "sovereign will" of the state, is being gradually discarded, and a more human and more direct relation of rules of international law to the moral and legal units, that is to the individuals responsible for giving effect to these rules, is gradually being adopted. In this plane the application of private law does not appear to be of a demoralising or confusing influence upon the "public law character" of international law. Because the possibility of private law playing any part at all in the development of international law is conditioned by the acceptance of the view that acts of states and of their organs are actions of men, for ordinary human purposes, governed by standards of justice, morality and expedience and accepted by states and their peoples in their dealings within their territory. It is conditioned by the recognition that the interests of states are only in a certain degree different from those protected by other collective bodies or even from those relating to individuals.

The character of international relations

For, it is submitted, there is nothing in these interests which is inherently different from the interests protected by law, by private law. They are not of the highest order. It might be said that individual interests are chiefly economic,

whereas those of the states are political in their character, but even if this is so, it ought not to be forgotten that, as a rule, the political activities of states in the field of international relations are primarily devoted to the safeguarding of the collective economic interests - no matter under which disguise they happen to appear. What gave to them- and still gives- this mysterious aspect of absolute heterogenity, of supremacy- is their independence from those common standards of law and right which govern the relations of individuals and groups of individuals under the sway of municipal law.[1] In the measure in which the necessities of international intercourse or - sometimes- public opinion force the governments to give up this postulated independence from the reign of law- in the same measure international law advances and developes.

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1) How great is the influence of this common conception of the "public" character of international law, and of the necessity of establishing different standards-r legal and moral - for the purposes of international law, can be seen from the following opinion of a leading legal authority: "..to think of the moral responsibility of the British Empire in terms of the moral dutiesof a single man... is to put morals in terms of law, not law in terms of morals, as we did in the classical ere. In truth a moral order among states is not the simple matter which the analogy of the individual mind has made it appear. There are many difficulties, psychological,economic and biological that make the analogy of politically organised society to the individual human being x wholly misleading "(Roscoe Pound, Philosophical theory and internationsl law,Bibl.Visser.,vol.II., p.79).- It is submitted, with great deference,that this is just the view which underlies the modern theory of international law and the results of which are, also according to Dean Pound, by no means reassuring. We ought certainly to put law in terms of morals,but to put different standards of morality for individuals acting as such, and for individuals acting as members of a family, of a corporation or of a state, is destructive both of those moral standards and of the legal value of principles which are derived from them. The moral responsibility

Along with this, the conviction must gain in strength that between individuals, autonomous groups and states there is a legal difference of degree only.

It is especially necessary to discard the uncritically accepted and misleading notion that whereas private law is above the subjects of law, international law is a law between them, and that, therefore, every analogy is inadequate. Both international and private law are composed of external rules of conduct which, once given their formal existence as law, are independent-in law, not, of course, on the plane of facts- of the will of the parties or the subjects of law; it is a law above them-in both cases. It is true that there is a difference in the manner in which the rule of law is created. Individuals give their consent, on the whole, through the machinery of municipal legislation; states, their number being small, give their consent directly, in treaties, particular or general. But even this is not always the case. In a great number of cases they are subject to international rules in the creation of which they have no part whatever. States are

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of states is co-extensive with the moral responsibility of their citizens, or of those elected by them. It is a moral responsibility of men. This was just the great historical function of the classical international law and of its expounders that "...it appealed to men and took account of men...Its obligations were the obligations of personal sovereigns as individual men and its rules were imposed on those sovereigns in their capacity of individual men" (ibid. p.76.). The modern positivist theory discarded this appeal to men for the sake of the higher right of impersonal states.

certainly co-ordinated legal entities. This means that even if their rights are not actually equal, they are nevertheless equal before the law.[1] But this co-ordination presupposes logically a common subordination to a higher rule. That two things are equal means simply that they are equal in relation to an objective value. In private law the individuals are equal-that means that they are equal in relation to the law which is above them. This is also the case in relation to states.-This is the second fundamental point of view from which, it is submitted, the question of private law analogies in international law should be regarded.

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1)See Dickinson, op.cit.pp.3-6.

P a r t II.

Private law in application to different parts of international law.

CHAPTER III.

Private law analogy in application to treaties.

1.

Private law contracts and international treaties. Their legal nature and the "special character of international law".

23. This chapter is primarily concerned with application of private law conceptions to construction and interpretation of treaties. Its first task is, naturally, to answer the question: How far does the conception of treaty itself constitute an analogy to the private law notion of contract? International law - both theory and practice- stands here between two conflicting tendencies: the tendency to base the conception of treaties on the solid foundation of a consensual obligation as developed in private law; and the tendency to dispense with the two essential elements of the private law conception: with the free consensus of the parties (admissibility of duress), and with the objectively binding character of the obligation (the clausula rebus sic stantibus). Both theory and practice adhere to the positive rule of international law that the essential condition of the validity of contracts in private law, the free consensus of parties, is not essential in international law; neither has the predominant doctrine discarded the principles connected with the clausu-

la. It is this second tendency which embodies the so called "special character of international law".

Their legal identity in theory and

The fundamental structure of private law contracts and international law treaties is essentially the same. The autonomous will of the parties, both in contract and in treaty, is the condition which gives rise to a legal relation, which, at the moment of its creation, becomes independent of the discretionary will of one of the parties. It is the law of the state which gives objective force to a contract in private law, it is the rule pacta sunt servanda, the fundament of international law, which gives objective force to international treaties. It is, legally, not of the slightest importance that this objective validity, now independent of the discretionary will of one party, is in one case supported by external force, and in the other not. Neither is it relevant to say that the contents of the two legal transactions are different. One must not be misled by the statement that a treaty is an act of legislation in the sphere of international law, whereas a private law contract does not rise above individual interests.

in the science of international law.

There is no doubt that Grotius' treatment of "promises", "contracts", and "treaties and sponsions" follows closely the lines of private law. This is - as we have seen - obscured by the fact that he him-

self often stresses the difference between civil and Roman law and the law of nations. But these exceptions - numerous as they are - relate to points of minor importance. Although it has become a commonplace to blame Grotius for this strict adherence to the private law pattern, it is obvious that no writer is in the position to discard the analogy. The analogy is the starting point; it is upon its foundations that authors develop distinctions which seem to them important.

"It is unnecessary here to enter into the general principles of the law of contract" - begins Westlake the chapter on "treaties and other international conventions". "What is important for us is to notice the points in which contracts between states present any exception to those principles or any particular application of them". [1]."As the tendency is to apply so far as possible the analogies of private law, when the validity or construction of international compacts are in question, it may be said that just as private contracts are void when contrary to public policy as defined in municipal law, so are the first named when in conflict with public morality as defined in international law" - says Taylor [2].

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1) Vol. 1. p. 290.
2) p. 365.

And again Bonfils-Fauchille: "Les éléments essentiels des traités internationaux sont comme pour les contrats entre particuliers"[1]; or Pradier-Fodere:"Les traites et les conventions sont les contrats des Etats; leur objet essentiel est de produire généralement des obligations réciproques et des droits corrélatifs"[2]. Similar is the attitude of the general body of writers.[3].

We have seen that the positivist theory, while acknowledging the admissibility of some analogy, is emphatic in the denial of the private law character of the institution of contract. It belongs - says the theory - to general jurisprudence. It has been shown in the first chapter that this term is in this connection no more than a form of speech. There is, on the whole, no general jurisprudence to which international law has made any noteworthy contribution. In this particular case, however, the term seems to serve a good purpose. It purports to solve the otherwise unsurmountable difficulty: how is a contract possible without the free will of both parties being an essential condition of the validity of the contract. The requirement of consensus is simply reduced to an instance of private law analogy - which, of course, must be rejected as quite inapplicable to state relations... It is most

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1) 1912, p.528.
2) par. 888.
3) Fiore, par.971; Phillimore vol.2.p.75; Fenwick p.317.

instructive to note how Nippold, for instance, the positivist and protagonist of "general jurisprudence", denounces the prevalent opinion as running counter to a clear principle of general jurisprudence. The meaningless fallacy of this term when detached from the mother soil of private law, cannot be better illustrated.

Disregard of the vitiating influence of duress.

24. But be this as it may, there are few questions in international law in which there is such a measure of common agreement as this - that duress, so far as states are concerned, does not invalidate a contract. This may safely be described as a settled rule of positive international law. And yet, it is submitted, this does not affect the view presented here of the fundamental identity of contracts and treaties, as well as of the inherent analogy between the two branches of law. It is submitted that the analogy fails here so far as international law is an undeveloped law. The analogy fails here because - and so far as - international law has not yet achieved its goal on the way from "positive morality" to law. It may safely be said that when international law will become l a w - without qualifications and reservations - the analogy will hold with undisputed force. The writers, while laying down this positive rule, regard it as their obvious duty to explain and to justify it. They regard it as a malum necessarium, the absence of which would certainly tend to perpetuate the state of war amongst the unorganised society of nations. They agree that the rule is a positive one, but they are far from assuming that it is

beneficial to the idea of law. Moreover, it seems that some of these writers are apt to acknowledge the binding force of treaties concluded under duress only in those cases in which the state exercising compulsion does it in the name of law and in accordance with it, - as the arm of law, as it were. To put it more clearly: they disregard the invalidating effect of duress only in those cases in which it may be regarded as the execution of international law, of just - if the bold word is permitted - international law.

That Grotius - in his age of wars - was apt to sacrifice a legal principle for the sake of peace, should not be a cause of surprise. Expedit rei publicae ut sit finis litium. "As by the consent of nations a rule has been introduced that all wars, conducted on both sides by authority of the sovereign power, are to be held just wars: so this has also been established that the fear of such a war is held a justly imposed fear, so that what is obtained by such means cannot be demanded back"[1]. This is a bold statement on the part of the great jurists who took pains to distinguish between bellum iustum and iniustum. And it is not made clearer by the previous argument that "He who gave cause why he should suffer force, or be compelled by fear, has himself to blame for what happens: for an involuntary act arising from a voluntary one is held morally for a voluntary one."[2]. Then what about the attacked who

Grotius.

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1) L. II. c.XVII. s.19
2) L. II. c.XVII. s.19

did not give cause "that he should suffer force"? And yet - although in the chapter on "promises" he is "entirely of the opinion of those who think, that, setting aside the civil law, which may either take away or diminish an obligation, he who has promised anything under fear is bound", he is cautious enough to state in the same section: "but I also think that this is certainly true; that if the promisee has produced a fear not just, but unjust, even though slight, and if the promise was occasioned by this, he is bound to liberate the promisor if the promisor desires it"[1]. This cannot be regarded as a refutation of his view in the main question, but it is certainly illustrative of the difficulties with which he had to cope.

Even more instructive is Vattel. He lays down with his usual clearness the rule that "a sovereign cannot dispense himself from observing ~~him~~ a treaty of peace by alleging that it was extorted from him by fear or constraint".[2] He gives them the usual reasons for this proposition. But then comes the important limitation: "if ever the plea of constraint may be admitted, it is against an agreement which does not merit the name of a treaty of peace, against a forced submission to terms which are equally contrary to justice and to all duties of humanity".[3]. Vattel.

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1) L.II. c.XI. s.7
2) Book IV., ch. 4. par 37
3) loc.cit; comp.also Ayala, Law of War (1582) Carnegie edit; Translation p.60.

And he proceeds, after having given some historical instances, with the impassioned argument: "Although the natural law prescribes fidelity to promises as a means of securing the welfare and the peace of nations, it does not favour oppressors. All of its principles are directed to procuring the greatest good of mankind; that is the great end of all laws written und unwritten. Shall he who himself violates all those principles which bind society together be allowed to invoke the aid of them? If it happens that the plea of constraint is abused, and is offered by a nation as a pretext for revolting without just cause and renewing the war, it is better to risk that ill than to furnish usurpers with an easy means of perpetuating their injustice and establishing their usurpation upon a solid foundation. But when it is sought to preach a doctrine which is contrary to all instincts of human nature, where shall hearers be found?" It has been deemed expedient to cite here this lengthy argument, because it gives a most able expression to the legal and practical considerations underlying this fundamental question. It recognises compulsionx only when it is in accordance with law, but then, it is submitted, complision no longer falls under the categery od duress. The same view is expressed a hundred years later by Klueber [1] and supported in a strong manner by the authority of Pradier-Fodere.[2]. Modern writers

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1). French ed.1861 p.184. (The consent is free if it is not extorted by an unjust violence).

2). Par.1076; also Twiss p1.385.

It is indicative even of the present position of the question that a thoroughly positive writer expresses, in 1924, the following opinion: "when, therefore, it is said that in international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as violating the agreement made in consequence of their use, the statement can be accepted only as expressing a rule of law in so far as the recognition of the agreement by third states is concerned, not as implying that the agreement creates the obligation of good faith". 1). 2).

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1). Fenwick p.328; see also Manning, Int.L.2ed. Amos (1875) p.124: "Nevertheless, though this act (a treaty of peace imposed by force) really qualifies the actual cogency of such treaties, it does not qualify their legal cogency in the minutest degree; comp. also the "note doctrinale" in the Croft case, in Recueil des Arbitrage Intern., Lapradelle et Politis, 1924, Vol.II pp.36,37.

2). The following recent instance may be useful for the appreciation of some of the aspects of the question: In May 1915, China, acting under the threat of an ultimatum by Japan accepted the so called twenty-one demands dmpairing severely her rights as an independent state. "The Chinese Government, immediately after signing the Agreement, published a formal statement protesting against the Agreements which she had been compelled to sign... (Willoughby, China at the Conference, Statement of the Chinese Delegation, p.285). The Chinese delegation, at the Conference at Washington 1921, raised the question and demanded the cancellation of this Agreement. In reply to the assertion of Japan, that "the insistence by China on the cancellation of these instruments would in itself indicate that she shares the view that the compacts actually remain in force and will continue to be effective, unless and until they are cancelled," The China delegation stated that "the Chinese people had always regarded these agreements as peculiar in themselves by reason of the circumstances under which they had been negotiated, and that the conditions arising from them were only de facto and without any legal recognition upon the part of China.") p.253.

All these views do not seriously affect the established rule, which no doubt remains unshaken. They show, nevertheless, its inherent weakness. Even the great majority of writers supporting this rule do not deny that the lack of analogy with the corresponding principle of private law constitutes an exception to the rule of law, an exception due to the unorganised character of the international society. The analogy fails here, it is submitted once more, so far as international law is not yet law. In the fully developed international law; real,not fictitious, consent will be required for the creation of a legal obligation.

Analogy is lacking so far as international law is an undeveloped law.

25. This "special structure of international law" thus deprives the conception of treaties of one of the essential elements of every contract, that requiring the free consensus of the parties. But it deprives it also of another, equally essential, element - by the doctrine of the clausula rebus sic stantibus, the doctrine that a state may lawfully rescind a valid treaty, if there has taken place such a change of circumstances that the fulfilment of the treaty would dangerously affect its vital interests.[18]) The mistake is often committed of seeking the origin of the clausula - as represented in international law - in Roman law. Nothing could be more misleading than this inference from

Clausula rebus sic stantibus.

18) Schmidt: Die voelkerrechtl.clausula rebus sic stantibus,1907. p.15.

the Latin form of the rule.

It is well-known that private law admits the possibility of the dissolution of a contract before its fulfilment. This takes place especially in cases of supervening impossibility of performance.[1]. The clausula in international law could be based on this foundation - as it has, in fact, been done by some writers [2] - provided that an objective test for the impossibility of fulfilment could be found. The rule could, secondly, be based on the will of the parties, in the meaning that a resolving condition was expressly or implicitly attached to the contract [3]. There is nothing in the notion of contract that compels us to assume that mutuus dissensus is the only way in which it can be dissolved. But it is an absolute negation of the term to assume that it may be dissolved at the discretion of one party. This is, however, the gist of the clausula in international law of to-day. There would be no objection against assuming that the threat not only to the independence, but also to the progress [4] of the state may give to it, in law, a right to demand a declaration that a treaty

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1). Art. 275. German Code.
2). Heffter-Geffcken, p.214; Bluntschli, p.217.
3). see for instance Hall p.350; Oppenheim I.p.692; Moore, Digest. vol.5.319.
4). see f.i. Hall, Oppenheim, Taylor.

has become abortive. But that this declaration may be made by the interested state - this idea is as typical of the prevailing theory, as it is repugnant to the idea of law.[1] Only ius, or the juridical organs of the ius, can dissolve the vinculum iuris. The tendency of international law as a law goes in this direction. If the Covenant of the League of Nations may be regarded as an expression of international law then its nineteenth article marks an important step towards the abolition of a doctrine as mischievous as contrary to law. It provides a means - a very inadequate means [2] - towards the necessary revision of the existing law, and it excludes thereby the admissibility of a one-sided withdrawal from a treaty. It is an indication of a tendency, as is article X, which, in its extensive interpretation, excludes the admissibility of duress so far as the independence and territorial integrety of a state is concerned. In both cases the analogy to private law means - assimilation to law.

Its elimination..

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1). Neither is it, in fact, the creation of the practice of states - . This has been clearly shown by Schmidt. The instances when it has been invoked are, in fact, few; it has never been recognised as a legal rule by the injured power. It is rather the theories of writers, than the necessities of international life, that gave prominence to the doctrine.

2). Because of the requirements of unanimity, see Oppenheim.I.p.299.

26. While the theory of international law rejects the analogy to private law with regard to duress it does accept it with regard to fraud and error. It is agreed that whâle error renders the treaty void, fraud exercised by one of the contracting parties renders it at least voidable. 1). And yet - there is no doubt that, from the juristic point of view, all three cases - duress, error, fraud, - stand on the same level: In all of them there is no real consent on the side of one of the contracting parties. "Neither does freedom of consent exist where the contract is concluded under false impressions produced by the fraud of the party benefited" - says Taylor 2).

Error and fraud.

A study of this part of text books reveals the fact that with one insignificant exception, -there are no historical instances of fraud or error in the conclusion of treaties.3). What writers say on this point is no more than analogy to private law. The practice of states affords no instances, and it cannot afford them. The monotony with which publicists

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1). Nippold p.176; Heffter p.190; Westlake I. p.290; Bluntschli, par.408-9; Klueber, par. 143.

2). p. 386.

3). Wharton Digest. par.150; Phillimore vol.II.p.76; Rivier, vol.2.p.155. Die na. p.372.

repeat the instance of forged maps is appalling. The elaborate manner in which negotiations are conducted, the long time between the signature of a treaty and its ratification - exclude every reasonable possibility of fraud and error. It is, however, this conception of the treaty as a contract in which real consent is an essential element which induces international publicists to assign to fraud and error a place in the system of international law, irrespective of the probability of the application of the principle. But there are writers who deny even the vitiating influence of fraud and error. They explain it by the improbability of cases of serious error and fraud ever arising, and with the impossibility - owing to the lack of adequate tribunals - to determine whether they have taken place. The vast majority of writers, however, is adopting this analogy; it cannot do otherwise without destroying the very conception of contract and treaty.

The limits of analogy.

27. This means, on the other hand, that such rules as are not dictated by logical considerations or by the general sense of right, but which owe their origin to peculiarities of space and time, need not necessarily be applied. But where is the test for this logical necessity or ~~gnt~~ the general sense of right? It is certainly not easy to find this test. We have seen that the essential element of contract, the free will as destroyed by duress, fraud or error, is by many authors by no means regarded as indispensable. The

The "logical necessity" may be made entirely dependent upon the notion which is chosen as a starting point (that for instance not consent, but only the declaration of consent is a constitutive element of contract or treaty), and the sense of right may lead in practice to very different conclusions. But there is no doubt that such a test is necessary and that it exists - for all practical purposes. It lies in the actual universality of a rule. If a rule is confined only to one or only to some systems of private law then, clearly, it cannot be used as a suitable basis for the process of analogy. This becomes obvious when such rules as those relating to lesion (Laesio enormis), to pacts in favorem tertii and/to the interpretation of treaties are taken into consideration.

Laesio enormis.

According to Roman law, a contract of sale could be rescinded when a thing was sold for less than half of its actual value. This was the case of laesio enormis. The rule has been included in the law of some modern countries. It it unknown to others. To incorporate it in the system of international law, as has been done by some publicists in the early stage, is obviously inadmissible, the rule not being a general principle of law. The reason of its being a general rule or not lies not in its conformity with a preconceived idea of natural law or legal philosophy. It depends upon its inclusion in possibly all or many systems of private law. Here again the modern opinion is quite

justified in rejecting this case of analogy [1].

The same considerations apply to pacta in favorem tertii. The respective rules differ so largely in various systems of private law that any shaping of rules of international law on the ground of analogy must be misleading.[2]. There is no reason for the prevalence of one system of private law over the other. In this particular question international law can and does develop its own devices - i.e. accession and adhesion - for extending the possible advantages of a treaty to third parties.[3]. Any use of private law analogy - unless it be a mere figure of speech - is here quite unjustified.

Pacta in favorem tertii.

The same applies to the question of private law analogy with regard to the rules governing the interpretation of treaties. There are but few publicists who have not succumbed to the temptation to formulate a more or less lengthy list of rules of interpretation - without, however, alleviating the task of those called/in individual cases to interpret the meaning of a treaty. "The important point is to get at the real intention of the parties, and that enquiry is not shackled by any rule of interpretation which may exist in

Interpretation of treaties.

1).Phillimore p.176.; Klueber, par.143; Moore Digest vol.2.p.81.
2).Roxburgh: International Conventions and third states, p.6-18;see also Diena (Plan eines neuen interozeanischen Kanals in Nicaragua. Niemeyer's Zeitschrift.XXV.p.19) who, curiously enough, after deprecating the application of this or other rule of o n e municipal law construes art.1.s.1.of the Hay-Pauncefote Treaty as a pactum in favorem tertii.
3).Roxburgh op. cit. p.45.

a particular national jurisprudence but is not generally accepted in the civilised world."[1]. To this opinion of Westlake, which is in total agreement with the argument presented here, may be added that - with the exception of the English-American jurisprudence - the rules of interpretation of contracts are very few in most systems. For, both in private and international law, all rules of interpretation can be reduced to this fundamental rule - that effect has to be given to the declared will of parties. Even rules of Roman law cannot claim in this regard greater authority than those of any other system of municipal law. The history of state controversies shows how much rules of interpretation taken at random from one system of private law have been abused and chosen to suit very contentious assertions. [2].

The authority of Roman law.

Even rules of Roman law. For there is a marked tendency- notably in the English and American international jurisprudence - to attribute to Roman law the quality of those "General principles of law" to which the continental school has so frequent recourse. We have seen that some authors like Phillimore and Westlake regard Roman law as a direct source of international law. This may be true from an historical

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1). Westlake vol.1.p.

2). ch.6, 7, 8.;

point of view. Roman law, the "ratio scripta" supplied the foundation stones for the rising building of international law and it certainly exercised a great influence upon it in the subsequent stages. But to attribute to one system of a particular time and space qualities of a universal law, and to use it as a vehicle of development of international law, must obviously result in checking this development.[1]. This applies not only to Roman law rules of interpretation but to all cases in which a rule of Roman law is not corroborrated by an identical development in modern law.[2].

2.

The legitimate occasion of application of private law in treaties.

28. It has been shown on the instances of lesion, of pacta in favorem tertii and of interpretation of treaties that the use of analogy is unwarranted when the rules to be applied are not common to modern private law as a whole, but only to some systems of municipal jurisprudence; it has been urged, on the other side, in this and the preceding chapter, that where a legitimate occasion arises to apply a private law principle common to all systems of jurisprudence, the conception of international law as a system of l a w and of states as subject to the rule of law requires that analogy should be made use of. But when does the legitimate

1). Comp.here Geny: Methode d'interpretation et sources en droit privé positif, 1919, esp. the chapter: des conceptions et constructions en droit romain, pp. 171 et.seq.
2). On Roman law with regard to the rules of evidence before international tribunals comp. Ralston, Intern. Arbitral law & procedure, p. 136.

occasion arise? It arises specially in those cases in which an international treaty itself makes use of a conception of private law. The "independent character" of international law demands that such conceptions should be regarded as meaningless phrases without any definite contents. This is illustrated most clearly in the institute of international leases.

International leases of a purely private law type.

29. There are two categories of leases in international law. The first, generally overlooked in the writings of of publicists, furnishes no difficulties, as will be seen on the following instance: Through an exchange of notes an agreement has been reached (January,1905) between the British and Italian Governments in which "His Britannic Majesty's Government agrees to lease to the Italian Government an area of land on the east side of Kismayu, in the British East Africa Protectorate, not exceeding a hundred and fifty yards square, for the erection of a bonded warehouse or other necessary buildings." According to articles 3, 4, and 5, the Italian Government shall pay for the land leased an annual rent of £1, the lease to be in force for 33 years (subject to possible modifications), and on the termination of the lease the buildings erected on the land to become the property of the British Government. Article 6 provides that no Italian troops shall be landed at Kismayu

without the previous consent of British authorities - with the important exception of Expeditionary Forces which are permitted to land after previous notification. Article 8 says: "Nothing in these articles shall be construed to exempt either the land leased or the persons residing thereon from the laws and regulations in force in British East Africa Protectorate, subject to which, however, employés of the Italian Government residing in the leased territory shall be free to exercise the functions of their respective offices".[1] Essentially the same are the provisions of the Annex 4 of the Convention between Great Britain and France (June 1898), concerning the delimitation of the possessions and spheres of influence of both countries east from the Niger, in which a portion of land is leased to France on the Niger for the purposes of the landing, storage, and transshipment of goods, an annual rent of 1 francs to be paid by the French Government;[2] of article 8 of the convention between Germany and France of November 1911 concerning their possessions in equatorial Africa[3]; and in some respects of articles 363, and 364 of the treaty of Versailles, in which Germany leases to the Czecho-Slovak state, for a period of ninety-nine years, areas in the ports of Stettin and Hamburg, which shall be placed under the general regime

1)Herstlet's Treaties vol XXIV p.689
2)Martén's Treaties, 2 ser. XXIX p.126-130
3)Martén's 3 ser. V. p.656

of free zones and shall be used for the direct transit of goods coming from xxx or going to that state[1].

There seems to be no doubt, so far as theory concerns itself with the question, that to this type of leases the private law rules of lease are applicable. The lessor retains the sovereignty over the leased territory. The legal relation between the lessor and the lessee remains the same as in private law. It is hardly necessary to add that those agreements belong to the domain of international public law[2].

30. This is not, however, the case according to the almost unanimous opinion of writers in the instance of "political" leases, as those granted by China in the years of 1898 and 1899 to Germany.[3] Russia[4], England[5] and France[6]. They agree that the "pretended leases are aliemations disguised in order to spare the susceptibility of the state at whose cost they are made,"[7] "Political" leases.

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1). Herstlet's Treaties, XXX. p.227
2). Schoenborn, Z.V. VII.p.438-445
3). Martin's 2 ser.vol. XXX. p.326.
4). McMurray: Treaties and Agreements concerning China, p.119.
5). Martin's q ser. vol.32 p.90.
6). McMurray. p.124.
7). Westlake 1.p.136.

and they simply enumerate them as one of the ways of acquisition of territorial sovereignty.[1]. It is submitted that this theory is neither correct in law, nor warranted by the practice of states.

Disguised "cessions" and the practice.

According to all these treaties China retains the sovereignty over the leased territories and parts "in order to avoid conflicts" with the exercise of her sovereign rights for a limited number of years (25 years in the case of Port Arthur, 99 years in other cases); the lessees were either prohibited from subletting the leased territories to another power, or bound to obtain for this the permission of the lessor; in the case of Port Arthur and Talienwan, China retained the jurisdiction over her subjects for crimes committed in the leased territories,[2], and withing the "walled city of Weihaiwei" the jurisdiction of Chinese officers had to continue.[3].

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1). To the same class belongs the "Argument between the U.S. of America and the Republic of Cuba for the lease to the U.S. of lands for Cuba for coaling and naval stations, July 1903", Martẽn's vol.34.p.338.; Strupp, Grundzuege des positiven Voelkerrechtes, p.53.; Liszt, p.93; Lawrence p.177 ("the attempt to separate property or sovereighny on the one hand from possession on the other, by the use of phrases taken from the law of usufruct, is in its very nature deceptive. The terms in question are mere diplomatic devices for veiling in decent words the hard fact of territorial cession; Westlake I.p.135, 6; Despagnet, 1910, par.385.

2). Willoughby, loc. cit.

3). see also Korff, Russia in the Far East, Am. J.I.L.1923,p.265.

By the treaty with Japan, of December 1905, China exercised her rights of sovereignty by giving consent to the handing over of the leased territory from Russia to Japan [1], and again, in Article 1, of the treaty of May 1915, to the extension of the term of the lease from 25 to 99 years[2]; she gave consent in the same treaty to the rights of Germany over Kiaochan being transferred to Japan.[3]. After her declaration of war against Germany, she consulted international lawyers as to whether, by this act, her agreement to transfer the German rights to Japan has not become inoperative, and, according to Dr.John C.Ferguson's report before the Committee for Foreign affairs of the United States Senate, a number of international lawyers of eminence gave the opinion that her declaration of war against Germany, notwithstanding her contract which had been made with Japan already in 1915; of itself vitiates not only the German lease, but also the treaty with Japan.[4]. In the course of the Washington Conference, in December 1921, Dr. Koo, the leader of the Chinese Delegation, declared: "While the measures

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1) Marten's II. ser. vol.34., p. 748; this right has been expressly recognised in art. 5 of the Peace Treaty between Japan and Russia of September 1905, McMurray loc.cit.
2).Mc.Murray p.1221.
3).Mc.Murray p.1216.
4).Willoughby: Foreign rights and interests in China, p.392.

and extent of control by the lessee powers over the leased territories varied in different cases, the leases themselves were all limited to a fixed period of years. Expressly or impliedly they were not transferable to a third power without the consent of China. Though the exercise of administrative rights over the territories leased was relinquished by China to the lessee power during the period of the lease, the sovereignty of China over them had been reserved in all cases. The leases were all creatures of compact, different from cessions both in fact and in law"[1].

This legal position, as expressed by the Chinese Delegation, has been partly given recognition by the fact that, with the exception of the Liaotung Peninsula held by Japan, the powers declared their readiness to agree, under certain condition, to an immddiate termination of the leases contracted in 1898 and 1899[2]. All these facts do not seem to speak in favour of the contention that those contracts can be regarded as instances of acquisition of territorial sovereignty by cession[3].

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1).see also: A History of the Peace Conference in Paris, Shantung at the Peace Conference, Vol.VI. p.377; Godshall, The international aspects of the Shantung question, pp.121, 140-142.
2) Comp.also resolution No.7 of the Washington Conference regarding Radio stations in China (s.4).
3).Comp. U.S.For.Rel.1900.pp.387. in which Secretary Hay's view is expressed to the effect that the reservations of Chinese sovereignty at least "cuts off possible future claims of the lessee that the sovereignty of the territory is permanently vested in the lessee".

31. The publicists put this construction upon the above-mentioned transactions with the avowed intention of grasping the real facts of international life, and not their legal appearance; not the declared, but the real intention of the parties. But this, it is submitted, cannot be the task of international jurisprudence. Its task is not to supply a political interpretation of facts - in this case a very doubtful interpretation - but to classify and explain legal transactions according to the declared will of the parties. It degenerates otherwise in a descriptive science of political facts - a task which may be useful, but which is not an interpretation of law. Under no circumstances should the reservatio mentalis of one of the parties to a treaty be made the foundation of interpretation. By no means should the science of international law give encouragement to a deleting of differences between legal terms. "Concepts of law are sharply defined, and the merging of one into another would mean the end of science, the end of legal life... What utter danger for life, family and property would it be to assert that the border lines between individual legal transactions are in a state of flux, for instance, the difference between sale and hire, between marriage and concubinate, between murder and manslaughter. This is just the essence of law that it

The task of interpretation.

defines in rigid terms the fluid relations of life"[1]. The same idea is given lucid expression by a recent American author: " It is the contract which is the subject of interpretation, rather than the volition of the parties. It may be that while certain expressions are used in a particular sense, a contradicting state has in fact given its consent with the design of accomplishing a purpose hostile thereto. Proof of such an intention is not decisive of the rights of the parties under the agreement" 2).

The rule of interpretation with regard to terms of private law in a treaty.

Two states use in a treaty a concept - obviously taken from private law - the meaning of which is generally accepted and without ambiguities. There are differences of opinion as to the right of the hirer to sublet, as to the effect of the accidental destruction of the object of the lease during the term of the lease, as to the rights of both parties in the case of improvements effected by the tenant[3]; there may even be some doubts with regard to the real or contractual character of the reciprocal rights and duties of the lessor and the lessee [4], but no one would seriously challenge the statement that "the lessee of the land is he who rightfully possesses it, but does not own it, and that the lessor of the land is he who

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1). Jellinek, Staatenverdingungen, p.15.
2). vol.2.p.63.
3). Holland, Jurisprudence, p.294.
4). Pollock, the Land Laws, p.145; Salmond, Jurisprudence p.397.

owns it, but who has transferred the possession of it to another".[1]. And Salmond draws only the necessary logical conclusion from this fundamental relation between the lessor and the lessee when he states: "a lease exists whenever the rightful possession of a thing is separated from the ownership of it; and although this separation is usually temporary, there is no difficulty in supposing it permanent."[2]. Its application to leases.

Now, the mentioned leases are not permanent; they are limited to 99 or 25 years. To maintain that these principles do not apply in international law is to do violence to the generally accepted meaning of a term and to deprive the work of interpretation of this solid foundation which we call the accepted meaning of words. It means also the depriving of international law of a new institute which obviates the difficulties and dangers of cession of territory while securing at the same time all its advantages. Why make cession the only legal form in adjusting conflicting claims of territorial sovereignty? Neither international law nor international relations gain through such a procedure.

There is, it is submitted, no essential difference between the indicated two kinds of leases, unless it be the object of the rights exercised by the lessor. In the first

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1). Salmond p.399.
2). p.400; Roman law regards even the emphyteuta as an encumbrancer, not as an owner.

case his jurisdiction is none or limited, in the second he exercises full rights of jurisdiction. In both cases one state parts only with the exercise of its rights. There is no difficulty in grasping and constructing legal relations between states in which not only rights of property but also their counterpart in international law, the rights pertaining to territorial sovereignty, are made the object of a contract of lease. There is no need for disregarding the declared intention of parties for the sake of a political construction of doubtful application.

The practical consequences of the common construction are obvious. The treaty becomes what is usually called an executed one;[1] the legal obligation to restore the leased territory to the owner after the expiration of the term of the lease becomes abortive; in the case of war the validity of the treaty continues. The consequences are, of course, different when the rule here put forward is applied. This rule is: whenever in a treaty a generally accepted term of private law is being used, the interpretation and construc-

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1). On the analogy of transitory or disposive treaties to "conveyances" and on the danger of constructing International Law by analogy to municipal law" Rexburgh, quoted below, page 108.

tion of the treaty must follow the principles generally recognised as implied in this particular term.[1]

32. The necessity of applying the above rule of interpretation is, it is submitted, shown with ~~di~~ sufficient clearness in the new institute of international law: in the international law mandates.

International mandates. The three interpretations.

It is proposed to deal here at some length with this question, because, together with "leases", international mandates offer, it is believed, a most instructive illustration of the problem under discussion:-

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1). The results of this passion for uniformity which finds in the concept of cession - open or disguised - an ever-ready instrument for grasping the different ways of territorial adjustment are clearly illustrated by the case of Bosnia and Herzegovina. A great number of writers treated this right of occupation and administration as an instance of a (disguised) cession. (Liszt. p.92; for ample references see p.35. n.39.) It is not possible to go here into the details of this question and to investigate whether the rights left to the Sultan amounted to something more than a nudun ius. Be it as it may, art. 25. of the Treaty of Berlin was n o t , in law, a cession. Only the unjuridical tendency to grasp the political significane of the treaty made it appear as a cession. Nevertheless, when in 1908, Austria-Hungary annexed the two provinces, there was an almost unanimous consensus of writers that a clear provision of the Treaty has been broken. But, surely, if art.25 was ~~e~~ in international law ~~e~~ a cession, then the annexation was - in international law - lawful. I find it, for instance, difficult to follow Oppenheim when (p.379.I) he regards the transaction as a cession while asserting at the same time (p.394. n.1). that "such annexations are certainly ~~unlawfu~~ unlawful in time of peace and of doubtful legality in war".

Three tendencies can be ascertained in the vast literature dealing with this subject:[1] There are, firstly, a number of writers of authority (and of Statesmen), who do not attach any meaning at all to the term "mandate" used in the Covenant of the League of Nations. The expressions "mandate" and "mandatory" occurring in several sections of Article XXII of the Covenant are, according to them, a euphemism used in order to conceal the fact of a real annexation lying at the bottom of the whole system. Every extended use of analogy to the private law institute of mandate leads, so runs the argument, to ridiculous consequences and runs counter to the facts of international life. The term "mandate" has been used not only in private law, but also in commercial and constitutional law. In all these branches of law, the institute underwent substantial changes and it is difficult to see why just the private law conception of mandate should exercise a preponderate influence upon the analogous notion in international law. Not only does not the mandant - the League of Nations - choose the mandatory and fix the terms of the mandate agreement; it has not the right to terminate the mandate, or to exercise any right of sovereignty over the mandatory. The expression that the mandate is exercised "on behalf of the

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1). It is intended, from obvious reasons, to deal with this question only so far as the general proposition here put forward is concerned. Nor is it deemed necessary to refer to the vast literature on the subject, except to the most representative writers mentioned in the text.

the League" means no more than that the League has the right of supervision and of demanding annual reports from the mandatory. "The League is - as Lord Balfour said - not the author of the policy but its instrument". The mandatory power is the sovereign over the mandated territories.[1)]

This interpretation of the covenant is strongly opposed by those writers who see in the term "mandate" and in its implications embodied in the general principles of law a conclusive expression and evidence of the declared intention of the parties. The League is the lawful sovereign over the territories subjected to mandate, and it has the doubtless right to revoke it in all cases in which it deems the provisions of the mandate contract to be infringed by the mandatory".[2)].

The third group tends, naturally, to reconcile the conflicting view by assuming that sovereignty over the mandated territories is actually divided between the League and the mandatory or, what amounts to the same, that sovereignty belongs "to the mandatory" acting with the consent of the Council of the League."[3)].

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1). This view is put forcibly and with great lucidity by Rolin; Le système des mandats coloniaux, R.D.I.L.C., 1920. p.329 -363; see also Baty, Brit.Yearbook of Int Law., 1921/2, p.116.
2). A comprehensive statement of this point of view is to be found in Schuecking-Wehberg, Kommentar zur Voelkerbundsatzung,p.421-437.
3). Wright, Am. J.I.L., 1923, p.~~22~~ 698.

33. If we take into consideration the provisions of the covenant and of the individual mandates, it is difficult to see how - putting aside questions of legal theory - the sovereignty over mandated territory can ever be attributed to the mandatory, even if we commit the error of identifying sovereignty with the exercise of the right of sovereignty. The sovereignty of a state over its territory usually finds its expression in the fact that the inhabitants assume the nationality of the sovereign; that he has the right of disposal over the territory; that he is free in utilising the revenue of the territory in manner he thinks proper; that he has the unlimited right of levying troops and of conscription; that his tariffs and custom policy is free and that restrictions, if any, are conditioned by reciprocity; that the right of interference by other states in the internal administration, is, as a rule, excluded. One or two of there requirements may, it is true, be absent without destroying what is called the sovereignty of a state. But it cannot be doubted that in the absence of all of them the sovereignty of the administering power cannot be seriously maintained.

The actual powers of the mandatory according to the provisions of the mandates, to the decisions of the Council and the Assembly, and to relevant decisions of national courts.

This is just the case with the alleged sovereignty of the mandatory: The inhabitants of the mandated territory, even those of the "C" mandates, do not assume his nationality; he has no right to assign the mandate to another power, let alone to part with it in the way of cession; he must not use the

the revenue of the mandated territory for purposes outside its borders; he has no right - in the "A" mandates - to organise military forces exdept on a voluntary basis, and - in the "B" and "C" mandates - the military training of the natives, otherwise than for purposes of internal police and the local defence of territory, is prohibited; the establishment of military or naval bases or fortifications is prohibited in the "B" and "C" mandates; the most favoured nation clause - without reciprocity and in most comprehensive terms, no distinction being made between the nationals of the mandatory and those of other countries - forms part of the "A" and "B" mandates; the mandatory is not only under the obligation to supply the mandates commission with annual reports and to submit himself to an examination by the commission, but any member of the League has the right to demand a decision by the Permanent Court of International Justice in any question relating to the application of the terms of the mandate which can not be settled by negotiations.[1].

This is the law of international mandates as defined by the terms of the individual mandates, by the decisions of the Council and the Assembly of the League of Nations, and,

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1) see the Judgment and dissenting opinions in the Mavromattis Case between Great Britain and Greece before the Permanent Court of International Justice, September, 1924.

in some cases, by decisions of national courts. This is recognised law and not theoretical reasoning as to the admissibility of the application of the rules of private law mandate or trust. It is very far indeed from the recognition of the sovereignty of the mandatory. - But it would be an exaggeration to maintain that it recognises - ~~thus~~ in a manner not open to doubt - the sovereignty of the mandant, of the League of Nations. The framers of the existing mandate law - notably the Council and the mandates commission - repeatedly express the opinion that it is for the science of international law to give an answer for this question.

The authority of the mandatory as given by the covenant.

34. The science of law, in giving its answer, has to take into consideration: (a) the original source of the law of international mandate: the article XXII of the Covenant: (b) the subsequent decisions of the Council, of the mandates commission and of the competent tribunals. But it has not to supply a political explanation of the "real" character of the mandates.

It is submitted, on the ground of the preceeding considerations, that the formulations of the law of mandate subsequent to the Peace Treaties do not allow the sovereignty over the mandated territories to be attributed to the mandatory. It remains now to draw the necessary conclusions from the Covenant itself. The answer turns here upon the interpretation of the terms

"mandate" and "mandatory" used in Article XXII. If the analogy to private law mandate be admitted, then there is no doubt that alongside with the "mandatory" there exists a/corresponding "mandant", who is logically and legally the "principal", and from whom the authority of the mandatory is derived, no matter how great may be the restrictions of the authority of the mandant. In this case the ultimate sovereignty of the League of Nations over the mandated territories is a natural inference. If the analogy be rejected, then other solutions must be sought.

The juridical relation between mandatory and mandant. The general rule of interpretation.

Can this analogy be rejected? It is submitted that it can not. It has been said in connection with leases and it is one of the main propositions put forward in this monograph that "whenever in a treaty a generally accepted concept of private law is being used, the interpretation and construction of the treaty must follow the rules generally recognised as implied in this particular concept." [1]. The same rule applies necessarily to the law of mandates. There may be differences in individual systems of private law as to particular rules regulating the relations between the mandant and the mandatory, between the principal and the agent; they may differ with regard to the renumeration, to the determination of the cases in which a mandate comes to

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1) p. 93 ..

to an end, with regard to the diligence to be exercised by the mandatory, and so on, but they allagree as to the ultimate authority resting with the mandant, as to the fundamental relation of delegation between the agent and the principal. Commercial law may adapt some of the rules of this institute to special requirements of business and commercial intercourse; constitutional law may adapt it for its special purposes; but in no case is it conceivable that this fundamental relation of derivation of powers should be obliterated. If it is, then violence is done to rules of juridical logic and to the ~~accepted~~ accepted meaning of words. This is true even if our view on the inherent analogy between the subjects of international and private law is not accepted. When states use in a treaty the concept "loan", then it is inadmissible to say that the general rules governing this contract in private law are inapplicable to the respective treaty, and that the duty of repaying the borrowed sum is subject to special conditions of international law and international relations. The relation of a mandatory acting on behalf of a mandant can never be reduced to a relation of the mandant being an instrument of the policy of the mandatory.

35. It is misleading to state that "if the term mandate had an accepted meaning in international law, doubtless there would be a strong presumption that the treaty nations accepted that meaning, but it apparently has not"[1]) Private law as a source of development and adjustment.

1) WWright, op. cit. p. 694.

for if "mandate" has no accepted meaning in international law - how could it ? - it certainly has a meaning in this branch of law from which it is derived. Mandate is a legal terminus technicus. To assume that concepts of private law taken over by positive enactment - by treaty - into international law, have no meaning, or - to put it more clearly - lose their usual meaning, would mean depriving international law of a source of development without which it must for ever remain in the rough stage of a primitive law. We shall see in the course of the discussion of the cases of international arbitration, that a greater part of disputes would have to be left undecided if only such terms and concepts which have a well established meaning in international law were to be allowed to serve as a basis of decision. Positive international law is at liberty to change individual rules of a private law notion in the course of its reception and to adapt it to its specific needs and circumstances, but as long as it has not done so, the general principles of this source of law from which the conception has been derived must prevail. This proposition applies, of course, only to those cases in which a term of private law is actually used in the treaty, not where the analogy to private law is the result of construction by writers.

36. The sovereignty of the League of Nations over the mandated territories and, indeed, the admissibility of analogy the private law mandates are often contested because: (a) the alleged mandant neither chose the mandatory, (b) nor did he fix the terms of the mandate. But this fact in no way precludes the sovereignty of the League or its position as mandant.1) The League became mandant and sovereign over mandates at the moment the Council approved the draft mandates laid before it; by and through this fact the mandate agreement between the two parties has been concluded. The fact that its influence on the choice of the mandatories has been small, or none at all, has no deciding influence upon the general construction of the reciprocal relations. In a contract of sale and purchase the price is usually fixed by the parties to the contract, but it is quite conceivable that this task should be entrusted to a third person, to a bonus vir.

The League of Nations as the Soverein. The difficulties.

Those who deny the ultimate sovereignty of the mandant would find it impossible to give an answer to the question on the position of the mandated territories after the termination of the mandate, owing either to the re-

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1). Although it may be doubted whether the interpretation given by the Council to the expression "members of the League" as relating only to the Principle Allied Powers is justified by the letter of the Covenant.

vocation on the part of the League or to the withdrawal of the mandatory. But they agree that in this case the right of appointing a mandatory devolves upon the League. [1]. This is, however, possible only in the case of the ultimate sovereignty resting exclusively with the League. - Difficulties are obviously created by the fact that the writers do not think it proper to distinguish between the right of sovereignty and the exercise of sovereignty. The first rests exclusivley with the League, the second is shared - in very unequal portions - between the League and mandatory.

37. When, however, it is urged that the analogy to private law institutes of mandate must be applied so far as its particular rules have not been changed by the provision of the respective treaties, it is by no means suggested that the rules of only one system of private law, even those of Roman law, must exclusively be applied. It has already been mentioned in connection with leases that there is no justification in tying down international law to one system of private law of a given time and place. Many institutes of Roman law have been adopted by modern systems, but it would not be right to say that, while adopting the reform of an institute, they did not effect such changes in their contents as was necessary.

Limits of analogy. It is restricted to fundamental and generally accepted principles.

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1) Wright op, cit, p. 702.

This is seen, for instance, in the case of the renumeration of the mandatory: in Roman law mandatum was, as a rule, gratuitious, although - and this is often disregarded - it was not vitiated by renumeration, the promise of which was being enforced by extraordinaria cognitio of the praetor. In the German Civil Code the mandate is defined as an absolutely gratuitious contract,[1], whereas the Japanese Code, so largely influenced by the Germans, contains the provision that "a mandatory is entitled to compensation only by virtue of a special agreement",[2], a provision identical with the respective clause of the French code[3]. In the English law of agency - which although not identical with the Roman mandatum takes to a large degree its place in the system - renumeration of the agent is a rule, and the agent is not liable for the mere non-performance of that which he has undertaken to do gratuitiously.[4] The trustee, resembling in some respects the mandatory, is, as a rule, not entitled to compensation for personal trouble or loss of time, but he may be renumerated under an express or implied direction in the instrument creating the trust, or an express order ot the Court, or by an express stipulation on the subject which he has made with the cestui qui trust before he accepted the trust . 5)

The renumeration of the mandatory.

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1). par.662.
2). Art.648
3) Art.1986
4) Bowstead, "on agency", p.117
5) Halsbury, XXVIII.p.163.

It is obvious that in this - as in similar cases - no analogy to a private law rule is possible - simply because there is no private law rule of sufficient generality on the subject.

On the other hand, such rules may - and must - be applied which are, practically without exception, adopted in all systems of private jurisprudence. It is no natural law and no philosophy of law but just this uniformity of acceptance which is the empirical proof of their legal necessity. This applies for instance to the question of termination of the mandate. It is common to all systems of private law that - as a rule - both sides have the right to terminate the mandate at any time. [1]. This rights is the expression of the permanent authority of the mandant on one side and of the personal relation of confidence on the other.

The termination of the mandate.

The generality of this rule is by no means impaired by reasonable adjustments to exceptional circumstances: that for instance, the mandatory is not entitled to terminate the mandate at a time exceptionally unfavourable to the mandant, [2]; that - especially in the English law of agency - the authority of the principal is irrevocable where the agent has acquired a legally recognised interest in the continuation of the contractual relation. [3]

Modifications of the general rule.

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1) German code par. 671 French code art. 2003, Japan code art. 651.
2) French C. 2007.
3) Bowstead op. cit.

These exceptional cases are not without importance in relation to international law mandates. In article 22 of the Covenant and in the mandates approved by the Council, the mandate is handed over to the mandatory powers for a definite purpose and - impliedly - for a definite period. This is especially clear in the "A" mandates, where the advice and assistance rendered to the mandated peoples is limited "until such time as they are able to stand alone". It would seem therefore, that, until the time of ther performance of the task entrusted to the mandatory, the right of the League to revoke the mandate is limited to cases of breach of the provisions of the mandate on the part of the mandatory. Similarly - owing to the same reason - the right of the mandatory to withdraw would be restricted to those cases in which the continuation of the task is fraught with great danger for his independence or safety. In both cases it would be for the Permanent Court of International Justice to state whether the alleged facts are objectively existent or not.

This construction of the international law mandates reaches, in close analogy to the corresponding conception of private law, in many respects the same result as the theories which oppose this way of interpretation.

It differs from them by the fact that in recognition of the fundamental legal relation between mandate and mandatory, between agent and principal - it places the ultimate sovereignty in the League of Nations. It avoids thus the necessity of ignoring the declared intention of the parties and of reducing the termini technici used by them to a mere form of speech. It is based essentially on the consequence of the general proposition put forward in these pages, but it is, on the other side, corroborrated by the actual development as expressed in the terms of the individual mandates, in the decisions of the Council and the Assembly of the League, in the decisions of the mandates commission and in those of national courts.

Two other instructive instances of interpretation of a conception of private law used in a treaty are contained in the Alabama arbitration treaty ("due diligence") and in the treaty providing for the British Guiana boundary arbitration (prescription). They will be discussed in the chapters dealing with the respective arbitrations.

"The civil law, like the English and American common law, may properly be resorted to as a text of the intrinsic value of the rules of internationa law...
Fenwick, Internationa Law, p.246, n.1.

CHAPTER IV.

Private Law Analogies outside Treaties.

38. The investigation into private law analogies outside treaties has a double purpose: It must be shown, firstly, in what manner and to what degree a particular notion of private law has been used; it must be examined, on the other side, how far the use of private law did, in a particular case, prove to be an ordering element in the development of the respective part of international law.

The influence of private law on the theory and practice of acquisition of territorial sovereignty.

The part of international law upon which private law has engrafted itself with the greatest force and durability is that relating to acquisition of territorial sovereignty over land, sea and territorial waters. This influence dates from the formative period of international law, and it did not cease until to-day, although it is now obscured by the reaction against the so-called patrimonial conception of state.

"Without some acquaintance both with the language and doctrine of the Roman law upon the subject of possession and dominion, it is impossible correctly to understand and justly to appreciate the writings of commentators upon international law" (on the subject of acquisition of territorial sovereignty) - says Phillimore[1], giving thus

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1) Vol.I. p.327.

expression to an almost unanimous opinion of writers[1]. We have to enquire whether this influence is of a merely historical importance or whether its essence is preserved in the international law of to-day.

The requirement of form.

There are two essential principles, both taken from Roman law, but inherent in every system of private jurisprudence, which form an integral part of the international law to-day. There is, firstly, the principle that the f o r m s of acquisition of territory are regulated and defined by international law. There is a l i m i t e d number of modes of acquisition of territory, although it may be a matter of dispute whether accretion or subjugation or prescription form a special mode of their own, or ought to be included as sub-divisions in other groups[2]. But international law will not recognise any acquisition of territory accomplished outside the accepted forms. Not every acquisition is lawful acquisition. The dictum "Besitzstand gleicht Rechtzustand" (possession is law) has no validity in international law[3]. Mere force unaccompanied

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1) Oppenheim Vol.1. p.374; Westlake vol.1. p.98; Twiss Vol.I.p.193.

2) With regard to accretion: Jerusalem: Voelkerrechtliche Erwerbsgruende, p.418; with regard to subjugation: Pradier-Fodéré, Vol.II. p.392; Twiss vol.I.p.227. (title by conquest resolves itself juridically into title by cession); Fauchille-Bonfils, 1912, p.352. (subjugation confers no title at all; prescription, see below).

3) That mere facts are of constituitive value in acquisition of territorial sovereignty is maintained by Jerusalem, op.cit; Liszt p.157; Gareis p.88.

by a legally recognised form of acquisition does not confer a legal title. Even the title by conquest is regulated and well defined by international law[1].

The second principle, dominating the theory and practice to-day not less than a hundred or two hundred years ago, is that based on the Roman law rules of possession, on the connection of animus with corpus, of the bodily act with the mental attitude. From Grotius[2], Vattel[3], and Bynkershoek[4], through innumerable disputes accompanying the discoveries of new parts of the world to the articles 34 and 35 of the Congo Conference of Berlin which gives a modern formulation to the requirement of "corpus" -there is the same principle underlying the theory and the practice of original acquisition of territory. It was of the greatest importance as an ordering element in the development of international law and international relations in the period following the discovery of the New World.

The connection of animus and corpus.

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1) I say is - although it should, perhaps, be said: was. It appears that Article 10 of the Covenant of the League - not so much by its actual contents as by the interpretation given to it by the sub-sequent resolutions of the different organs of the League - abolishes the title by conquest altogether.

2) L.II.c.II.s.2; L.II.c.VIII s.3; see also passages in "mare liberum" quoted below.

3) I. s.208.

4) de dominio maris, Cp.I.

39. States and writers were being confronted in those turbulent days of partition by two opposing principles: the principle of papal grants, of title given by pure discovery, of extensive rights given by the so-called contiguity; and by the private (Roman) law principle of the connection of will and fact. What principle could oppose the rights granted in 1493 by the Pope Alexander V to Ferdinand and Isabella of Spain over "all land further westthan a line drawn from north to south, a hundred leagues west of the Azores of which no Christian power had taken possession before Christmas day 1492", and the rights of Portugal over the lands east of that line? or the exaggerated claims of fictitious discovery? or the conflicting rights of contiguity stretching so far as imagination or scant geographical knowledge reaches? The Oregon question, the Louisiana dispute, and the British-Venezuelan Guiana arbitration afford ample evidence that even so late as the nineteenth century the question did not leave the field of controversy[1]. Now, says Vattel: "... when explorers have discovered uninhabited land through which the explorers of other nations had passed, leaving some sign of their having taken possession, they have no more troubled themselves over such empty forms

The historical function of the "animus and corpus" principle.

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1) For references to these disputes, as well as for a lucid exposition of the question s.Hyde, Vol.I. pp.164-6.

than over the regulations of Popes, who divided a large part of the world between the crowns of Castille and Portugal."[1] This sharp statement, undoubtedly written under stress of circumstances accompanying the settlement of these questions among nations, clearly shows how great was the need of a comprehensive rule to master the facts of the international life of the day and to command the respect of navigators and statesmen in a greater degree than the regulations of the Popes and the principles of fictitious discovery. This rule has been supplied by the private law of Rome, by the private law of possession and of property. Its was not often that English Admiralty judges had recourse to Roman law, but Lord Stowell had, it seems, no hesitation in applying it to questions of territorial property. He sais in his judgment in the Fama[2]: "All concur ... in holding it to be a necessary principle of jurisprudence that, to complete the right of property, the right to the thing and the possession of the thing itself should be united ... this is the general rule of property and applies, I conceive, no less to the right of territory than to other rights." And - seventy years later - a fairly positive writer like Twiss regards it as sufficient to repudiate the claim of a state to territory on the ground of mere discovery, by the simple statement

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1) B.I.s.208.

2) 5.C. Rob.Adm. Rep. pp.114-16.

that it is neither "recognised in the Roman law nor has it a place in the system of Grotius or of Puffendorf."[1] 2) It was only natural that Roman law could not deal with a l l the contingencies arising out of the discovery of the New World, but this is of minor importance in comparison with the weight of the service it has rendered.[3] It is firmly embedded in the international law of to-day and the great majority of writers do not hesitate to use the terms of corpus and animus in order to explain the present law of occupation as a title for acquisition of territorial sovereignty. It is, therefore, inaccurate to assume that the adoption of this private law principle is solely a result of the then prevailing patrimonial conception. It has been largely called into life by urgent necessities of international intercourse, and it was owing to these necessities that a close analogy of rules has been established.

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1) p.197; The Oregon Question p.156.

2) The Duke of Wellington demanded repeatedly, in the course of his negotiations with Russia, to be supplied with the opinion of the "civilians" on the legal questions connected with the claims of Russia. This, it seems, has been done, because he writes in a note to Count Nesselrode, in October 1822, referring to the claims put forward in the Russian Ukase of 1821: "Thus in opposition to the claim founded on discovery... we have the undisputable claim of occupancy and use for a series of years which all the best writers on the law of nations admit is the best founded claim to a territory of this description" (Appendix to the case of the U.S. in the Alaskan arbitration pp.113-17).

3) This is, quite unjustly, disregarded by some writers, for instance by Fenwick, p.221; Taylor p.268; comp. Oppenheim I. p.385.

40. There is another reason which caused this fundamental part of the private law rules of possession to become firmly rooted in international law. The reason is simply this, that there exists, after all, a definite analogy between territorial sovereignty and property in private law. I say: analogy, not identity. There was an identity of the two notions in the time of the patrimonial theory. To-day, the publicists, quite rightly, reject this identification as antiquated and as unworthy of our time and of our democratic institutions[1]. But it is often forgotten in t his reaction against patrimonial ideas that both institutes are nevertheless analogous. Not so much by the fact of the object of both being transferable, as by the absolute and exclusive right of the entitled subject of law over territory (in the case of a state) and over the object of private property[2]. They belong, in juridical logic, to the same class of rights; they differ only in the object of the right. The same piece of land may be under the territorial sovereignty of one state and under the private property of

The analogy between sovereignty and property.

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1) Fiore: Diritto intern.publ.3rd ed. par.863.

2) Comp.for instance, the definition of the French Code,Art.544: ownership is the right of enjoying and disposing or things in the most absolute manner; or that of Blackstone: (ownership consists in the free use, enjoyment and disposal of all ... acquisitions without any control or domination) Comment.vol.I. p.138.

another; treaties exist to this effect[1]. But it is futile to deny that both rights, although they differ in their contents, are similar in their legal relations - which alone constitutes the basis of analogy[2]. Is it not suggestive that there is scarcely a writer who, notwithstanding the undoubted rejection of the "patrimonial" way of thinking, doest not use the expressions "international property" and "rights of property and jurisdiction"?

This intrinsic analogy explains why international law relating to acquisition of territorial sovereignty has retained not only the classification but also many rules of the private-and especially Roman - law of property and possession. The division into original and derivative acquisition has been retained, and all the three Roman law modes of original acquisition: occupatio, accessio, praescriptio - have been taken over. - The case of occupation has been already dealt with. Now, it is generally recognised that in the case of accretion the rules of Roman law have remained unchanged until to-day[3], although they have

Occupation. Accretion.

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1) Heilborn: System des Voelkerrechtes, p.30.

2) Only in one case would we be obliged to abandon the analogy: if we agreed to regard territory not as an object of the rights of the state, but as an element of the state. This construction adopted by Fricker (von Staatsgebiet, 1867) has been generally rejected.

3) Fenwick p.229; Taylor p.273; in detail, Phillimore I.p.342.

been extended from fluvial accessions to those arising on the sea-shore[1]. Not later than 1911, the Roman law terminology and Roman law rules on this subject have been used, in the Chamizal arbitration between the United States and Mexico, not less freely than in the formative period of international law.[2] That many of these rules are simply the embodiment of common sense does not alter the fact that they have been taken from private law.[3] [4]

41. The influence of the private law doctrine of intention coupled with actual possession as an essential condition for acquisition of territorial sovereignty was not, however, limited to acquisition of sovereignty over land. It is generally overlooked

The influence of private law upon the development of the conception of the freedom of the sea.

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1) comp. Lord Stowell's Roman law reasoning in the Anna.

2) see the award in Am. J. I. L., 1911, p.785.

3) Hall p. 123; Triepel: p.225; Bluntschli. p.179.

4) The scope of this monograph does not permit an investigation into the influence of private law on the development of the institute of cession. It is clear that cases of acquisition of territory by gift, exchange, or testamentary provision are not likely to occur now to any noteworthy extent, but this cannot be said about sales, which occurred frequently in the second half of the nineteenth century (Oppenheim I.p.379); and as late as 1916 there took place the important cession by Denmark to the U.S. of "all territory, dominion, and sovereignty, possessed, asserted or claimed by Denmark in the West Indies ..." in consideration of twenty-five million dollars". (s. the convention of New York, of August 1916, printed in Am. J. I. L. supplement 1917, p. 53a). Not only dominion but also sovereignty is made object of the sale; art.II provides - in a quite private law terminology - that "Denmark guarantees that the cession made by the preceding articles is free and unencumbered by any reservations, privileges, franchises, grants or possessions..."

how decisive an influence this doctrine played upon the creation and the development of the conception of the freedom of the sea. It is not too much to say that it has been the chief legal argument - in contradistinction to arguments drawn from natural law. The "Mare liberum" Grotius. bristles with quotations from the Digest and the Institutes showing the necessity of actual occupation in order to obtain a clear title of sovereignty." [1] Says Grotius - combining the legal with the natural argument:- "If any part of these things (sea or the shore) is by nature susceptible of occupation, it may become the property of the one who occupies it only so far as such occupation does not affect its common use" [2]; and even moreclearly: "the nature of the sea, however, differs from that of the shore, because the sea, except for a very restricted space, can neither easily be built upon, nor enclosed ... nevertheless, if any small portion of the sea can be thus occupied, the occupation is recognised". [3]

The argument that occupation and possession is necessary for acquisition of sovereignty has been taken up by Bynkershoek [4], who, however, held that the sea c a n Bynkershoek be actually occupied by the maintenance of an efficient fleet. He supplies (in chapter 8) ample

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1) Mare liberum, translation of Magoffin, pp.12,13,15,29.
2) pp.30. ibid. 2
3) p. 31. ibid.
4) De dominio maris dissertatio, Magoffin's translation .1856.

"evidence by which dominion over the sea is proved concerning the nations which have gained possession of the sea"; but he denies that any European nation of this time has actually acquired such a possession[1]. "We have said above that no sea is held to-day under the dominion of any prince, and we have proved it according to the rules of ownership."[2]

However, he unreservedly agrees with Grotius so far as the vast ocean is concerned: "The fact is certainly patent that this is not occupied and clearly cannot be occupied; for all the ships of the ~~rules~~ world would not in any way be sufficient for holding it in possession ... wherefore no one can justify a legal individual right over it." 3) Vattel also accepts Grotius' argument[4].

It is indivative of the great influence exercised Ortolan by the private law doctrine over the theory of the freedom of the sea, that as late as 1856, a time when the principle of the freedom of the sea has become generally recognised, Ortolan used in his well-known treatise on the law of the sea[5] the same argument on which the founder of international law availed himself over two hundred years ago. He quotes Savigny's treatise on possession[6], and he says: Le fait sans

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1) Chs.IV, V, VI.
2) p.60 ibid.
3) p.77 ibid.
4) B.I s. 208.
5) Règles internationales et diplomatie de la mer,35d.ed.1856.
6) p.126-7 ibid.

l'intention ne suffirait pas pour constituer cette possession, encore moins l'intention sans le fait. Il faut l'un et l'autre réunis[1]. Décuplez, centuplez toutes les flottes du monde réunies, mettront-elles la mer à la discrétion d'un peuple...? La mer n'est pas susceptible de tomber dans la propriété des hommes, parce que la mer ne peut pas être possédée"[2]. Wheaton adopts the argument[3] - like many other writers before and after him[4]. Hall is only giving to the doctrine a modern form when he states: "It being recognised that states are unable to maintain effective control over large spaces of sea, so as to be able to reserve their use for themselves, it is a principle of international law that the sea is in general insusceptible of appropriation as property."[5] Hall

42. But while this private law doctrine - coupled with the natural law argument - succeeded in finally silencing the claims to sovereignty over seas, it led, on the other hand, to the establishment and the acceptance of the legal rights of states over their territorial waters. It was Bynkershoek who laid the foundations of the modern conception of territorial waters. But he was only taking up Grotius' arguments of the necessary connection between the possibility of occupation and the right of appropriation

And on the conception of territorial waters.

1) ibid. p.126-7. Règles internationales et diplomatie de la mer.
2) p.127 ibid.
3) Dana's ed. p.269.
4) s.Hall, p.153, p.1.

of any part of the sea. "If any small portion of the sea can be thus occupied, the occupation is recognised" says Grotius. He adheres to this view in many passages of the "Laws of War and Peace"[1]. Bynkershoek follows closely Grotius' legal argument, although - as observed - he does not agree with him in the application of the rule "What we have set forth thus far concerning the ownership of the sea,... is the right solely from the origin of ownership and from the rules for acquiring or losing a possession which are admitted by the law of nations. And these rules, for the most part, we find written in the civil law of the Romans ...[2] Hence the rule of the extent of the maritime belt" as far as Cannon will carry; for that is as far as we seen to have both command and possession;" 3) "For there can be no question that he possesses a thing continuously who so holds it that another cannot hold it against his will... for there can be no reason for saying that the sea which is under some one's man command and control is any less his than a ditch in his territory." 4) It is a long way from Grotius and Bynkershoek to a modern writer like Westlake, but it is interesting to know how the latter supports the resolution of the Institute of International Law in favour of the existence of a territorial sea

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1) Mare liberum p.3.
2) De dominio maris p.53.
3) p. 44. ibid.
4) p.43.ibid.

subject to sovereignty by the argument "that occupation which is the ground of sovereignty is possible in the case of the territorial sea".

43. It was about two hundred years later that the same private law argument played again an important part in the theoretical battle concerning the acquisition of territorial sovereignty over the air. "L'air, par sa nature même, ne se prête à aucune appropriation; il ne seurait être occupé d'une façon réelle et continue; il ne peut donc être un objet de propriété."[1] A thing which cannot be occupied cannot become an object of property or sovereignty. This principle of the freedom of the air, (subject to the right of self-preservation) - adopted by the Institute of International Law in 1911 - has been rejected by the practice of states and by conventional international law.[2] The principle of aer clausus obtains to-day with undisputed force. But it would be too much to say that the aerial law of to-day is incapable of further development in the direction of the ever-growing freedom of the air.

And on the sovereignty of the air.

These instances show the direction of the influence

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1) Report of Mr.Fauchille before the Institute of International Law, Annuaire 1902, p.32; see also report of Nys, ibid.p.104.
2) The Air Navigation Convention of 1919 (Cmd.670).

1) This connection is frequently concealed behind the changes that have taken place in political and legal theory as a result of the rejection of the patrimonial theory. It would be of interest to trace the influence of the conception of property upon the development of that of political sovereignty. Without historic and juristic aid of the idea of

exercised by private law on the theory and practice of acquisition of territorial sovereignty. It is suggested that in all these cases an ordering principle of great practical merit was represented by the use of analogy. It is not suggested that the reppective principles are valid to-day as rules of private law. They have become an organic part of international law and are valid as such. But their creative influence in the past is not of mere historical value; it bears witness to the fact of the intimate connection of both branches of law, a connection quite independent of the fate of the patrimonial or other conception. - It remains now to deal shortly with two doctrines connected with the acquisition of territorial sovereignty: prescription and international servitudes.

44. Prescription is, in international law, not only a mode of acquisition of territorial sovereignty. It may - and has been - invoked in other cases where the lapse of years was deemed sufficient to create the presumption of a legal title or to bar a claim. It is especially in the field of international arbitration that the institute of prescription is gaining - with one exception to be

Prescription

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property - says Holtzendorf, vol.II.p.228 - and its application to the territory of the state it would not have been possible for the old „theorists to discover the principle of political sovereignty. s.also Merriam: History of the theory of sovereignty since Rousseau. p.21-24, and Grotius: L.I.C.III.Ch.18.

discussed later - [1] unqualified recognition[2]. Its importance is increasing with the growing intercourse between states. It has been recognised by almost all writers on international law. Even those publicists who are usually quoted as rejecting prescription, as Holtzendorf[3], Ullmann[4], Carles[5], agree that although it does not create the title, it allows the presumption of such a title - a very theoretical difference.

Real opposition against this private law rule could only come from this side which stresses the fundamental difference between international and private law. In a community in which - unlike that governed by private law - force constitutes right, in which actual possession - regardless of time - confers a title, in such a community is the institute of prescription unnecessary. If no possession is illegal, if every possession is lawful, then, clearly, there is no need for a jural principle meant to legalise an originally illegal position. This is, for instance, the view of Liszt who speaks of "the direct law-

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1) The Pious Fund Case, s.ch.7.
2) Ralston, International arbitral law and procedure.p.263-273.
3) Vol.II. p.255.
4) par.92.
5) p.88.

* Comp. Politis, La prescription libératoire en droit international, R.D.I.S.D.G.S.1925, pp.3-10. - It does not seem that a recent article of Mr.Silbey (The Story of the Manilla ransom, 1762, and Britain's debt to the U.S., Journal of Comparatif Legislation and International Law, Febr.1925, p.17 et seq.) takes account either of the opinion of the overwhelming majority of writers or of the practice of international tribunals (for the

creating influence which mere force, especially conquest, has on international law."[1] This ~~is~~ the opinion is almost generally rejected, but it is nevertheless an instructive instance: It shows from what theoretical sources the typical opposition to private law arises.

45. Closely connected with acquisition of territorial sovereignty is the question of state servitudes. It is, naturally, impossible to deal here with any other aspect of the problem except that bearing upon the subject under discussion. It may, however, be stated in this connection that no other conception has brought private law analogy into more disrepute than international servitudes. The reason for it is, perhaps, the attempt on the part of the majority of the publicists to embrace by it all, or almost all, restrictions of sovereignty - not merely those relating to the territory of the state as such, or to the territorial sovereignty in general.[2] State Servitudes.

Pious Fund case s.p.). That the Hague Conferences do not mention the rule is hardly an argument for the contention that prescription is no longer recognised by states. As to compound interest (the bill presented by the author amounts to 2,187,000,000 £) see p. n.

1) p.156; s.also Jerusalemop.cit.

2) For an extensive literature on the subject s.Bonfils-Fauchille par.339; for an exceedingly long list of international servitudes - including, for instance, international rivers, s.Fenwick p.263; Hyde (Vol.I. par.195) classifies as an international servitude the grant by the U.S. to Gr.Brit. in 1871 of freedom of transit in the form of an exemption from payment of custom dues for certain classes of goods. - In addition to authors enumerated by Oppenheim (I.365) the

The confusion which resulted from this lack of moderation in the application of analogy tended to deprive it of any value, even in those cases in which the analogy to private law servitudes seems quite justified.

The consequences of the doctrine

There would be no harm in the classification of this or other restrictions as a servitude if no practical consequences were attached to such a classification, but - obviously - there are such consequences. The classification as servitude naturally implies that the right is a real one, that it is not affected by the change of sovereignty. International law is called, in these cases, to choose between two alternatives: (a) should every restriction of territorial sovereignty for an unlimited period of time be regarded as a servitude, that is as a permanent obligation running with the land, as a real right, or (b) should such restrictions only be regarded as servitudes which have been expressly described as such by the contracting parties, or the real character of which has been expressly stipulated in the respective treaty. There is, in the case of the first alternative, a distinct possibility that a construction is being put on a declaration of the parties which is by no means in accordance with their intentions.

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following oppose the institute; Nys, II.p.320; the Louter I.336; Niemeyer p.104. Strupp.p.77; (partly) Hydel 272-7; Foulke I.p.331; S.also the opinion of the intern Commission of jurists (Professors Larnaude, Struycken, Max Huber) appointed by the Council of the League in the question of the Aaland Islands (Off.Journ. Spec.Suppl.N.3, Oct.1920) and the judgment of the Permanent Court of International Justice in the Wimbledon case.

In order to avoid this, international law would have to demand that in all cases where the parties intended to create an international servitude the respective stipulations should leave no doubt as to their intention. This has been adopted in a striking manner by the Tribunal in the North Atlantic Fisheries arbitration of 1910.

The Fisheries award examined.

It is commonly accepted that the Hague Court rejected the institute of servitudes in international law. This, however, is by no means the case. The Court rejected it as a matter of construction by lawyers, but it was prepared to accept it if so stipulated by the parties. "It could therefore... be affirmed by the tribunal only on the express evidence of an international contract." 1) This brings us to the following consideration: It is quite possible - and has in fact been done by the Hague tribunal - to adopt the conception of servitudes without adopting the so-called doctrine of international servitudes. By rejecting the doctrine, we reject the legal presumption in favour of an international servitude having been created in a particular case; by adopting the conception itself, we

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1) The award of the Tribunal: Scott, reports p.160; that such treaties are possible and actually occur may be seen for instance from the Treaty of October 1901 between the U.S. and Gr.Brit.which provided: "... no change of territorial sovereignty, or of international relations of the country or countries traversed by the beforementioned canal shall affect the general principle of neutralisation or the obligation of the High Contracting Parties under the present treaty".

state that, should the parties avail themselves expressis verbis of this conception, international law will recognise it and will give effect to the will of the parties by the application of rules generally recognised as applicable to this concept. The private law analogy is here fully restored.

There is an additional reason why it seems difficult to adopt international servitude as a matter of construction or presumption. The construction of a treaty as a servitude means not only that the right connected with the servitude is a real one, in accordance with the maxim res transit cum onere. It means, in the case of positive servitudes, the existence of jurisdictional rights exercised by the grantee in his own name. The North Atlantic award recognises it expressly. So does the Cologne Court of Appeal in an outspoken decision regarding the state servitude enjoyed by Holland: "... This means ... not what might be termed a mining concession of the Dutch Government granted by Prussia according to civil law, but the exclusion of certain sovereign rights in the ceded parts ... a sort of international servitude has arisen by which Holland as a state is entitled, now as previously, in the matter of this mine to exercise its own legislative authority and police and supervision, that is, it has real sovereign rights with respect to the object situated within the territory of the

The further analogy to a real right.

foreign state (Ullmann: Voelkerrecht, pp.320)"[1].- Grave doubts may therefore be expressed as to whether a construction resulting in these far-reaching consequences is permissible - although it is being denied by some publicists that the consequences of international servitudes are as far-reaching as has been claimed in the above-mentioned instances[2].

It is not intended to pronounce here an opinion whether it is necessary for international law to retain this conception. It seems that the confusion caused by its exaggerated application to almost all restrictions of sovereignty has become so great, that some publicists prefer to dispense with it altogether and to put forward alternative constructions intended primarily to grasp those cases in which an international obligation continues to be attached to the territory notwithstanding any change of sovereignty. The fact, however, that the conception has been introduced, that it has been taken over from one generation of publicists to another, and that it is still being retained by a large number of writers[3], is indicative of the great attractive force of private law even in those cases in which its application admittedly offers considerable difficulties.

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1) For the award s.Am.J.I.L., 1914 p.907.
2) Oppenheim I.p.366; but see Clauss,Scott's translation p.165; Calvo,Dictionnaire pp.215; Heffter p.106; Heilborn p.30-4.
3) see f.o.Hatschek,Voelkerrecht 1923, p.154; Fenwick pp.261-283.

46. There is, perhaps, no instance more typical of the relation between private and international law than that of state succession. The notion of state succession has been created and developed in close connection with the Roman and private law conception of inheritance and succession. From Grotius to the most recent writers there is no hesitation in applying, in principle, the private law analogy to the solution of the question as to how far, in the case of change of sovereignty, the rights and obligations of the former sovereign are taken over by his successor. This is the prevalent opinion[1]. It is admitted also by those who - attacking the use of private law and international law - oppose the predominant opinion in the question of succession of states[2], that the analogous principles of private law contain, quite apart from their ethical value, an ordering jural principle essential for the well-being of every civilised society.

State succession.

It is really not important whether succession takes place quoad iura only, and not also quoad personam - although much is being made of this distinction by international publicists[3].

International Law or the will of the state the basis of succession

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1) For a concise history of the doctrine s.Keith, p.II,3; Huber, p.9-17.
2) Schoenborn p.101.
3) The line of distinction drawn by Huber (p.18,19) is of a theoretical rather than practical importance: "~~in Roman law it was the transmission of the personality of a deceased person to one or more persons called heirs (the universal successor)~~

The fundamental fact is that there is a substitution and continuation of rights, that the legal stability and the acquired rights are not destroyed by the physical end of the subject of law. This principle is one of the basis of every legal order, and it was only natural that the general consensus of publicists incorporated it into their systems. It is, as a rule, followed by the practice of states. The problem is in international law undoubtedly the same as in private law: whether the legal order, the international legal order, is strong enough to regulate the facts arising out or a change of sovereignty, or whether it takes place in a legal vaccum; whether the new sovereign acquires rights because it pleases him to take them, or because international law confers upon him the title; whether the new sovereign is bound by the obligations of the old, because he finds it convenient to be so, or whether he is bound by international law; whether, to put it shortly, the so-called succession in international law is regulated by the discretionary will of sovereign states or by law. The first view will regard the private law analogy as inadmissible; the second adopts it unhesitatingly.

The "will" theories.

In the theory objecting to the application of private law the process accompanying the change of sovereignty is a question of fact lying completely

outside the sphere of law. It is the theory of Gidel and of Keith, developed afterwards in its logical consequences by Cavaglieri and Schoenborn[1]. "Another power attacks a state, defeats its force, occupies its seat of Government, appropriates its revenue, annexes it, counts its citizens as its nationals, and legislates for it. What takes place is substitution of authority; there is a break with the past. The state seizes whatever think of value it can obtain, but it certainly did not conduct the war for the sake of assuming onerous obligations"[2]. Neither is the position different in the case of cession. ~~Neither~~ there is no legal obligation to take over either contractual debts, or debts secured on local revenues, or even such real rights as local servitudes of passage - although the last-mentioned may be taken over as a matter of expedience[3]. Gidel[4] supplies the theoretical construction for this assertion: The state ceding the territory abandons its rights over it, and the acquiring state establishes over this territory, now free from any other domination, its own authority in a manner in which it pleases, and only with such restrictions as it thinks proper. It is not possible to apply to international law the private law rule nemo plus iuris in alterium transferre potest quam ipse habet. It is only a consistent upholding of the assertion that there is a complete break of legal continuity when Schonborn declares that the rule res transit cum suo onero has no

1) Keith, the theory of state succession, 1907; Cavaglieri, la dottrina della successione di stato a stato e il suo valore giuridico, 1910; Schoenborn, Staatenzukzession, 1913; the same views are expressed by Gidel, in 1904 (Des effets de l'annexion sur les concessions.)
2) Keith, p.5.
3) p.4.ibid.
4) [illegible]

application in the case of state succession[1]. Cavaglieri draws only the inevitable logical conclusion from this theory when he declares that the problem is not one of international law but of municipal regulation which should, however, be guided by the principle that the recognition of the obligations of the former state is "L'espressione di un sentimento di equità e di giustizia cosi elementare che e logico che essa sia reconosciuta, nell'uns o nell'altra forma, da tutte le legislazione moderne."[2] These views are rejected by an almost unanimous opinion of writers, but they are illustrative of the consequences to which leads, in some cases, the total emanipation of international law from anslogy to private law.

47. The basis function of law is protection of acquired rights. They do not suffer - as a rule - as a result of the death of the individual. International private law contains rules safeguarding rights acquired under foreign municipal law; the execution of foreign judgments is, subject to slight modifications, a recognised rule. While preserving the peculiarities and the individuality of the different systems of municipal law, the international community gives thus expression to the unity of law and to its continuity. Only in the case of states being mere

The international order as securing the continuity of rights.

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1) p.47.p.cit.
2) p.135 op. cit.

agencies of force and of their sovereignty being a "will" unfettered by a legal rule, can this recognition of acquired rights be disregarded by events of international politics. It is not only the sense of right that is prima facie violated in this case, it is the sense of a legal order overstepping the borders of state that is being violated. The death of the individual and the changes in state sovereignty are - in relation to legal rights and obligations - legal crises which may be either regulated by law or decided by events lying outside it. Private law regulates these crises by the rule of succession; international law, by accpeting the broad principle of private law, adds to its character as a legal community. It is not on a plane lying outside the law that the succession of sovereign states takes place.

Succession and revolution.

This is made clearer by the following consideration: There is no writer, so far as I know, and no theory, which does not accept it as a truism that the change of the internal constitution of a state, in the way of revolution, does not affect the duties of the state as an international person. And yet, there is no legal continuity between the old and the new constitution, between the old and the new state. It originates in a revolutionary act, from which - and from which alone - is derived the legal validity of the new order. From the point of view of the new state there

is no legal obligation whatsoever for regarding itself bound by the acts of its predecessor who, legally, does not exist for him. But his duty is recognised by international law - independently of the will of the new state. It is the international legal order which is the bridge between two facts otherwise totally disconnected. It is international law which fills the void and provides for a succession of rights and duties[1]. The same applies to the rights and duties of states in cases of changes of sovereignty. A legal order - international law - is the link securing legal stability and recognition of acquired rights.

It is not an exception to this broad principle of private law that political treaties do not pass - because they are iura personalissima, which by the very nature of things, and also by private law, cannot pass to its successor; and the private law rules governing the passing of obligations for torts[2] and

The private law principle not a ri[illegible] one.

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1) comp.Kelsen p.288; the contrary opinion would be, in relation to state succession, that the changes which take place are outside the sphere of law. This standpoint is again given very clear expression in a recent article by Cavaglieri (Note in materia di successione di Stato al Stato, Rivista dirit.intern. 1924, p.33: "Tra l'estinzione del vecchio Stato e l'apprensione dei suoi elementi constitutivi da parte di uno Stato nuovo o già preesistente vià un hiatus, che il diritto è incapace di colmare".

2) Sir Cecil Hurst, British Year Book of International law 1924. p. There is no need to start, in this case, from an alleged inapplicability of private law. The rule actio personalis moritur cum persona is well recognised in private law, especially in actions ex delicto; s.also Keith, p.75.

the benefit of inventory[1] may suitably be used without destroying in the least this broad principle.

The practice of states.

There is no doubt that the practice of states follows, on the whole, the principle of succession not only in rights, but also in obligations; but there are remarkable exceptions showing the contrary. Treaties, for the most part, affirm the principle, but some deny it[2]. It is a vicious circle that is involved in the query whether treaties affirming the principle conform to the rule, or state the exception; or whether treaties which do not admit succession, do it only as an exception to a generally recognised principle. Clearly, if unanimity is the test of a customary rule, then no customary rule of international law has yet been evolved on the question of state succession. But the fact that it is being accepted by the growing practice of states[3] and by the vast majority of writers; and that

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1) Adopted by Westlake, vol.I.p.76, whose statement of the theory of succession is in full accord with the general proposition put forward on these pages. "e discards the argument that, in contra-distinction to private law, it is the will of the state which is creative of the respective rights in the case of change of sovereignty, by the simple statement that "a private successor is not bound to accept the succession, so that he also is not bound to accept the succession, so that he also is- comes in by his own will", s.also Coll.Pap.ch.8, pp.476.

2) s.Keith p.2.

3) This is admitted also by Schoenborn (p.11,100) who, however, explains it by the necessity of taking into consideration the interests of the neighbours and of the annexing state itself.

even those who call into doubt its existence as a rule of law, accept it as a rule dictated by justice, equity and the necessities of the intercourse of nations[1], proves, that in this as in many other cases, the principles of private law, far from fettering the development of international law, are an important element in its development to a higher stage of law.

48. This is shown, with still great clearness, in the theory and the practice of state responsibility for international delinquencies. Is an international delinquency committed by the very fact of the legitimate interests of one state having been injured by another? Or is it, broadly speaking an essential condition for the existence of such responsibility that wilful or malicious intent, or culpable negligence should be proven to the injuring state? Here again we see a repetition of the usual story: the adoption of the private law principle in the formative period of international law, its beneficial effect upon international relations, its acceptance by the common opinion of writers and the practice of states; and - lastly - its rejection by a number of positivist writers in the name

The theory of state responsibility.

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1) Hyde I.p.205; it may be noted that other institutes of Roman law are used in connection with state succession, i.e. the in rem versio theory by Bluntschli, Pradier-Foderé, Appleton; Cavaglieri (p.135) has recourse to the principle "che nessuno debba indebitamente arricharsi (condictio sine causa); the opponents of the institute do not hesitate to mention the "usucapio pro hedere lucrativa" (Schoenborn p.103, n.5.).

of the special character of international law as against a misleading private law analogy.

It was Grotius who introduced this conception of Roman law into the theory of international law. "That anyone without any fault of his own, is bound by the acts of his agents, is not a part of the law of nations"[1] "a civil community, like any other community, is not bound by the act of an individual member thereof, without some act of its own, or some omission."[2] This "fault of his own" lies in the "patientia" and "receptus"; in the "sharing in the crimes" by "allowing" or "receiving"; it is the Roman law doctrine of liability as dependent on culpa; it is - subject to some scanty exceptions - the foundation of the doctrine of liability in the most municipal systems[3]. There are few examples of the theory and practice following with such a degree of unanimity in the footsteps of the founder of international law as this private law principle of culpability in relation to responsibility of states[4]. The opposing theories do not arise before the end of the last century.

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1) L.II.c.XVII.s.20.

2) L.II.c.XXI. s. 2.

3) For instance the well-known rule in Rylands v.Fletcher; compare Pound, Interpretation of Legal History, 1923.pp.106; also Kolin, Responsabilité sans faute, R.D.I.L.C., 1910.

4) For references, s.Schoen, p.9-10. and Strupp, op.cit.

The great historical service rendered to international law by the introduction of this principle can be judged appropriately only by taking into account the state of affairs to which the culpa theory was originally opposed. It was especially the German doctrine of reprisals, of collective responsibility for wrongs done to a state or its subjects by a foreign state or its subjects. There was an element of perpetual strife and injustice in this reversal of the Roman principle of "si quid universitati debetur singulis non debetur nec quod debet universitas singuli debent"[1], an element so rooted in the habits and usages of Grotius' time, that the great lawyer himself was not free from a partial justification of some aspects of this practice. "And this rule has been established by a certain necessity, in that otherwise there would be great licence for the commission of injury, since the goods of the rulers often cannot so easily be got at, as those of private persons who are more numerous."[2] ~~But it is nevertheless~~ But it is nevertheless obvious that he dealt a death blow to the doctrine of collective responsibility by the adoption of the principle of malicious intention or of culpable negligence. It is, henceforth, only in cases of patientia and receptus that the collective responsibility becomes, ~~in this case,~~ a direct responsibility of the state itself.

The historical function of the traditional doctrine.

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1) Nys: Les origines du droit international pp.62;for the historical exposition compare Goebel, Am.J. in. L.1914,pp.802-852.
2) L.III.c.III. s.2.

It is not possible here to expatiate upon the merits of the accepted doctrine. It is sufficient to say that it checked the theory and practice of collective responsibility; that it became a part not only of the science of international law, but also of the legal convictions of states and of their practice; and that it corresponds with the conception of states as moral agencies accountable for their acts and omissions in a proportion to their mens rea, a conception which must form the foundation of any legal theory of responsibility.[1] [2]

49. The attack upon the orthodox theory has been launched by Triepel and developed by Anzilotti; it was naturally coupled with the usual argument of the inapplicability of private law to relations between states.[3] It is especially Anzilotti who thinks that it is the theory of state responsibility which has been influenced more than any other part of international law by private and Roman law - to its own disadvantage.[4] He starts from the dualistic conception of the two branches of law. While in private

The positivist theory of absolute liability.

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1) Attempts have been made to prove that the recent practice of states dispenses with the requirement of culpable negligence and that it adopts the principle of absolute liability: s.for inst.Goebel,Am.J.I.L.,1914-802-852. - It seems, however, that in all these cases the demanded indemnities have been paid under external pressure.

2) For cases illustrating the current opinion s.: Moore,Digest: VI.787-883,Arbitr.610,1712,2896,3037,3034,4925; Borchard (Dipl.Protection) 244.nJ:Ralston,quoted below pp.217-259.

3) La teoria generale della responsibilità degli stati,pp.154,15[illegible] 179-80.

4) "..Non vi e forse altro argomento in tutto il diritto

law the juridical precept imposing upon the individual a certain line of conduct emanates from a will other than that of the individual who is, as a rule, not in the position to influence the scope of duties imposed upon him, the legal precept of the international community is a result of the direct will of the state which ... is not bound to a greater extent than it wished to be bound".[1] As therefore - says the theory - the will of the state is the only source of its obligation, it is not necessary to make its responsibility conditional upon a particular connection between the injurious act and a given state of mind. The theory makes an attempt to show, very ingenuously, how no culpa in the usual meaning canbe applied in this connection. For: (a) if the organ of the state acts within the scope of his authority, culpa does not take place at all; (b) if the state organ acts outside his competence, no culpa can in law be attributed to the state[2]. Anzilotti arrives thus at the conclusion: "the state is responsible not for the direct or indirect connection

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internazionale in cui l'influenza della teorie romanistiche sia cosi profondamente ra dicata come in questo .. (151; ... La discussione scientifica intorno alla responsibilita degli stati commincio come una affermazione del principio raomano contro le idee germaniche della responsabilita generale. Lo svolgimento successivo delle teoria e pure intimamento collegato con l'influenza esercitata dalle idee romanistische,generalizzate nelle dottine del diritto naturale".(p.155).

1) ibid. p.155.

2) For a critical exposition of these arguments see Schoen (die Haftung der Staaten fuer Handlungen Privater,Zeitsch,f.Voelk. 1917,pp.50; Jess. Die Haftung der Staaten...,1923,pp.116; the theory has been recently modified by Strupp (das Voelker-

between its will and the action of the individual, not for a possible culpable or malicious intention, but for not having fulfilled the obligation imposed upon it by international law, for having violated a duty to other states, a duty consisting in the non-toleration of the facts or in its punishment if it has occurred; not the fault (colpa) but the fact which is contrary to international law creates responsibility".[1)]

This statement is the locus classicus of the positivist opposition to the established doctrine. The argument that not culpa, a subjective state of mind, only the very fact of the violation of an international obligation is the source of responsibility is being quoted with unqualified approval by recent writers. But in what does this violation of an international duty consist? It consists either in not showing proper care, or in actual malice. No one - not even Anrilotti and his followers - asserts that a state is responsible for every injury done on its territory to another state. It is responsible for not showing a proper degree of care. But "care" or "due care" are conceptions logically connected with the idea of fault

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rechtliche Delikt, 1920, pp.42.) to the effect that absolute responsibility only so far as material reparation is concerned, but moral and political satisfaction remain conditioned by culpa.- As an illustration of this view, s.the declarations of Greece before the Council of the League of Nations in the course of the dispute with Italy in 1923, s.Official Journal, Vol.IV.p.1300).

1) p.172.- A different formulation of the theory is contained in Fauchille "Risque etatique" (Annuaire, 1900.p.235).

and negligence[1].

The attitude of writers urging absolute responsibility was, no doubt, prompted by the great difficulties in dealing with the responsibilities of many turbulent states, especially in America, for acts of their agents and private persons in the course of frequent revolutions occurring in this part of the world in the second half of the nineteenth century. The requirement of culpable negligence helped, no doubt, many of them to avoid the responsibility for damage done to the life and property of foreign residents[2]. But the acceptance of the principle of absolute responsibility does overreach the mark. As in private law it may constitute an exception to the rule, but not the rule itself. The legitimate interests of foreign residents can be safeguarded by extending the duty of due diligence not only to the suppressing of wrongs perpetrated in the course of revolutions, but also to the prevention of such revolutions as far as possible[3].

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1) Comp. Lapradelle et Politis, 1924. op. cit. pp. 973-5; - Visscher, la responsabilité des Etats, Biblioth. Visser, 1923 - Vol. II. p. 89-93. It is interesting to note the attempt to support the theory of absolute responsibility by reference to the new tendencies denying the juridical personality of the state. (Lapradelle et Politis, op. cit.) As there is no sovereign, no separate juridical entity, there is no subject to whom culpa can be attributed. But it is forgotten that these "new tendencies" replace the mystical state by real persons, by individuals who are the subjects of international law. To them culpa and dolus may no doubt be attributed.

2) Anzilotti, op. cit. p. 159; Goebel, op. cit.

3) comp. Oppenheim I. (p.) and II, (p.) edition.

There might also have been apprehension in the mind of the expounders of this theory that the unorganised character of international law does not permit distinctions between liability based on fault and absolute liability. But such a point of view, it is submitted, should never be made a starting point for suggestions of reforms in international law. International publicists, when they put forward suggestions with the view of altering the practice of states, should visualise the international community as proceeding gradually to a stage of organisation with a normally functioning judicial authority. In our case: we ought not to accept absolute liability because there is no superior to judge whether negligence (or dolus) has taken place; we must think in terms of a permanent court of international justice deciding in each particular case whether a breach of an international duty has been committed. The common theory of the publicists and, on the whole, the practice of states are in this particular case a strong basis to build upon. They are both, it is submitted, of great intrinsic value. They visualise international law in terms of commands addressed to men - not to metaphysical entities. They regard them as organs of a legal order, as moral beings accountable for their acts according to general standards adopted between individuals under municipal law.

50. With the question of responsibility of states are closely connected those of damages and interest. They both supply instructive evidence of the ultimate adopt- The question of interest.

ion by international law and of the respective, generally recognised rules of private law. - We begin with the problem of interest, more especially of moratory interest in international law.

Does, for instance, the general rule of almost every system of private law (the position of the English common law will be considered later) that in the case of default of the debtor to fulfil a pecuniary obligation the creditor is entitled to moratory interest without further proof of actual damage -apply automatically in international law, unless provided otherwise by custom or treaty? Does the fact that all systems of private law have recognised in this or other form the validity of this rule entitle it to recognition by international law? It will - and has been - [1] argued in this connection that nothing is more dangerous and unjustifiable than application by analogy of the rules of one system in the field of another; that although there are similar situations calling for analogous rules, these rules cannot derive their obligatory force from any other source than from the collective will of the states. "Nessuna applicazione analogica e possibile dall' un all' altro campo, perche l'applicazione analogica presuppone che i subietti del rapporto sono sottoposti alla norma da applicare analogicamente, e gli

1) s.Anzilotti, Rivista di diritto internazionale, 1913, fasc.I.p.68.

stati non sono sottoposti alle norme del diritto civile".[1] It is said that a rule of private law, even if identical in all municipal systems, remains nevertheless a rule of private law, unable by itself to govern the relations between states; that, therefore, moratory interest not being a logical consequence of responsibility, has no application in international law.-

We shall see in the analysis of the important arbitration in which this question constituted the main issue - the Russian Indemnity Case before the Hague Court, November 1912, - that arguments had been put forward attempting to show that the situation is, in fact no analogous; that states cannot be compared with individuals, and that payment of moratory interest may under certain circumstances prove to be inconsistent with their self-preservation. We shall see that the Court adopted, to its full extent, the respective rule of private law. It adopted the view that the non-fulfilment of an obligation by one contracting state constitutes a delinquency entitling the other to compensation; that in the case of a pecuniary debt this compensation assumes, in accordance with the generally recognised principle of private law, the form of moratory interest.

The adoption of the contrary argument leads, in the long run, to consequences incompatible with the normal development of international relations. To maintain that a legal relation

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1) p.62. ibid.

between two states, prima facie identical with a corresponding relation between individuals, cannot be governed by a generally recognised rule applicable to the matter in question, because it has not been expressly recognised by international law - is to make such a relation impossible or to render it ineffective. The postulate of positivism is complied with by the fact that the states enter into legal relation as a result of their own will, but it cannot mean that this legal relation should be rendered abortive because there are no special international law rules to govern it. International and private law differ usually from each other by the subject matter which they order. If the subject matter is the same or analogous, then the rules to be applied must be the same or analogous, unless stipulated to the contrary by treaty or custom. It is true that a generally recognised rule or private law is not per se a rule of international law; but it becomes so implied by states entering into such legal relations, which can be maintained or rendered effective only by the application of this generally recognised rule.

The practice of allowing interest in international arbitration is generally recognised[1], and special reasons are adduced by arbitrators in those cases in which interest is being disallowed, for instance if the claimants have been guilty of delay in the prosecution of their claim[2]. There is only one

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1) Ralston, op.cit.pp.82-7; Moore Arb.p.658 (Geneva Tribunal) p. 4964 (Costa Rica Packet); as to compound interest s.Ralston, op.cit.p.85.Lapradelle et Politis, op.cit.II .pp.101-111.
2) Moore Arb.p.2185,4327.

case in which interest has been disallowed because "there is no settled rule as to the payment of interest on claims on countries or governments"[1]. There is no reason for not recognising interest as accepted by international law because there is no agreement or settled rule as to the rate of interest or to the date from which it begins to run.[2] This fact cannot exclude the awarding of interest any more than prescription canbe excluded, because no rule has yet been evolved as to the amount of time required for its completion[3].

50. A general problem of a similar kind is involved in the question as to how far the general principle of private law that, in awarding damages, a restitutio in integrum should as a rule be aimed at, applies in cases when damages are to be awarded under international law. This principle means that "the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed, or in the position he occupied before the occurrence of the tort which adversely affects him"[4]. It means specially that not only - to use the Roman law expression - The measure of damages.

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1) Montijo Case (Moore Arb.1445).
2) So f.i.Strupp (Delikt) p.213; but s.Ralston pp.83-7.
3) It is mere pedantry to say that owing to this fact even the recognition of moratory interest on the part of the two interested states - in the Russian Indemnity Case - is of no decisive value: Strupp, loc.cit.
4) Halsbury,X.p.302.

the damnum emergens, but also the lucrum cessans is taken into consideration. This is, as a matter of fact, the practice of international tribunals in almost all cases in which damages have been awarded[1]. The principle has been affirmed even in those cases where the claim itself has been rejected. "The umpire desires to lay down as one of the requisites for consequential damages, that there must be a manifest wrong the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned, according to custom and business."[2]

It will be seen in the course of the discussion of relevant cases (s.esp.Chapt.8) that the question of remoteness is often a question of degree, and that some arbitrators, while not denying the right to damages for prospective losses, are apt to take an unusually strict view on their "uncertain and speculative character", with the result that the right to prospective damages is sometimes denied in fact. But it may safely be stated that out of the uniform practice of governments and international tribunals, the rule gradually evolves - in conformity with the respective principle of private law - that prospective profits are compensated if

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1) Ralston, op.cit.Chapt.IX.; La Fontaine,pp.154,281,368,397,511; very clearly stated in Moore Arb.4129.

2) Rice Case, Lieber umpire (MOOre 3248); Rudolff Case,Venez.Arb. of 1903,p.182,198; De Caro Case ibid.p.810 (lucrum cessans in the course of blockade); s.Ralson p.168,9; Schoen 126-7.

resulting directly from an international tort[1]. Now, the undue prominence given to the Alabama award and to some minor arbitral decisions created the impression that international law does not recognise the validity of this general rule of private law. This impression was strengthened by the opinions of some writers (notably Calvo) attempting to build up an international law theory of damages which should take account of the special and privileged position of states. But it is not only the practice of international tribunals that rejects this doctrine*). At the London Conference of 1909, when Article 52 of the Declaration was under discussion, it was taken for granted on the part of some delegates that in international law damages for lost profits are not awarded[2]. But how unjustified this view was will be seen from the fact that both Great Britain and the United States which in the Alabama case and in the Behring

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1) s.Lapradelle et Politis, op.cit.pp.283-287, 978-980; says the arbitrator Asser in the cases Cape Horn Pigeon, I.Hamilton Lewis, C.H.White, Kate and Anna arising out of "Whaling and Sealing claims against Russia (U.S.-Russia, U.S.For.Rel.1902, App.I, p.467 et s.): The general principle of private law according to which the awarded damages must contain a compensation not only for the actual loss, but also for the profits of which one has been deprived, is equally applicable to international disputes. And in order to apply it, it is not necessary that the amount of the prospective gain should be certain and exact, but it is sufficient to show that in the ordinary course of affairs one would have made a profit frustrated by the fact out of which the claim arises". - There is, of course, nothing to prevent contracting states from excluding the operation of the general rule; s.f.i. The Convention between the United Kingdom, France, Italy and Japan relative to the assessment and reparation of damage suffered in Turkey by the nationals of the contracting parties (Treaty Series No.3 (1924) art.6.s.H.

2) Strupp p.212; Hold v.Ferneck, die Reform des Seekriegsrechts durch die Londoner Konferenz p.213, n.1.

*) For the discussion of the Alabama award s.chapt.VI.

Sea arbitration represented, respectively, the view that actual loss only, in the restricted meaning of damnum emergens should be compensated, and proposed at this conference that full compensation should be paid in the case of illegal and unjustified seizure.[1] The question of the measure of damages is thus another instance of an attempt - an unsuccessful one - to discard a general principle of private law in deference to the "special circumstances of international law".[2]

52. The enumeration of private law analogies dealt with in this chapter is not meant to be an exhaustive one. The scope of this monograph allows the discussion of such cases only as had acquired actual importance in the practice of states and in the science of international law. But their list is certainly not closed. Cases of analogy which, to all appearance, have only a theoretical value in the systems of writers and are therefore vigorously opposed, prove often to be of considerable importance in the construction of facts of international life. So, for instance, when Heffter gave place in his system to the notion of quasi contracts, he either found no following, or was opposed by many writers. But when - in the Venezuelan

Other instances of analogy outside treaties

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1) For the views expressed in the official memor.on this question, s.The Declaration of London,Official Docum.ed.by J.B.Scott.- Russia alone advocated compensation for direct losses only; Gr.Brit.and the U.S.proposed "full compensation"; comp.also Bentwich,Dedaration of London,p.100; for the meaning of full compensation in the practice of prize courts,s.Moore Arb.2721.

2) In full accordance with the view represented above are: J.C.Wis Tort in International Law, Am.J.I.L.,1923 p.245,where the practice of Gr.Brit.in the course of the last war is discussed; it recognises expressly damages for lost profits. - Comp.also

arbitration of 1903 - the blockading powers demanded that preferential treatment should be granted to them with regard to the revenues of the Venezuelan customs, they did not hesitate to have recourse to the Roman law or procuration (negotiorum gestio) - a typical case of quasi - contracts[1]. Moreover, their opponents did not deny in principle the admissibility of the analogy, but placing themselves on the ground of the Roman law institute, attempted to prove that the blockading power did not comply with its essential requirement[2]. - In the course of the same arbitration the question of the application of private law rules of bankruptcy in relation to a state attracted considerable attention from both parties, and although there was no agreement on this point and no decision of the tribunal, it cannot be said that the question has since been neglected by international

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A.Hauriou, Les dommages indirects and les arbitrages internationaux, R.G.D.I.P. 1924,pp.203, comp.arbitration cases discussed in Chapt.VIII of this monograph.

1) Des europ.Voelkerrecht,1855,p.183; the usual attitude of international writers is again expressed in a recent work of a distinguished Italian writers: Non e escluso che sorgano responsabilita anche da un rapporto quasi-contrattuale (non essendo inconibile una gestione di negozi o la ripetizione d'unindebito nemmeno fra Stato e Stato, ma si tratte di cosa oggide tanto rara che non merita particolare discorso. (Gemma, Appunti di diritto internaz.1924); s.Tripel p.222.

2) Proceedings of the Venezuelan Preferential case p.1094-8,1110, 1190, 1194,5.

lawyers[1]. The fact that in the same arbitration the private law rules of hypothecation, and the common law and Roman law doctrines of consideration and causa were - amongst others - used in application to the questions arising out of the dispute, proves that there is nothing in the "special character" of international relations which is opposed to such analogies, and that they cannot be discarded by the dogmatic statement that the respective rules must be expressly recognised by custom and treaty. These and similar cases will be analysed in the chapters dealing with international arbitration.

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1) comp. Sir John Fischer Williams, International Law and International financial obligations arising from contract. Bibl. Visser. II. esp. pl. 5. 52-55.

CHAPTER V.

Private Law rules of evidence and procedure.

States are, in their mutual relations, subject to rules either expressly recoguised by them, or flowing from the very nature of those relations and from the fact that they constitute a legally ordered co munity The attempt has been made in the preceding chapters to establish that in the absence of rules expressly provided by custom and treaty, it is , on the whole, private law as generally accepted by civilised communities which supplies the element of development for international law and the rules for decision in individual cases. It does so, not because it has been expressly recognised by sovereign states, but because it contains, in the majority of cases, the juridical elements of the respective interstate relations. The same applies with no less force in principle, although with some modifications in detail, to formal concepts of private law as rules of evidence and procedure. It is not possible to deal here with all cases of this kind; only the most typical instances will be adduced in order to illustrate the general principle. Of them there is none more instructive or better illustrated by cases taken from the practice of states, than that of estoppel. I propose, therefore, to deal at some length with this doctrine. It is instructive because it shows how even a technical rule of evidence in private law is being incorporated into intern-

Estoppel admission waiver.

national law, and because it throws light, not only on estoppel, strictly speaking, but also on the ~~international~~ rules of admission and waiver (aveu, renonciation; Anerkennung, Verzicht).

The doctrine of estoppel a universal rule.

The doctrine of estoppel is prima facie a private law doctrine forming a part of the law of evidence. It is, at the first sight, a strictly technical rule unfit to be applied in the "rough jurisprudence of nations". Where one by his word or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" - this is the classical formulation of the doctrine[1]. It might seem that it is a doctrine exclusively confined to English law, and that it cannot therefore be regarded as a general principle of private jurisprudence. But this is only so in form. In substance, the principles underlying estoppel are recognised by all systems of private law. Not only so far as estoppel by record (estoppel by judgment) is concerned, but also - under different names,- with regard to estoppel by conduct and by deed[2].

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1) Lord Denman, C.J. in Pickard v. Sears, 1837,6. A.V.E. p. 474,; comp. also McNair, Legality of the occupation of the Ruhr, Brit. Yearbook of I.L., 1924 p. 34;

2) comp. art. 122, 307-9 of the German Code art. 1341,1350,1351 1352,1356 of the French Code and Riezler, quoted below, pp. 114, 121,122,144,147,149, 166; s. also Kocuster, Principles of German Law p. 361-2.

It is of interest to see how strongly English judges believe in the aniversality of the rule. Says Lord Campbell in Cairncross.v. Lorimer:[1] The doctrine is found, I believe, in the laws of all civilised nations, that if a man... (follows the exposition of the doctrine); or Cleasby B. in Halifax Union v. Wheelwright:[2] 'It is perhaps only an application one of those general principles which do not belong to municipal law of any particular country, but which we cannot help giving effect to in the administration of justice viz. that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default against a person, who was misled by that default without any fault of his own" - It is not easy to adduce reasons why it should be disregarded in the relations between states - unless the "special" and "rough" character of international law is pleaded. As a matter of fact in no/less than seven great arbitration cases - apart from those of minor importance - has the doctrines of estoppel been put forward by the parties or made the basis of the award.

In the excellent judgement of the senate of Hamburg in the Croft case between Great Britain and Portugal the plea of estoppel was dealt with in extenso by the Tribunal and the principle itself adopted.

It was Lord Hannen who in the Behring Sea arbitration, while opposing the institute of prescription, admitted the possibility

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1) Sherman op.cit.vol.2.417.; it cannot be investigated in this place how far estoppel originated from an equivalent Roman doctrine (Inst.3,21) s. Riezler, Studien in roemischenn, englischen und deutchen Rechte, Venire contra factum suum, 1912.

2) MacQueen's Scotch Appeals (House of Lords, vol.3.p.827.)

of basing the claim of the United States on estoppel, on the part of Great Britain ; Article 6 of the arbitration compromise contained the question: "how far were these (Russia's) claims of jurisdiction recognised and conceded by Great Britain ?" [1] and a great deal of the argument in one part of the award was devoted to answering this question. (The detailed analysis of the argument and of the legal position in this and other cases is contained in the following chapter.) In the British Guiana arbitration, it was claimed by Venezuela that the so-called Palmerston line of 1850 constituted estoppel on the part of Great Britain which prevented her from claiming now any territory beyond this line; it appears clearly from the proceedings that neither Great Britain nor the members of the tribunal denied the admissibility of estoppel as between states. [2] In the Pious Fund case, quite apart from the question connected with the principle of res iudicata, it was maintained by the United States that Mexico was estopped by its conduct from questioning the jurisdiction of the mixed commission of 1871, and this assertion was accepted by the tribunal. [3] In the Venezuelan Preferential Claim, both sides availed themselves of the argument of estoppel [4], and the tribunal took the fact that the Government of Venezuela itself recognised in principle the justice of claims presented to it by the

Instance

1) 10.L.R. Ex (1875) p. 192. 2) Moore arb. 801; ibid p. 916.
3) Proceedings p. 854, 2024-42. 4) Proceedings, Ralston's Report. p.111, 342.U.S. arg.

blockading powers as one of the grounds of its decision. In the Alaskan boundary dispute the question again became relevant.[1] In the Corvia Case of the Venezuelan arbitrations of 1903, it was held that estoppel operates against a claimant state, a national of which has forfeited his citizenship by accepting foreign diplomatic employment abroad.[2] The award in the Russian[2a] Government is by its conduct precluded from demanding moratory interest from Turkey because "in the relations between" the Imperial Russian Government and the Sublime Porte, Russia.... renounced its right to interest, since its Embassy repeatedly accepted without discussion or reservation, and mentioned again and again in its diplomatic correspondence the amount of the balance of indemnity as identical with the amount of the balance of the principal.[3] In the Agreement between the United Kingdom and the States, of August 1910, constituting the American and British Claims arbitral tribunal, it was provided in the terms of submission that "the arbitral tribunal shall take into account as one of the equities of a claim to such an extent that it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward. 4) This is, it seems, more than a permission to treat admission as evidence. In fact, in a number of cases de-

1) see below ch. 7.
2) Ch. 6.
3) ch. 7.
4) Scott's Reports. p. 322 (the award)

2a) Indemnity case is wholly based on what practically amounts to estoppel; it was held that the Russian

cided by the Tribunal the award is based - partly or exclusively - on what practically amounts to estoppel (for instance Lindisfarne, Steamship "Eastry", Youkon Lumber [1]. In others (Hardman, David I. Adams, The Favourite, Newchwang) the argument of estoppel was put forward by one or by both parties without having been ~~considered however~~ accepted by the tribunal. [2]

These examples show how a private law rule of evidence, which, apart from the last mentioned case, has never been expressly recognised by positive international law, may now be regarded as a working rule of international arbitral law.- It flows - as do many others - from the simple fact that states live in a legally ordered community, and no such community, be it of individuals or nations, can favour the venire contra factum suum, ~~estoppel.~~ The plea that states have never accepted it or that they, being political entities of a higher order, cannot be subject to rules governing the relations of individuals, would lead in this and other cases to impossible results. In fact, it is very seldom that states have, in practice, recourse to such arguments.

This may be seen in the case of res iudicata, included in English law in the doctrine of estoppel. The principle of res-iudicata is , no doubt, a fundamental principle of private law. Is an express recognition by sovereign states necessary in order to make it binding between nations? A strictly positivist theory would answer this question in the affirmative. But the practice

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1) 1910 (C.d. 6501)

2) See ch. 8; also award of C.J. Taft in an arbitration between Gr. Brit. and Costa Rica, Am. J.I.L. 1920.

of states cannot and does not follow it. In the Pious Fund arbitration, where the question of res iudicata formed the central problem confronting the tribunal, the p r i n c i p l e of res iudicata was not denied even by Mexico. It will be seen from the analysis of this case, that the actual differences between the parties turned upon the question of whether the force of res iudicata extends to the award only, or whether it embraces also other elements of the judgment, especially the reasons of the decision. The Court followed in the answering also of this particular question, what may be fairly called a general principle of private jurisprudence. The award does not contain - this was not necessary - a pronouncement in favour of the principle of res iudicata. It affirms only" that all the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and that they all serve to render precise the meaning and the bearing of the dispositif (decisory part of the judgment) and to determine the points upon which there is res iudicata and which therefore cannot be put in question " 1)

It is only natural that the analogy to private law has been closely followed in the application and in the development of the institute of arbitration. This analogy has been somewhat obscured by the fact that international arbitration takes, in some respects the place of the ordinary judicial proceedings in municipal law.

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1) see. ch.8.

International arbitration had and has frequent recourse to private law rules of procedure and evidence. Counter-claim, set-off, intervention, the principles of summary procedure and other rules have been incorporated into international arbitral law. It is also recognised, in accordance with the respective private law, that the burden of proof rests, in the case of international tort, upon the claimant state, upon the party alleging the commission of a tort. There is scarcely an arbitration case in which this ~~case~~ rule did not prove of some importance. 1)

It is especially with regard to two questions that the application of analogous private law has influenced greatly the development of international arbitration. There is, firstly, the competence of the arbitral tribunal to pass judgment upon the scope of its own jurisdiction. It is a broad rule of private arbitral law that the arbitrators possess the power to determine their own jurisdiction and to give an ~~interpretation~~ interpretation to the instrument creating their mandate. It is a rule grounded on principles of logic and expediency upon which it is not necessary to dwell in this connection. But it was only after a prolonged discussion, lasting over a century, that the competence of an international tribunal to determine its own jurisdiction became a recognised principle. The question arose during the deliberations of the mixed comm-

The competence of an international tribunal to pass upon its jurisdiction.

1) Moore arg.p.610,3034,3037,1712; Schoen,op.cit.p.128; Borchard op.cit.232,3 also p. 221.

mission formed under article 7 of the Treaty between the United States and Great Britain of Nov. 1794, when the British Commissioner denied the power of the Court to determine its jurisdiction, and was thoroughly dealt with by the Commissioner Gore; [1] it occupied again the tribunals in the Alabama and in the Pious Fund Case. [2] It would be an idle task to decide whether it is due to a conscious application of a private law rule or to the intrinsic merits of the question, to the "reason of the thing", that there is now a unanimous consensus on the part of the practice and writers in answering, this question. [3] Both views are probably right, in the sense that it is primarily private law which provides in most cases a clear formulation of the "reason of the thing".

58. The same can be said with regard to the question of appeal and revision in international arbitration. It flows from the conception and the purpose of arbitration that the finding of the arbitrators should be a final one. This was

Appeal and revision.

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1) Moore arg. p. 2277.
2) Proceedings of the Pious Fund case, Ralstons Report p. 111-115
3) Comp. Lammasch, Die Rechtskraft internationaler Schiedsspruche, 1913 p. 67-70; die Lehre von der Schiedsgerichtsbarkeit, 1914, P. 166; Higgins: Hague Peace Conference 1909, p. 176, and Art 73 of The Convention for Pacific Settlement of International disputes.

the clear rule of Roman law (followed closely by Grotius and the first classical writers [1] and it is now accepted, on the whole, as a principle of modern private jurisprudence. On the other hand, while regarding the arbitral award as final, modern systems provide a safeguard against abuses, by demanding a formal authorisation for the execution of the award by the state courts [2] or by granting relief in cases of obvious miscarriage of justice. [3] It may be said now, after a long battle in books and (~~=~~) at conferences, that the development has followed, so far as the finality of the award is concerned, the obvious principle of private law. "The award duly pronounced and notified to the agents of the parties settles the dispute definitely and without appeal". [4] But the analogy has not been carried so far as to provide a safeguard "in case of an invalid compromise, or in case of excess of authority, or of proved corruption of one of the arbitrators, or of essential error." [5] The respective proposals at the second Hague Conference proved abortive

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1) L. III. Ch. 20.
2) Code proc~~edure~~. civile. art.1020. 1. ; for English Law, Halsbury I. 473.-481.
3) Austrian Procedure. par. 595; German Procedure par. 1041
4) Hague Convention, loc. cit. par. 81.; the "revision of the par. 83 which may be provided for in the compromise by both parties and which can be demanded only "on the ground of ....discovery of some new fact which is calculated to exercise decisive ~~clear~~d influence upon the award and which at the time the discussion was/ was unknown to the Tribunal and to the party demanding revision - is a revision only in name.
5) Resolutions of the Institute of Intern. Law., Scott's ed. p.7.

because of Germany's opposition tothe establishment of a real permanent court of arbitral justice which could serve as a court to decide in cases of alleged nullity of the award. But there is no reason why now, with the Permanent Court of International Justice in existence, the analogy should not be completed. This would substantially strengthen the institute of international arbitration. 1)

Random instances of private law analogies.

59. Here the consideration of individual cases of private law analogy comes to an end. It is not contended that the list of possible or of actually applied analogies is thereby exhausted. The history of international law, of peace and war, is rich in instances of analogy not mentioned in the last three chapters. Here belong for instance: the influence of private law upon the arrangement of the contents of internation~~a~~al law, i.e. upon the system of international law, 2) upon the institute of condominium, 3) upon the theory and practice of ratification, 4) upon the conception of ~~an~~ international

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1) For the question of appeal and revision see Lammasch, die Lehre p. 212-224.
2) Bulmerincq, die Systematik des Voelkerrechtes, p.25,31,32, 66, 106, 113, 209, 215.
3) Nys. vo. 1. 381.2.
4) Triepel p. 215.

guarantee, [1] upon the conceptions of self-help, necessity and self-preservation, [2] upon the notion of the equality of states. [3] And it would be interesting to trace the influence of Roman law upon the early law of contraband and upon the international law of the sea, [4] or the attempts to apply Roman law analogies to the conception of blockade [5] [6]

60. It was only intended to throw some light upon those typical instances which, it is believed, show that the usually encountered picture of international law impeded in its growth by an exaggerated use of private law is simply misleading. It will be seen, in the course of the analysis of cases of internation[al] arbitration, that this intimate connection, so often challenged under the influence of the positivist tendencies, is an obvious and undisputed rule of practical application. It has already been mentioned that to confine the settlement of international dispute to application of such rules as form a recognised part of the positive international

The sources of development of international law.

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1) see Quabbe: die voelkerrechtliche Garantie, 1911, pp. 31.
2) Strupp, op. cit. pp. 122, 124; Grotius L II c.II. s.6.
3) Vinogradoff, op. cit. p. 56.; Dickinson op.cit. throughout, espec. pp. 49-50, 86-88, 111-113 (with ample references).
4) Hyo, vol. 1.569,570
5) Ortolan, vol. 2. p. 329;
6) comp. also art. 55 of the 4th Convention of the Hague Regulations the occupying state as usufructory of the immovable property of the hostile state: Holland, the laws of war on land, p.59.

law (in the current meaning) is to renounce, in a great majority of cases, any settlement at all; to confine international tribunals to such rules is to render abortive a judicial pronouncement altogether. The realities of international life cannot, however, take into account onesided theories. We shall see that, as a rule, the parties to an international dispute, and, what is more important, a considerable number of arbitral awards, have no hesitation in applying the analogy of states and individuals and in making use of private law rules, notions and arguments.

There is, naturally, a consensus of opinion that in no system of law are gaps as numerous as in international law ,[1]

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1) Lemmasch, Lehre, p.179.

but the views differ widely as to the competence of judges and arbitrators to fill them.[1] Lammasch points, as a source of decision in such cases, to analogy - analogy within international law and in accordance with a spirit of international law. He refers also to logical deductions on scientific basis.[2] In order to make possible such an analogy, he continues, it is necessary - to appoint judges coming from countries with different systems of m u n i c i p a l law. In the same way, J.B.Scott, while speaking on the administration of international law and equity by the Permanent Court of Arbitration, urges the necessity of judges coming from countries with various systems, as well as the necessity of the "internationalization" of municipal law for the purposes of this court.[3]. It is the same idea that finds expression in article 38 of the statute of the Permanent Court of International Justice. It provides that the Court shall apply:...3. the general principles of law recognised by civilised nations". These "general

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1). comp. Alvarez, Codification du droit intern.pp.114.

2). Lehre, p.180

3). The Status of the International Court of Justice.p.94.

principles of law" do not embrace either international conventions or international custom - both are enumerated before. A source of law of lying outside the two exclusive sources of what is called the positive international law, is thereby recognised. It is submitted that in practice - it is time to leave out theory at this stage - the phrase "general principles of law" cannot mean anything else than "generally recognised principles of private law." 1) It is now intended to show that this is the actual interpretation put upon these words by the practice of states so far as international arbitration is concerned.

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1) see on this subject Prof. Llanas: Fuentes del derecho Internacional segun el estatuto del Tribunale permanente de Justicia. Revue de droit intern. (Geneve), 1924, n.3.p.295, where this provision is explained by reference to natural law, and Salvioli, loc. cit.

Part III.

Application of private law in international arbitration.

CHAPTER VI.

Private law as a source of international law in international arbitration.

61. While the continental, and especially the German, theory was busy in the three last decades of the past century in attempting to banish from international law everything that threatened to deprive it of its "independence", British and American practice was laying strong foundations for the building of modern arbitration which, it is submitted, was called upon to prove the futility of the respective positivist theories. I shall not mention the long series of arbitral mixed commissions which, starting from the commissions constituted under the Jay treaty, continued almost without interruption until the close of the century. But the great arbitrations - partly preceding the establishment of the Court at Hague, partly taking place in its lifetime - the Alabama, Behring Sea, British Guiana (it was in reality a British-American arbitration), the Alaskan boundary and North Atlantic Fisheries arbitrations, were in fact, the most instructive and the most important instances of peaceful settlement of international disputes. The interests at stake were, in all of them, big, and, in some cases national passions were roused to a high pitch. Their legal importance

The British-American arbitrations

is equally considerable. The arguments of Counsel were carefully prepared and may, therefore, be regarded as expressing the considered legal conviction of the Governments; We shall see how, one after another, the arbitrations destroyed the fiction of an international law as totally independent of concepts of private law and private law rules.

The Alabama arbitration

62. The Alabama arbitration stands on the threshold of modern international arbitration, not only owing to the importance of legal problems which it had to answer and to the application, on an unprecedented scale, of a well ordered arbitral proceedure, but also owing to its political importance as the first instance of settling a dispute which raised highly the national feeling on both sides, and which, if unsettled would have proved a real hindrance to peaceful relations between the two nations. The Alabama arbitration settled a dispute that really mattered. The instances of arbitration until this date are either restricted to cases of minor importance, or fulfil the task of settlement of questions decided in principle by a peace treaty.

The four questions

It would seem that the object of the arbitration, as concerned chiefly with the rights and duties of neutrals, does not leave much scope for the examination of the problem of private law analogies. It will be seen, however, how the recourse to private law, both by the parties and the

members of the tribunal, was instrumental in deciding the chief issues of the arbitration. The legal battle in Geneva centred upon four questions: (a) what constitutes "due diligence" (or the absence of due diligence) required from a neutral in the discharge of obligation as defined in the article 6 of the arbitration Treaty of Washington?; (b) in the event of Great Britain having been found neglugent in the fulfillment of her duties of neutrality, what is the measure of damages to be awarded to the United States? (c) in the event of damages being awarded, should interest be admitted?; (d) upon whom lies the burden of proof that negligence has taken place? Has Great Britain to prove that her authorities acted with due diligence, or is due diligence on her par to be presumed and the burden of proof to the contrary to be thrust upon the United States?

It would have been in vain to rely, for the purpose of answering these questions, upon settled rules of international law - for the simple reason that there were no settled rules of international law on the subject. The analogy between states and individuals reveals itself in the lack of hesitation with which the parties in this, and in many other arbitrations, have recourse to generally recognised rules of private law.

65. The contention of the Unites States that "the extent of the diligence required to escape responsibility is gauged by the character and magnitude of the matter which it may affect, by the relative condition of the parties, by the ability of the parties incurring the liability to exercise the diligence required by the exigencies of the case, and by the extent of the injury which may follow negligence"(1) was based chiefly on Roman, common and continental law, on the pandects and judgments of municipal courts. (2) The Court had now to answer the question; are the criterions of due diligence as applied between individuals applicable to states and their mutual relations. or have these words a different and special meaning so far as states are concerned. This last contension was obviously at the bottom of the British argument (3) It seems, however, that the contention of the United States has been taken as a basis of the award: the due diligence ... ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil

Due Diligence

(1) The Case of the U.S. Government's Printing Office, 1871, p. 152.

(2) loc. cit. p. 153 - 7.

(3) "...it would not be reasonable to exact, as of right, from the Government, a measure of care exceeding that which Governments are accustomed to exert in matters affecting their own security on that of their own citizens" (The Argument at Geneva, New York, 1873, p. 156, also Moore, Swb. pp. 573, 612.

the obligations of neutrality on their part." This is a typical private law solution. It is a well settled principle of the main systems of private law that, although the degree of diligence required by law varies from case to case, it has nevertheless an objective criterion; that the amount of caution required of a citizen in his conduct is proportionate to the amount of apparent danger;(1) that the diligence of "an average prudent man" constitutes an objective test independent of the idiosyncrasies of the individual citizen. It is clear that the unrestricted adoption of the "diligentia qam in suas rebus" would render impossible an orderly administration of justice. The Tribunal did not however go to the extreme of proclaiming the absolute responsibility of a state, irrespective of fault. The award does not speak of the risks to which a belligerent has become exposed, but to which it may be exposed.(2) It is evident, from the opinion of Count Sclopis, how great a part the Roman law distinctions of culpa lata and levis played in the formation of the award.(3)

67. It is, however, with regard to the measure of damages Damages.

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(1) Pollock, The Law of Torts, 1923, p. 440.

(2) This does not amount to the adoption of culpa levrissime, as some writers were disposed to assume (Lapradelle and Politis, op. cit. Vol. I. p. 970) S. art. 25 of the IV. Hague Convention of 1907

(3) Moore, 4069.

to be awarded in the case of an international tort that this arbitration is referred to by some writers as settling an important rule and as rejecting at the same time a general principle of the private law rules of damages: that indirect losses cannot be compensated and that damages for prospective profits cannot be awarded by an international arbitral award. The first rule has been formulated by the Tribunal in a preliminary decision which declared that indirect losses "do not constitute upon the principles of international law applicable to such cases good foundation for award of compensation or computation of damages between nations";(1) the second, obviously running counter to the general principle of private law which takes the restitutio in integrum as a basis for compensation, has been embodied in the final award.(2)

There is no doubt that this part of the award contains a distinct element of compromise. There was nothing in previous cases of arbitration that would as a precedent justify the Tribunal in a total rejection of all claims forprospective damages. The practice in this regard was varying, and, even in the cases of rejection of such claims, the respective awards were at pains to show that the

(1) Moore, p. 646.
(2) p. 658.

speculative or, owing to particular circumstances, highly uncertain character of the prospective gains, does not allow a decision in their favour.(1) To reject, in a sweeping statement, any compensation for prospective gains is certainly a rejection of an accepted private law rule, but also, at the same time, of a demand of justice and convenience. The subsequent arbitral decisions do not follow this lead,(2) and the most recent arbitral awards quite clearly - although subject to certain conditions - recognise the right to damages for prospective profits. The awards of the British American Claims Arbitral Tribunal under the convention of 1910 offer instructive instances in this regard.

The rejection of the demand for indirect damages may be justified by the character of the American claims. They embraced the loss in the transfer of the American Commercial Marine to the British flag, the enhanced payments of insurance, the prolongation of the war and the

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(1) Tl. p.

(2) The findings of the commissioners concerning the individual cases arising out of the distribution of the gross sum awarded by the tribunal do not belong to the domain of international law; they were governed by an act of the congress (June 1874) which provided that "in no case shall any claim be admitted or allowed for, or in respect to, unearned freights, gross freights, prospective profits, gains or advantages" (Moore 4278)).

addition of the large sum to the cost of the war and the suppression of rebellion.[1] The rejection of claims of this character cannot seriously affect the general rule. It is, no doubt, a recognised principle of private law that causa proxima non remota spectatur. But the "directness" of the damages remains always a question of degree, and the too general statement on the part of the Tribunal contains ~~certainly~~ an element of compromise and was repeatedly criticised in other arbitral awards. - The arguments of Great Britain in this question, coupled with the plea of contributory negligence on the part of the United States, were based on decisions of American and English courts,[2] but so also were those of the United States, who supported their claims by reference to the unanimous opinion of jurists "both of the common law, as in Great Britain and the United States, and of the civil law, as in the countries of the Roman law in Europe and in America".[3]

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1). Moore, p.647; and the British Counter Case p.131-134, 137-140 (Geneva Edition)

2). Counter Case p.135; says C.J.Cockburn in his dissenting opinion (For.Rel.Geneva Arb.Vol.4.p.357.): "Where damage to property arises not directly from a wilful injury - but indirectly only from want of due care, an indemnity against actual loss is all that by the law of England and America, or by any principle of general jurisprudence, can possibly be awarded."

3). U.S.Arg. p.213.

65. The question of interest on the sums awarded for losses was of considerable importance as the interest claimed by the United States amounted to about 75 % of the principal.[1] As the treaty of Washington contained no mention of interest to be awarded in addition to the gross sum, the United States demanded that interest should be allowed as an element of damage within the gross sum and quoted historical instances in which interest has been awarded.[2] The accuracy of those instances, as having any bearing on the case under consideration, and the demand itself, were strongly contested by Great Britain.[3] Both sides based their arguments on private law. Great Britain[4] contended that, according to settled rules of civil jurisprudence, interest can be allowed only "where there is a principal debt, of liquidated and ascertained amounts, detained and withheld by the debtor from the creditor after the time when it was

The question of interest.

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1). s.summary of American Claims, U.S.Arg.p.573.
2). U.S.Arg. p.280.
3). Counter Case of Great Brit. p.141 (Gen.ed.)
4). Arg. of Sir Roundell Palmer on the claim of the U.S. for interest by way of damages. Brit. Arg.p.551 -567.

was absolutely due, and ought to have been paid, the fault of the delay in payment resting with the debtor; or where the debtor has wrongfully taken possession of and exercised dominion over the property of the creditor;[1] Pandects, French, English and American authorities were cited. Here the case of Great Britain rested on a secure ground. But she had to concede that private law "admits interest when given as damages"[2], and, pleading absence of gross negligence on her part and contributory negligence on the part of the United States which, in addition, it was alleged, were responsible for the delay in the settlement of those claims, Great Britain thought the allowance of interest inadmissible. But it is significant that, while availing herself to the fall of the rules of private jurisprudence, Great Britain recurred again and again to the plea that it is a claim "between nation and nations" and quoted Sir Christopher Robinson to the effect "that sovereign powers do not usually pay interest"[3]. The-

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1). loc. cit. p.551.
2). loc. cit. p.553.
3). loc. cit. p.565.

The American argument met the British contentions on the ground of private law.[1] It did not deny that principles of private law govern this question[2], but entered a discussion upon their application. - The tribunal decided not to disclose the manner in which it arrived at the gross sum of 15,500,000 dollars awarded to the United States, but Sir Alexander Cockburn revealed in his dissenting opinion that it took 6% interest as the basis of assessment.[3].

66. It appears, from some parts of the award [4] that the tribunal adhered to the well established principle of private law that, as a rule, it is upon the claimant to supply the proof. But it was asserted by the United States that as "by the law of nations the state is responsible for all offences against international law arising within its jurisdiction, by which a foreign state suffers injury, unless the former can clear itself of responsibility by demonstrating its freedom from fault in premises, after proof of hostile acts on neutral territory

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1). Reply on the part of the U.S. to the Arg. of H.B.M. Counsel on the allowance of interest in computation of indemnity p.568-573 loc. cit.
2). loc. cit. p. 569.
3). The allowance of interest in this case is sharply criticised by Lapradelle and Politis, op.cit. Vol.II.p.981, as an inadmissible analogy to private law.
4). especially these relating to the "Sallie, the Jefferson Davis, The Music" and so on.

the onus probandi of due diligence rests upon the neutrals.[1] This contention was vigorously opposed by Great Britain.[2]. Other rules and analogies of private law were mentioned in the course of the arbitration by both parties (for instance, both? the power of the tribunal to pass on the question of its jurisdiction[3] the rule eiusdem generis[4], interpretation[5], rules of evidence[6] but they do not seem to have influenced the main issue of the arbitration.

67. Among the five questions submitted to the tribunal in Paris, in 1892, in the Behring Sea arbitration, two were of decisive importance in the determination of the issued: (a) how far were Russia's claim to exclusive jurisdiction in the Behring Sea and to exclusive rights in the fisheries therein recognised and conceded by Great Britain?[7] (b) "Have ~~the~~ The Behring Sea arbitration.

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1). U.S.Arg. p.154.
2). loc.cit. p.423 - 5.
3). loc. cit.
4) p.211.p.440.
5). loc.cit. p.432 .441.
6). Brit.Counter Case p.10.
7). comp.question 2 of Art. 5 of the Arb.Treaty of Washington of February 1892.

the United States any right, and if so, what right of protection or property in the furseals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit:?[1] They were both questions in which recourse to private law was obviously essential; prescription with regard to the first, the general rules of property and possession with regard to the second question. The problem of damages and of the burden of proof appeared again, and the theoretical discussions on the part of the Counsel and of some members of the Tribunal on the nature of international law and the sources of its development contain valuable contributions to the problem connected with this monograph.

The plea of prescription.

68. It is doubtful whether the inclusion of the question as to the recognition of the Russian claims by Great Britain constitutes a case of the adoption of the doctrine of estoppel. Neither the term nor the doctrine are mentioned in the written and spoken arguments of both parties, or in the pronouncements

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1). Question 5.

of the arbitrators - with the exception of a casual remark on the part of Lard Hannen, who, while denying the existence of prescription in international law, suggested the possibility of arguing the case on the ground of estoppel. But it appears clearly, both from the opinions of the American arbitrators and from the oral argument, that it was on the basis of prescription that the United States originally founded their argument. It was contented by the United States that after an acquiescence, for a period or more than sixty years, in the Russian assertions of an exclusive right over the sealing industries on the Pribilof Islands, it is not competent for Great Britain to deny now the existence of this right [1]. It seems that this contention has been put forward not so much as an argument in favour of estoppel on renumeiation, as an element of prescription. Senator Morgan, one of the arbitrators, after quoting many authorities on prescription asks in the course of his opinion: "Will this Tribunal shrink from the recognition of this doctrine now that an opportunity, distinctly given, calls for a firm declaration?" [2].

It was the same arbitrator who, in the course of the oral

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1). Proceedings before the tribunal in the Behring Sea Arb. p.361, 725-9; arg. of the U.S. p.40; opinion of Senator Morgan p.30 -54 (Vol I. of the American edition of the case.)
2). loc. cit. p.46.

argument, in a lengthy discussion with Sir Richard Webster, forcibly urged this view.[1] The relevance of the problem was conceded by both parties; the diplomatic correspondence preceding the arbitration Treaty shows that question 2 of article 6 was readily assented to by both of them.[2] The United States failed however to prove acquiescence on the part of Great Britain, and the proceedings established as a fact the very opposite of the American contention.[3]. It is admitted by the agent of the United States in his final report that "early in the preparation of the case of the United States the conclusion was reached that it would be difficult to sustain this allegation and that "the decision of the Tribunal on the first four points of article VI was not unexpected."[4]. These questions of fact are not essentially but the circumstances that both states included the principle in the terms of submission to the Tribunal is of importance.

Rules of property and possession.

69. Anticipating defeat qua prescription, Counsel for United States put their whole strengthe in proving the United States' right of property in seals. Both the United States and Great Britain, which rejected this assertions, admittedly adhered to private law as a source for decision.[5]. It is not necessary to pronounce

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1) Oral Arg. p.1271-1280.
2) Annexes to the British Case.
3) See the impartial opinion of this question of Justice Harlan - pp.75. Vol.1.op.cit.
4) Vol.1. Proceedings, American Ed.p.9.
5.s.opinion of Justice Harlan, Vol.1. op.cit.p.156-75; U.S. Arg. p.41-105; Brit.Arg. p.31-32, Geneva ed; proceedings, Sir Charles Russell's arg. pp.7-8.

here an opinion on the merits of the controversy. The United States claimed to have established the facts; that the fur seals were begotten, born and reared on the Prâbilof Islands, and owned by the United States; that they made these Islands their home and spent there a large part of each year; that while on migration they possessed the animus revertendi and never resorted to any other land, and that the existence of the race depended upon the care and industry of the United States. But they were unable to answer the objection of Great Britain - an objection based upon private law of the United States, of Great Britain and of other systems of private jurisprudence - tha t the seals being strictly animals ferae naturae the property on them depends on actual physical possession, that "if animus revertendi gives property in animals ferae naturae, then the law of every civilised country would have given property in pheasants, in rabbits, in hares...; yet it is notorious. . that there is merely the exclusive right to take game when it is upon the land of the owner."1)

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1) Proceedings p.7-8.

It is only natural that, from the very beginning, the United States based their arguments not only upon positive private law, but upon philosophy of law, upon the law of nature, and upon justice and morality underlying the law of nations.[1] But the Tribunal refused to follow this path in a question where private law of all countries supplies a pretty clear answer. Here lies the importance of the decision "that the United States has no right of protection or property in the fur seals frequenting the island of the United States in Behring Sea when such seals are found outside the ordinary three-miles limit".[2]

Damages and the burden of proof.

70. This arbitration furnishes an instructive example of how both parties did not hesitate - in the question of damages for lost profits to assume an attitude directly opposed to that assumed in the Alabama arbitration. Great Britain, basing herself on decisions of her courts, demanded now damages for prospective profits and pointed

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1). Arg. of the U.S. pp.1-26, 613-643, especially the chapter: what law is to govern the decision?; proceedings p.365,367, 1883 -1902; very clear and instructive is Justice Harlan's discussion of Roman law as a source of decision: pp.143.

2). The award: vol.1.op.cit.p.78.

out that "the refusal of the Geneva arbitrators to award damages to the United States for the loss of prospective earnings " must be understood with reference to the actual conditions of the case before them"[1]). The United States invoked private law authorities and, with more justification, the award of the Geneva Tribunal[2]). The decision of the Tribunal did not embrace this question.

The attempt was made by the United States to throw upon Great Britain the burden of proving that Russia had lost her alleged jurisdiction in the Behring case[3]), but Great Britain objected, pointing out that "when a nation is contending for a jurisdiction in excess of that which is admitted by international consent, the onus must rest with that nation of proving the existence of such jurisdiction"[4]). It seems that this view expressing the principle of the onus probandi resting upon the party alleging an exception to a general rule has been adopted, in practice, by the United States in the course of the arbitration.[5])

71. The third great arbitration of the nineteenth century, the British Guiana boundary arbitration, was, no less than the two above mentioned, largely de- The British Guiana Arbitration.

1).Arg. of Gr.Brit. p.72, 73.
2) Arg. of the U.S.pp.217-227.
3)U.S.Case p.57.
4) Brit.Counter Case pp.59
5).Proceedings pp.194.

dependent for its solution upon the proper application of some private law notions. There is continuity, so far as parties to the dispute are concerned, between this and the former two cases, as it was the United States, who, basing their intervention on the Monroe doctrine, were instrumental in bringing about the arbitration. They provided the Counsel for Venezuela and the two national arbitrators. Article III of the arbitration treaty of Washington, of February 1897, between Great Britain and Venezuela provided that: "The Tribunal shall investigate and ascertain the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain, respectively, at the time of the acquisition by Great Britain of the colony of British Guiana - and shall determine the Boundary line between the colony of British Guiana and the United States of Venezuela". The United States of Venezuela based their claim to the whole land between the Orinoco and the Essequibo on Spain's discovery of America which gave her the right to reduce to possession the discovered countries; on her actual possession thereof from early in the sixteenth century, and her actual control over the Orinoco and Essequibo rivers and the adjacent territory during the seventeenth, eighteenth and the first part of the nineteenth century; on the fact that the Dutch rights acquired against the established title of Spain and the treaty of Muenster must be limited only to such land as was

actually reduced by them into possession; on the fact that the disputed region being a geographical and political unit, Venezuela had during this period acquired constructive possession of the whole region; and that the present occupation by Great Britain of portions of this region, being in xnt violation of the Treaty of Muenster and of the agreement of 1850 between Great Britain and Venezuela cannot be regarded as a valid basis of a title[1].

Great Britain denied that either Spain or Venezuela, after her declaration of independence, had at any time real possession or dominion over the disputed territory; that long prior to, and at the date of the treaty of Muenster, the Dutch had founded settlements in the various parts of the territory of British Guiana; that they extended gradually their possessions between 1648 and 1796, when Great Britain succeeded to all the rights of the Dutch, and that after 1814 Great Britain extended her settlements to the territories originally claimed by the Dutch. - The dispute was, no doubt, to a large extent a dispute ofer xhm facts of actual possession, occupation and exercise of jurisdiction, but it was necessarily coupled with questions of law, the three most prominent being those in which rules of private law were freely invoked and applied by the parties.

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1) Case of Venezuela pp.229-236; documents and the correspondence relating to the question of boundary between Gr.Brit. and Venezuela, Venezuela Nr. (1896) (C.-7972) pp.41.

72. There was, firstly, the question of prescription which was of decisive importance with regard to British settlements made after 1796. Rule (a). of Article IV of the terms of submission of the treaty of 1897 provided "adverse holding or prescription during a period of 50 years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription." This provision of the treaty is rightly quoted as an instance of recognition of the notion of prescription in international law. But not the whole problem has been settled by the provision. It has been contended by Venezuela that possession during a period of fifty years is not enough. That time- so runs the argument of Venezuelan Counsel - is but one of many elements essential to create title by prescription; that prescription between nations - as between individuals - must be bona-fide, public, notorious, adverse, exclusive, peaceful, continuous, uncontested and maintained under a claim of right.[1]. It is true - so runs the argument of Venezuelan Counsel - that the treaty fixed 50 years as the period of prescription, but it leaves its other elements

The requirements of prescription in international law.

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1) Venez. Case p.229; Venez. Arg.p.354.

unimpaired. These contentions were put forward by Counsel with much vigour.[1] They urged that, a concept of private law having been expressly incorporated into a treaty, it is incumbent upon the Tribunal to follow all the implications of this term. "Whenever in a legal document a word occurs which in the law bears a technical meaning, that technical meaning is the primary meaning for the purpose; Thus words having a well-known legal meaning, whether they occur in statutes, deeds, will or contracts, are given their legal meaning unless the context clearly indicates the contrary... No terms are better known or have a more precise and exact meaning than the terms "adverse holding" and "prescription". Effect must be given to that meaning when ascertained, unless there is something in the context of the treaty which indicates the intention to use the terms in a different sense"[2]. The proceeded to discuss, on the basis of common and Roman law, the above-mentioned requirements of prescription in application to the British settlements, and they attempted to show that those specific requirements have not been fulfilled either by the Dutch or by the British occupation.[3]. It is not possible to

1). Especially oral arg. of General Tracy, proceedings of the arbitration, Paris 1899, Vol.9.2699-2707.

2) General Tracy, loc.cit. p.2691.

3). op.cit. pp.2710 - 2722, vol.10. pp.3094.

to deal here at some length with these arguments. It is believed that the Venezuelan contention was sound in principle. An impartial reading, however, of the treaty in question conveys the impression that it was the intention of the parties to constitute the elements of time as the only essential requirement for adverse holding.

73. The questions of occupation, possession and abandonment, were throughout the arbitration in the centre of the argument. It was especially Venezuela who, as a successor of Spain, put forward extensive claims resting on the right of discovery; discovery, it was contended, gave to Spain (and Venezuela) the right to constructive occupation. "The Dutch could not therefore rightfully occupy, as terra nullius, Essequibo or any part of the disputed territory, and any title acquired by the Dutch must therefore be rested either upon conquest, cession or prescription."[1] The British argument invoked the modifications of the absolute title conferred by discovery and formulated with great clearness in the Oregon and Louisiana disputes: (a) that when a nation takes possession of any extent of the sea coast, that possession extends not from sea to sea but only to the country covered by the rivers emptying within that coast and their branches; (b) "When any European

Occupation and possession

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1) Venez. Case p.230.

nation makes a discovery and takes possession of any portion of that continent and another afterwards does the same at some distance from it where the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course." 1). 2). It was denied, on the other hand, by Great Britain that there has been such an extent of control on the part of either Holland or Spain as to create a presumption of perfect title.

The influence of private law rules of possession upon the respective doctrines and the necessity of their application whenever conflicting claims of this nature showed itself clearly in the course of the argument. They were used by both sides, Venezuela alleging that the requirements of corpus and animus should strictly be applied to the claims of the Netherlands and Great Britain, as conflicting with their good and original title;[3] and they were used, with even greater force, by Great Britain, in combatting the Venezuelan claims founded on first discovery.[4] This and the Alaskan Boundary Arbitration are, perhaps, the best instances illustrating the private law element in the modern in-

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1). Twiss: The Oregon dispute
2). Proceedings vol.8.pp.2189-2219, arg. of Sir Robert Reid, vol.3. arg. of Sir. Richard Webster pp.82-3.
3). Proceedings vol.9.pp.2599; 2990,1.
4). Proceed. vol.3.pp.819-849.

international law of occupation.

74. It is impossible, in the absence of a reasoned award, to state how far the argument of estoppel raised by Venezuela affected the decisions of the arbitrators, but the circumstances of the case, the force of the plea and the attention paid to it by the arbitrators make it one of the most illustrative instances of the application of the doctrine of estoppel in international law. The argument of estoppel.

In 1850, in the course of protracted negotiations and in order to facilitate even a temporary settlement, Lord Palmerston adopted and handed to Venezuela a map, the so-called Schomberg's sketch map which was regarded by Venezuela as the extreme claim of Great Britain. It was now contended by Counsel for Venezuela that this was an admission on the part of Great Britain that her claim would not extent beyond the area defined in the map, that it was acted upon by Venezuela when she made the subsequent agreement in 1850, that she would never have entered this agreement but for the representations made that the extreme claim of Great Britain would not extend beyond the line of 1840, and that accordingly, Great Britain is estopped from putting forward claims going beyond that line. It is, perhaps, advisable to quote some parts of the argument

dealing with this question: [1]

"Lord Russell (arbitrator): Is your point then that Great Britain is estopped from saying anything outside the Palmerston line?

Mr. Soley: Absolutely, my Lord.

Lord Russell: estoppel?

Mr. Soley: Absolute and complete estoppel.

Lord Russell: So that, if he made a mistake and was wrong, any different right cannot be asserted?

Mr. Soley: Yes.

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[2]

Lord Justice Collins: ... the estoppel you have contended for extends to this only, that they cannot say any other area is covered by the agreement of 1850 than that you have named. But when it served.. its purpose... would there be anything to enable that estoppel to be carried forward in reference to that which was not before in the minds of the parties at the time of the agreement?

Mr. S: The interpretation would depend on what was before the mind of the parties.

Lord Russell: Is that agreement really anything more than a modus vivendi till the respective rights are ascertained?

Mr. S: It was vastly more.... There are consequences that arise from the agreement. The very fact of a statement by Great Britain of the territory that she claimed was one of the most important elements for Venezuela to consider in entering into this agreement not to occupy

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1). loc.cit.p.2024.

2). p.2026.

or encroach..

L.J.Collins: You are upon estoppel now and so far as the rights of Venezuela were altered by the representations of Great Britain that Great Britain cannot recede from that representation.

Mr. S: Not altered, my Lord.

L.J.Collins: As far as she acted upon them.

Mr. S: Yes.

Lord Russell: It depends if you can show that either party acted to their prejudice.

Mr.S: They agreed not to occupy this territory. I say that they conceded something. They made some promise and I say that there was a consideration...[1]

The discussion was continued in the course of the subsequent stages of the oral argument.[2]. There was no suggestion that the doctrine, being a rule of private law, had no application between states.[3] - No express doctrine of estoppel was invoked by Counsel for Venezuela with regard to the question as to whether Great Britain was now at liberty to deny the extensive claims of Venezuela based on discovery, after having, in many instances cited by Venezuela, adopted the theory and arguments on which now the contested claim of Venezuela is based.[4].

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1) p.2027.
2).pp 2039-43
3).comp.p.2339, arg. Sir Robert Reid; He denied that there was any action on the part of Venezuela as a result of the Palmerston line which constituted only a modus vivendi (pp.2379,2395)
4).Arg. of General Harrison, vol.II.p.2995; he dealt fully with the case of St.Lucia.

75. The application of private law is, and should be, of a subsidiary character. Where there are available other sources, as international customs or rights arising out of a treaty, it is to those sources that states prefer to have recourse in the course of a dispute. This is seen clearly in the case of the Alaskan Boundary Arbitration of 1903, constituted under the convention signed at Washington in January 1903. The judicial task of the Tribunal was that of interpretation. It had to decide what was the meaning of articles III, IV, and V of the Treaty of 1825 between Great Britain and Russia which, among other things, defined a line separating the Russian from the British possession in South Eastern Alaska, the rights of Russia having been afterwards acquired by the United States through the purchase from Russia of all its possessions upon the North West Coast of America, to which was given the name of Alaska. The arbitrators had to decide, in the answer to the fifth question, whether, in the intention of the parties, the eastern boundary was to run round the heads of the bays, ports, havens, and waters of the ocean, or to cross them. By running round the inlets the line granted to Russia included a substantial strip or lisière of territory upon the mainland extending so far south as to Portland Channel.[1]).

The Alaskan Boundary dispute. The subsidiary character of analogy.

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1). Comp. Alaskan Boundary Tribunal Proceedings, Sen.doc.58th Congress second session; the opinions of arbitrators vol.1.28-97; U.S. arg.vol 5.p.90; U.S.Counter Case vol.4.p.91; Balch: The Alaskan Boundary p.10-18.

The United States based their claim to the lisière on the treaty of 1825, on the intention of the parties to it, and on the evidence of this intention as revealed both in the negotiations preceding the treaty and in the actions of the interested parties after its conclusion. The arbitration treaty provided that the tribunal "should also take into consideration any action of the several Governments or of their respective representatives, preliminary to the conclusion of the said treaties so far as the same tended to show the original and effective understanding of the parties". It was as an element of interpretation of the intention of the interested parties that the United States put forward their main argument: acquiescence, for over seventy years, on the part of Great Britain in the exercise of jurisdiction by Russia and the United States over the waters and coats in dispute.

The United States, placing themselves on the strong ground of treaties in question and of the arbitration compromise, expressly disclaimed the intention of availing themselves of the plea of prescription or estoppel, although they both were contained in the essence of their argument. If I shall be able - the Counsel of the United States urged 1) to show - that there was a concurrent view between Russia and

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1) Oral arg. of Mr. Dickinson p.732. op. cit.

Great Britain which gave an interpretation which was in effect at the time the United States bought, then the United States would succeed to the rights of Russia under that interpretation. I do not mean by way of estoppel, and I do not mean to predicate anything upon that or upon the doctrine of prescription, or upon the doctrine of acquiescence, so far as acquiescence may set up an adverse claim... and the only point upon which I shall insist upon acquiescence is that acquiescence may be looked to as indicating an understanding and an interpretation:. 1) The Canadian arbitrator and the British Council tried to construe the United States argument as a plea of prescription 2) which they promptly proceeded to deny, in this case, as a rule of international law. In the course of this stage of the argument, the President, Lord Alverstone, associated himself with the view expressed by Lord Hannen in the course of the Behring Sea arbitration, that while prescription properly so called was not recognised in international law, estoppel and acquiescence might be of considerable importance. 3)

But Counsel for the United States, being in possession of what they thought a clear treaty right, were quite unwilling to exchange it for a contested analogy. And although they quoted in their argument the loci classici of the international doctrine

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1) The same arg. is repeated on pp. 792, 793, 830; s.also case of U.S. p. 102.
2) Proceedings p. 322.
3) p. 323.

of prescription [1] they were careful not to invoke the doctrine itself.[2] And it appeard from the opinion of Lord Alverstone that they chose the right course. [3] It is submitted that the course taken was a right one; private law or rules of international law analogous to private law should be applied only where there is no remedy in the positive rules of international law.

76. The English Counsel did not, hesitate to apply the common law rule of merger in order to weaken the evidence ~~as~~ adduced by the United States. "It is a rule of common law that... when a bargain is made the previous negotiations are superseded altogether. They are not admissible and you cannot refer to them, for the simple reason that the contract supersedes them". [4] They urged that although the rule is not generally recognised in other systems of law, it should be followed when both parties are governed, in their municipal law, by the common law of England.[5] There are many statements in the opinions of the arbitrators to the effect that they did not regard themselves as

The authority of Roman and common law. Merger.

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1) Indiana v. Kentucky; Massamaquody Bay Commission under the Treaty of Ghent.
2) Arg. of Hannis Taylor, proceedings pp. 554-7; s. also the opinions of the American arbitrators p. 49, 63,64 op. cit.
3) p. 42. loc.cit.
4) Oral arg. of Sir Christopher Robinson p. 455, 6e.
5) s. also Brit. Counter Case p. 6-7.

bound by this common law rule. [1] But it is interesting to know that this contention led to an opposite, and no less extreme, assertion on the part of the United States put forward by Hannis Taylor [2] that the common law rules of evidence have no validity in international disputes because "the substructure of the whole international system is the Roman law as developed and embodied in the codes of continental nations", and that," this being a tribunal governed by the rules of procedure and the rules of evidence which prevail in Roman law tribunals, every fact is admissible which is pertinent to the issue, and its pertinence is a question to be decided by the judges themselves." [3] We shall meet with this assertion in other cases of international arbitration.

Rules of evidence.

In this case the question of burden of proof formed a disputed issue. The United States contended that it is upon Great Britain to prove that the unnavigable Portland Channel was meant as a boundary, and not the thalweg, because the burden of proof lies upon him who asserts that a special and conventional rule has been substituted by the parties in the place of a general law. [4] [5]

Burden of proof.

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1) s. opinion of Lord Alverstone p. 40 op. cit; of the American arbitrators p. 49.
2) Oral Arg. p. 501.
3) loc. cit.
4) Taylor, oral arg. p. 533.
5) As to rules of interpretation (which formed a contested issue in the dispute) s. espec. p. 459. of the oral arg; the U.S. arg. pp. 6-11 and the opinion of the U.S. arg. loc. cit. p. 49.

CHAPTER VII.

Private law as a source of international law in international arbitration. (Continuation)

77. The Pious Fund of California Case of 1902, the first case before the Permanent Court of Arbitration under the Hague Convention of 1899, gained prominence by the fact that it did expressly recognise the validity, in international law, of the private law principle of res iudicata (or of estoppel by judgment in English law). The text-books simply characterise it as the arbitration which affirmed the applicability of the principle of res iudicata in international law. (1) These statements are not accurate. Neither party to this arbitration disputed the applicability of the principle. It was being conceded by Mexico throughout the whole dispute that the principle of res iudicata does apply to the awards of international arbitrations. "That res iudicata pro veritate habetur is a principle, admitted in all legislation and belonging to the Roman law, certainly no one will deny. Nor is it denied that a tribunal or a judge established by international arbitration gives to its decisions pronounced within the limits of jurisdiction the force of res iudicata." This was the official declaration of the Minister of Foreign Affairs of Mexico addressed in 1900 to the American

The Pious Fund of California Case. The principle of res iudicata recognised by both parties.

(1) Wheaton: Inter. Law, 1916, p. 399; s. also Hyde, vol. II p. 115-7.

Minister, (1) and this attitude was being invariably maintained by Mexico in the course of the proceedings before the Tribunal(2) although Counsel for the United States deemed it necessary to expatiate upon this point and to defend the rule of res iudicata as a fundamental principle of every jural society.(3) It is significant how a rule never before expresslyrecognised as binding between states receives recognition even on the part of the state whose interests would demand the rejection of the principle.

78. It was, however, contended by Mexico that res iudicata is limited in its application to the condemnatory parts of the judgment and does not embrace the considerations and premises upon which the judgment is founded; that the "dispositif" of the judgment is the only thing coming under the scope of res iudicata, and that therefore the award of the umpire, Sir Edward Thornton of 1875, to the effect that Mexico should pay to the United States 904,000 dollars as representing 21 annuities due on the Pious Fund, has no binding effect for the future.(4) It was contended, on the other side, by the United States that "Whatever was of necessity implied or flowed as a necessary

The scope of res iudicata.

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(1) Cited in the Supplementary Brief on the part of the U.S. p. 43.

(2) Comp. p. 250. of the Record of the Proceedings, Van Langerhuysen Brothers, The Hague, 1902, arg. of Mr.Bernaert.

(3) U.S. Brief. pp. 29.

(4) Mexican answer to the Memorial of the U.S. (exhibit "A" of the replication of the U.S. p. 23)

consequence from the finding of the judgment is to be considered as an integral part of it, and not to be divorced from it.(1) Both sides quoted amply private law rules, cases and authorities as the only source for the decision of the Tribunal.

Never before was an important international Tribunal confronted with this problem. There was, however, no doubt that, in the absence of an express rule of international law, the generally recognised rules of private law may and should be used.(2) But is there a general rule of private law governing this question? The fact that both sides quoted private law in upholding their contention would indicate that there was no uniform source upon which the judges could rely. But it seems that the authorities cited by Mexico referred to motives of an explicatory character, and not to those forming logically an essential part of the judgment proper. This has been clearly put in the argument of Mr. Descamps: "Il faut bien reconnaitre que sous cette denomination: les motifs, on peut dans la realite comprendre deux choses tres distinctes: de simples elements d'ordre explicatif et les bases substantielles de la decision. Celles-ci constituent avec les resultats immediatement pratiques les

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(1) Oral arg. of Mr. Penfield op. cit. p. 331.; also arg. of Mr. Ralston. p. 127.

(2) For the large number of cases and private law authorities s. Mexican answer to the Memorial of the U.S. op. cit. p. 23-29; by the U.S.: Brief and Statement p. 45-55, Supple. Brief. 52-4.

elements constitutifs essentiels et forment le terrain d'application de la chose jugee".(1) This seems to be sound. Of course, it is sometimes difficult to draw the line between the two kinds of motives. It is, in such cases, for the Tribunal to decide, as a question of fact, regulated by the broad principle adopted by all systems that what is logically an essential part of the judgment falls under the scope of res iudicata, whether the motives in question belong to one category or to the other. In this light should be read the part of the award which affirms "that all the parts of the judgment or the decree concerning the litigation enlighten and mutually supplement each other, and they all serve to render precise the meaning and the bearing of the dispositif (decisory part of the judgment) and to determine the points upon which there is res iudicata and which thereafter cannot be put in question", and that this principle of private law" should for a still stronger reason be applied to international arbitration".

The right of the tribunal to pass upon its jurisdiction.

79. But should the Tribunal come to the conclusion that the question of future annuities falls within the scope of res iudicata, in this case - ran the further contention of Mexico - the umpire had no right to pass over his jurisdiction; he rendered a decision lying outside the scope of the mandate conferred

(1) Oral arg. p. 297; for Mr. Bernaert's arg. s. p. 231.

upon him by the compromise.(1) So arose the second "private law question": has an arbitral court the inherent power to pass upon its jurisdiction? "The analogy existing between international and private arbitration is such that we are justified in believing that if private arbitrators possess the power to determine their own jurisdiction and to interpret the instrument creating them, for stronger reasons must the same powers be regarded as resting in international arbitral courts" - says the argument of the United States.(2) Although they could rely in this matter on weighty precedents of international arbitration in their favour and on an almost unanimous opinion of international lawyers,(3) they quoted amply private law cases and authorities.(4) The Tribunal adhered, as was to be expected, to the contention of the United States, although the respective part of the award does not express the rule in a sufficiently general form: "the convention of July 4th, 1868, concluded between the two states in litigation, had accorded to the mixed commission named by the two states, as well as to the umpire to be eventually designated, the right to pass upon their own jurisdiction". It is not clear whether this is a conclusion

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(1) Oral arg. of Mr. Bernaert p. 250.

(2) Brief of the U.S. p. 27. 11) p.23-31.

(3) Brief loc. cit.; oral arg. of Mr. Ralston p. 11-16.

(4) Oral arg. pp. 110, 111, 119.

reached on the ground of interpretation of the compromise of 1868 or, perhaps, on the part of the argument of the United States that was based on estoppel.

The argument of estoppel

80. For it was contended by the United States, in the written and the oral argument, and in the briefs, that Mexico was estopped by its conduct from denying the right of the mixed commission of 1868 to decide over the question of the California Fund. It was urged that throughout the whole dispute, both before and after the decision of the umpire, Mexico "impliedly and by a uniform conduct conceded to the former commission the power to decide the case." This conduct consisted in the ratification, in 1872 and 1874, of the conventions providing for the extension of time within which the joint commission should settle the claims brought before it, and in other acts of the agents of Mexico.(1) "Her (Mexico's) course of conduct might have created against her what is known in English and American jurisprudence as an estoppel in pais. By such an estoppel she would be prevented from asserting that the court had no jurisdiction. We invoke all these principles in support of our present claim."(2) The United States pointed out that Mexico, embarking, in 1868 and in the subsequent

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(1) Oral arg. pp. 110, 111, 119.

(2) Suppl. Brief p. 47, 49. The term and the technique of estoppel were used by the U.S. throughout the case.

conventions, upon the litigation, accepted both the opportunity of success and the change or defeat. She cannot now, after having lost, question the jurisdiction of the Tribunal. "Let it not be supposed that in submitting this point we rely upon a technicality, for it would seem that if there be any intention on the part of one part not allow a given claim to go to arbitration... it is his duty to announce such fact in the beginning, since if such announcement be made, the opposing party may at once agree to the withdrawal of the subject-matter and make the claim the foundation of a separate convention."[1)]

It seems also that estoppel was pleaded by the United States in another direction, although the doctrine was not formally invoked in this case. According to the terms of submission, the Tribunal in Hague had to answer two questions only: (a) is the case within the governing principle of res iudicata? (b) if not, is the claim just? It was now contended by the United States that, by these terms of submission, Mexico is precluded from raising such questions as: that the claimants ought to have resorted to local Tribunals; that the award of Sir Edward Thronton was erroneous, and that the claim as such is barred by the Mexican statute of limitations[2)]. This part of the argument, however, which seems to be a rather strained one, did not receive much

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1) Statement and Brief p.30; see also p.43.

2) Oral arg. of Mr.Penfield, p.342.

recognition on the part of the Tribunal.

81. This may be inferred, among others, from the fact that the plea of the claims being barred by the statute of limitations was dealt with by the Tribunal and answered in the outspoken and severely criticised decision: "that the rules of prescription, belonging exclusively to the domain of civil law, cannot be applied to the present dispute between the two states in litigation."[1] Does this decision really signify the rejection of the well-established doctrine of prescription? This is most improbable if the following facts are taken into consideration: (a) The question of prescription in international law did not form an issue in this arbitration at all. It had only to be decided whether article 1103 of the Mexican code to the effect that "emphyteutic, or annuity pensions, revenues, rents and any other loans whatsoever, not collected when due, remain barred in five years" may be invoked in the case of the respective claim becoming an object of an international dispute. The decision of the Tribunal, properly read, supplies the correct answer to this question;[2] (b) even the United States were careful, in the course of the arbitration, not to oppose prescription as such. They drew a clear line of

The alleged rejection of prescription.

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1) Scott, reports pp.616.

2) See report of Mr. Balston to the Secretary of State, p.10 ("the controversy was eminently international in character, and... national rules of prescription could not be invoked to defeat such claims as ours, presented before an international body").

distinction between a statute of limitations, which is recognised in international law only so far as it may be agreed to exist for a particular case by a treaty, and prescription proper - which they did not reject[1]. In the light of these considerations should be read the decision of the Tribunal "that the (t h o s e) rules of prescription, belonging (w h i c h b e l o n g) exclusively to the domain of civil law, cannot be applied to the present dispute between the two states in litigation."

The Venezuelan Preferential Claim.

82. The Venezuelan Preferential Claim case of 1903 is, perhaps, the most convincing argument for the contention that states do not share the opinions of those writers who object to the application of any other rule except this expressly recognised by positive international law. The legal conviction of states and the actual relations between them call for analogies and for application of rules based on such analogies. No theory can change the fact that, when one state, in the course of a judicial or quasi judicial process of recovery of debts due to him or to his nationals, compels the debtor state to grant a security for the amount due, and afterwards, on the ground of this security, demands preferential treatment as against those states which have failed to obtain such a

1) Ralston, oral arg.101; it is of interest to note how the chief agent of the United States in this case, when acting as the umpire in one of the Venezuelan arbitrations of 1903, devoted in an outspoken award much space to the argument that the principle of prescription was by no means denied by the United States (Gentini ...

security, no theory can change the fact of an obvious analogy betweenthis relation and similar relations between individuals. The Venezuelan Preferential case is a good instance of this fact, not least owing to the number of states taking part in the dispute. Ten states (Great Britain, Germany, Italy, on one side; Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway, on the other) were represented and pleaded before the Tribunal - a representative array of nations.

Roman law as a source of international law.

83. "The three allied powers naturally seek, as we do, to establish their contentions on the rules of civil and Roman law, the ius gentium "par excellence" [1]. This passage from the countercase submitted by Spain adequately characterises the proceedings in this case. The same principle has been accepted, with even greater emphasis, by the opposing party: "the principle by which this matter should be governed in international law is laid down in the legal system exhibited by the "ius" and "lex" and the opinions of Roman jurisconsults. Rome has given a body of laws to all nations, called the law of nature... By the general consent of nations the rules of Roman law were adopted, especially in the matter of contracts" [2]. We shall see that not only Roman

1) The Counter Case of Spain, p.1064, The Venezuelan arbitration before the Hague Tribunal, 1903, proceedings of the tribunal, U.S.Sen.doc., 58th Congress, 3rd session.

2) The case of Italy, op.cit.p.800.

rules were invoked in the course of the arbitration. The parties had recourse to modern systems of private law insofar as, in their opinion, they embodied a general rule of law.

84. The powers demanding preferential treatment based their claim on several generally accepted rules of private law. They contended, firstly, that the assignment in their favour of the thirty per cent of the customs revenues of La Guaira and Puerto Cabello constituted a pledge or a real security governed by the Roman and private law of pledge and hypothecation, which constitutes a title to preference for the creditor to whom the object is hypothecated.[1] A kind of international lien - it was asserted - has been created by the assignment of those revenues. The blockading powers demanded, secondly, preferential treatment as a reimbursement of the expenses incurred by them through the blockade as "negotiorum gestores" of the non-belligerent powers and to their profit[2].

Hypothecation lien.

85. It was especially on this second ground that their opponents were quite ready to meet them. They pointed out that, according to Roman law" the constituent elements of procuration, which conferred the right to compensation for the expenses incurred on behalf of another, are that

Negotiorum gestis.

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1) German arg.p.1197, Case of Italy 860-62, with ample references to Roman law.

2) German case. p.816.arg.1198:Carter Case of Italy.p.1042;Brit. Case p.760.

another's business should really and truly have been the object of the management by the claimant to such compensation and that the acts of the latter should have been realised with intention to manage and as a means of obliging the other party, who must be ignorant of such procuration and not have expressly forbidden it"[1], and they maintained that no one of those conditions was complied with in the action of the blockading powers. It was even asserted that this action, far from having brought profit to the non-belligerent states, has injured their interests by diminishing the financial assets of common debtor[2]. France, while conceding the analogy of negotiorium gestio, proposed, as one of the rules governing the law of procuration, to limit the claim of the blockading powers to a certain privilege, proportionally to expenses incurred, without changing the proper nature of the claims[3].

86. But it was also on an analogy - a rather strained one - that the claim for equal treatment was founded. The non-belligerent powers maintained that, the position of Venezuela being analogous to that of cessio bonorum or bankruptcy, (or the German Konkurs) the respective principles of private law are to be applied according to which the creditors of the debtor enjoy, as a rule

Bankruptcy of states.

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1) Case of Spain, p.1196.
2) Counter Case of the Netherlands, Sweden and Norway, pp.1110.
3) Case of France, p.883.

equal rights on his estate[1]. It was not too difficult to show the inadequacy of this argument. It was pointed out that there is no uniform law of bankruptcy, that there is in international law no procedure in bankruptcy, that the seizure of the whole property of a state would be inconsistent with its continued existence as an independent community[2], that, in this case, Venezuela is not compelled to distribute her assets between all her creditors,[3] that she is not insolvent and that, although she has seldom paid her liabilities except under pressure, she can do so if her sources are properly administered". The blockading powers invoked, in turn, civil law rules showing that that creditor is entitled to preference who first takes action in order to protect his rights - vigilantibus non dormientibus subvenit lex[4], or who first obtained possession of the creditors goods - prior in tempore, potior in iure[5].

87. But it seems that the most weighty argument put forward by the blockading powers was that of estoppel (preclusion in Roman law systems), an argument fully, although not expressly, adopted in the award of the Tribunal. In February 1903, separate protocols were signed between Venezuela on one side and Great

The argument of estoppel.

1) Case of France p.980.
2) Case of Italy,p.987-8; Counter Case p.1038-9.
3) p.1043; arg.of Sir Robert Finley p.1248-9; Counter Case of Gr.Brit.p.976.
4) p.983 5) Case of Italy pp.982-3.
5) Case of Italy pp.982-3.

Britain, Germany and Italy on the other, in which the justice of the claims of the mentioned powers was admitted by Venezuela and provisions were made for the allocation of the custom revenues of two ports of Venezuela for the purpose of satisfying the claims of the blockading powers[1]. These protocols were incorporated in the compromis of May 7th 1923 providing for an arbitration before the Tribunal at the Hague. It was now argued by Great Britain[2] that the blockade was raised and the Venezuelan vessels restored in consideration of the admission contained in the protocols and incorporated in the compromis. The British counsel referred here to a similar case that arose in the course of the Pious Fund arbitration. They contended further that, as the other powers acquiesced in the action of the blockading powers", it is impossible for them now to turn round and to say that the blockading powers are to be deprived of the advantage which they have earned by taking the action in which the other powers acquiesced".[3] It is in the light of this argument that the respective parts of the award should be read: "... "hereas the Government of Venezuela in the protocols of February 13th, 1903 (article I) itself recognises in principle the justice of the claims presented to it

1) Op.cit.pp.23-31.
2) Arg.of Mr.Arthur Cohen pp.1254,end of Mr.Richards p.1265,6.
3) Reply of Sir Robert Finlay p.1329,1330, his arg.p.1219,1240; American Counsel denied acquiescence. Arg.in reply of Mr. Penfield p.1293-4,1347.

by the Government of Venezuela, until the end of January, 1903, in no way protested against the pretention of the blockading powers to insist of special securities for the settlement of their claims... and... whereas the neutral powers... did not protest against the pretentions of the blockading powers to a preferential treatment...[1]

88. Estoppel thus proved the most successful argument in this arbitration so rich in private law analogies; for other instances of analogy besides those mentioned until now were put forward and discussed in the course of the arbitration: The rule res inter alios acta aliis nec nocet nec prodest (could the protocols of February 1903 curtail the equal rights of the neutral powers?[2] the application of the rule "equality is equity"[3], the doctrine of cause and consideration[4], the onus of proof (does it rest upon those "who claim a preferential treatment to the detriment of other powers"[5] or on the others "to establish their right to intervene?"[6] Other instances of analogy.

89. It is often asserted that the juridical value of the award in the North Atlantic Coast Fisheries arbitration is greatly diminished by the elements of compromise contained in it.[7] A careful reading of The North Atlantic Coast Fisheries arbitration.

1) p.55.op.cit.
2) Case of Spain p.916.
3) Arg.of Mr.Cohen p.1259.1262.
4) Counter Case of the Netherlands... p.1110.
5) This was the contention of the "neutrals" p.55.op.cit.(Minutes of the second meeting).
6) Arg.of Mr.Cohen.p.975.
7) That the award is the result of a compromise has been admitted by the President of the Tribunal - but only in the meaning that the Tribunal availed itself of the right conferred by the arbitration treaty to make special recommendations.Comp. Lammash.Rechtskraft.p.66.

the award suggests, however, that the juridical part of the findings of the arbitrators is unaffected by the wish of the tribunal to arrive at a solution satisfactory for both parties. The compromise lies rather in the use made by the tribunal of the article IV of the arbitration treaty of January 1909: "The Tribunal shall recommend for the consideration of the High contracting parties rules and methods of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award[1]. For it seems that in the principal question of the arbitration, that of international servitudes, the attitude of the Tribunal was determined by a strictly juridical reasoning and by a meticulous, perhaps too meticulous, adhering to the consequences of a private law conception.

The adoption of a strict analogy by the tribunal.

The United States contended that - to use the language of the Tribunal - "the liberty of fishery granted to the United States constitutes an international servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereign of Great Britain, the servient state, and that therefore

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1) Substantially the same may be said with regard to the element of compromise contained in the Behring Sea award.

Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery." We shall see afterwards on what legal grounds and analogies this contention was based. It is sufficient to state here that the tribunal fully adopted the American argument: "Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a praedium dominans and a praedium serviens"[1]... The award seems to be quite right in stating that "this doctrine" - as formulated by the tribunal in full accord with the contention of the United States - "... has found little, if any support from modern publicists." The doctrine of servitude as accepted by the Tribunal and the United States in a thorough application of private law analogy, found certainly but little support from the publicists. - But the victory of the American theoretical contention caused its practical defeat. It proved too much. Just because of the real and absolute rights conferred by an international servitude - "it could be affirmed by this Tribunal only on the express evidence of an international contract"[2]. The tribunal did not reject the conception of servitudes and, perhaps, even not the doctrine of servitudes, but it demanded a strict proof for its existence. Such a proof could not

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1) Award and question 1 (3).
2) loc. cit.

be supplied by the United States.

It was in the last days of the arbitration that Counsel for United States saw that they are proving too much, and they began, very wisely, to secure the way of retreat. They were helped in this endeavour by the American arbitrator, Judge Gray. He asked in the course of the closing argument of Senator Root: "...This right does not depend upon its classification as technical servitude?"

Senator Root: Certainly not.

Judge Gray: You do not suppose Lord Salisbury had that in mind, or that any of the negotiators... had in mind any relation to this definition by the writers up to that time?

Senator Root: I suppose the negotiators understood the way in which rights of that character are generally regarded... I do not suppose that they considered that they were acting under a technical rule of servitude."[1]

He was cautious enough to say the same thing on a previous occasion: "... The rights are not made to depend upon analogy; they are explained by analogy... We are not here and we never have been claiming that we are entitled to have our treaty right here held inviolable because it is a

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1) Arg. of the Hon. Elihu Root. separate ed.p.250.

right founded upon an analogy to the Roman law of servitudes. We are here saying that this is a right which may be understood under a treaty which must be interpreted in the light of explanations of this and similar rights during a long series of years, and explanations accepted by the nations of the world..."[1] But it was too late. He had already succeeded in impressing upon the Tribunal the full analogy with Roman and private law servitudes.

90. It is perhaps advisable to quote some passages of the respective parts of Senator Root's argument, not only because they have been accepted by the Tribunal, but because they are, it is believe, a classical instance of a full application of private law analogy:

The question of analogy in the arguments of the parties.

"My contention is that American fisherman, exercising the liberty in British waters so far as regards the entire range of personal conduct, are under British sovereignty - but so far as the method, and time and manner of exercising this liberty, and the conditions upon which they shall exercise it are concerned, they are dependent upon their own Government. They take no right from Great Britain. They take the right from their own Government, which received from Great Britain the power to give them that right"[2].

He presented the theory with a convincing clearness:

"There is a difference between the results which would follow from treating this right that passed to the United States by the ratification of the Treaty of 1818 as a real right, on the one hand, and treating it as an obligation in terms perpetual on the part of Great Britain,

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1) op.cit.p.240.
2) p.295.

on the other hand. The first difference in the nature of the right is that in the first view the treaty would be deemed to take out from Great Britain a fragment of her sovereignty itself, and from that it would follow as a logical conclusion that Great Britain could not order, regulate, control, limit, or restrict the right that has passed to us, because it was not hers... On the other hand, if this is to be regarded as not creating a real right, but as creating an obligation, Great Britain is prevented from exercising control, limitation, or restriction over the right which passed by her obligation, and therefore the obligation is such that it excludes her from doing that thing.

"There is a second difference - this one as to the result. If this be a real right, as we think it is, the United States would have a right of control over the conduct of its citizens in the exercise of the real right in this territory, and laws made to govern the time and the manner in which they exercise that right would be laws which, for their validity, required the assent of the United States. They would be invalid, as affecting its citizens, but for the assent of the United States... On the other hand, if the treaty creates an obligatory limitation upon Great Britain, if the limitation of her sovereignty is a limitation created by perpetual obligation, and if in the exercise of the sovereign power Great Britain in that territory makes a law which oversteps the limits of her obligation which she was bound in the contract not to make, that is a wrongful exercise of her sovereignty, from which this Tribunal is bound, if it can see it, to restrain her..."

The President had some doubts as to the existence of analogy between the position of the private proprietor and the sovereign of a state with regard to such real rights, but it seems that no attempt was made to shatter the juridical foundations of Senator Root's argument. But, as said above, the strength of the argument defeated its very object.

But if the juridical argument of Mr. Root as to the essence of a real right was almost unassailable, then so were the grave practical doubts raised by Great Britain as to the applicability, without an express grant, of this doctrine to relations between states. Much of what has been

said in this connection in the course of the oral argument may, naturally, be put to the account of the forensic atmosphere,[1] but the main point of this part of the argument raised issues of real importance with regard to the doctrine of international servitudes. Says Sir William Robson, the Attorney General:

"A state may make, for instance with regard to a railway, a contract with another state giving that other state any rights it pleases over its own territory for the purposes of the railway. I say that that is properly done - call it servitude if you like. If you merely call it a servitude, and do not begin to attach to the servitude all kinds of consequences not intended by the parties, I have no complaint at all. I think such servitudes are proper and should be encouraged.... One of my complaints of the doctrine of servitudes is that the name itself is one which does not encourage the grant of such rights. I think it is an unfortunate name. And even if it is kept strictly to its narrowest limits, it does harm in international law.... No state ought to be deterred from doing it by being afterwards informed that when i t has done it, without ever intending to touch or affect its sovereignty, it has affected its sovereignty because of the view not put forward with regard to international law in reference to servitudes." [2]

The United States would have substantially strengthened their position by an attempt to justify the postulated analogy not only by formal similarities, but by the necessities of international relations, in the same measure as Great Britain was combating the doctrine. It cannot be said that they availed themselves to the full extent of this line of argument. There was not much convincing force in the respective argument of American Counsel:

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1) especially those relating to the "offended pride" of the servient state pp.1084 of the oral arg.s.also pp.1006. on the historical evolution of the concept.

2) Proceedings p.1012.

"These rights in civil law were so important that they were declared to be real rights... which were beyond the control of the grantor and of his successors, and which the grantee might protect, in his own right, against the encroachments of all persons whomsoever. - This reason of the civil law would appear to apply with added force in the law of nations... because there is no rule of international law under which a nationsl can be made to respond in damanges for breaches of its treaty obligations as there is in the municipal law under like circumstances. Therefore, there is tenfold necessity for attaching to rights granted by nations, when it is possible consistently to do so, the qualities of fixity and certainty, and of exemption from control of the grantor of the right"[1].

There is a clear rule of international law that, by the breach of a treaty, an international delinquincy is committed, which imposes upon the delinquent state the obligation to make reparation.

The award and the future of the doctrine.

91. It is not possible to follow here those parts of the oral argument in which the technical difficulties of the analogy have been fully brought to light by Great Britain and the Tribunal.[2] The arbitration was undoubtedly instrumental in revealing the great difficulties of analogy with regard to this particular concept. Its result is in agreement with the general proposition put forward in these chapters: Although there is nothing in the nature of

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1) Proceedings p.336.

2) comp.pp.351 et seq. pp.125 et seq. ibid. The U.S. had to admit that it is not possible "to square this institution in every respect with the servitude of the private law of Rome"; they had to admit that the praedium dominans is not the territory of the U.S. but the sovereignty of the U.S., and thus exposed themselves to the contention of Gr.Brit. that the right in question does not constitute a practical, but only a personal servitude.

international relations which forbids analogy and although, in the great majority of cases, the application of analogy is co-extensive with the strengthening of the legal character of international law, there must always be examined the question of whether there exists the foundation of all analogy, identity of relations. It is especially with regard to international servitudes that this should be strictly examined. It cannot be maintained that the last word has been said in this examination. The task of the science of international law is to establish before everything: (a) whether international servitudes mean permanent restrictions of sovereignty in general, or restrictions of territorial sovereignty, or of restrictions of territorial sovereignty qua territory only; (b) whether the essence of their real character is not only that they are not affected by changes of territory, but also that they imply the grant of a sovereign right to be exercised by the grantee in his own name. Should the present chaos and differentiation of opinion on these questions continue to remain unsettled, it would certainly be better to discard the doctrine altogether. The award in the fisheries arbitration did not do so. It accepted the doctrine but demanded a strict proof of an express contract in the case of its rules being invoked. This certainly does not render the acceptance valueless. For, should states avail themselves in the future, in a public treaty of this notion, then the judgment of the tribunal may be invoked as one of the most authoritative

formulations of the consequences flowing from such a treaty.

In this as in almost all arbitration cases, the question of interpretation of treaties[1] and of the onus of proof played an important part[2]. They were, however, overshadowed by the outstanding problem of servitudes.

92. The Russian Indemnity Case, decided in November 1912 by the Hague Court, was almost entirely dependent for its decision upon the application of private law rules. Claims for moratory or compensatory interest had occupied many previous international tribunals, but now for the first time such a claim formed the exclusive subject matter of an international dispute. Russia claimed from Turkey interest for the delayed payments of some indemnity sums provided for by the Treaty of Constantinople of 1879.[3] The pleadings on both sides and the award of the tribunal threw an excellent light upon the problem in question. The Russian Indemnity Case.

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1) s.Sir William Robson, or arg.(private and international law rules of interpretation).

2) p.1151 (discussion between Sir William Robson and Sir Charles Fitzpatrick); in the main question the tribunal held that "considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits and that, failing proof to the contrary, the territory is conterminous with the sovereign, it follows that the burden of the assertion involved in the contention of the U.S. must fall on the U.S." (Award, question 1).

3) For the summary of this and other Hague cases, s.Scott, Hague Court Reports, p.297.

Turkey contended vigorously that the position of a state is not that of ordinary debtors under private law. Its responsibility is limited by the assets under its actual disposal and it decides itself the order and the manner of satisfying the creditor. A private person may become bankrupt, a state not. It is the first duty of a private person to pay his debts, but it is the first duty of a state to cover the expenses of administration and defence. The creditors must know that the debtor state might be unable, for a time and from urgent reasons, to pay its debts. To compel a state to pay moratory interest and so to become a debtor to a greater extent than it may have wished is to expose it to "the risk of compromising its finances and even its political existence"[1]. The state as a debtor.

But in all other respects there was no hesitation on the part of Turkey to base her argument on private law. Article 1152 of the Code Civil was adduced in support of the contention that, as the treaty contained no mention of moratory interest, it cannot be demanded now; The Code Civil and the German law were quoted in support of the plea of vis maior which had prevented Turkey from the punctual fulfilment of the obligation; on private law was

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1) The Contre-Memoire of Turkey p.33. (cited after Neurer, der russisch-tuerkische Streitfall, in Schuecking, das Werk von Haag, p.271, vol.3).

based the contention that there was no formal demand, on the part of Russia, that the gift character of the indemnities exempts them from the consequences of delay so far as moratory interest is concerned, and, finally, that Russia waived, by an unconditional grant of extension, her possible right to demand moratory interest.[1] In the Contre-réplique, the plea of res cudicata has been added[2].

All these objections were opposed by Russia. Her "Replique" points out that the theory that states are not like ordinary debtors puts force and discretionary will in the place of law; that this theory, dangerous even in the case of individuals being creditors of a state, has certainly no application when the creditor is himself a state[3].

Adoption of analogy by the Tribunal.

98. The Tribunal could not refuse to give a legal decision because positive international law was silent on the question in issue. It adopted, as we shall see, private law rules governing analogous relations between individuals, but it asserted in the award that it is international public law that is being applied - a most important pronouncement showing that private law rules, by the very nature of things,

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1) Maurer, op.cit. pp.270-74
2) p.279.
3) p.276; for reply to other objections s.pp.267, 286.276-7.

and as a result of the legal identity of relations forming the subject matter of an international dispute, are deemed in such cases an integral part of international law.

The Tribunal held that Turkey "has no grounds for demanding anexception to this responsibility (responsibility of states) in the matter of money debts by pleading its character of public power and the political and financial consequences of this responsibility."[1] Turkey herself did not deny the general principle of state responsibility with regard to the fulfilment of international obligations - even in relation to pecuniary obligations. But, while invoking the Roman law distinctions of different kinds of responsibility and admitting her responsibility for compensatory interest should the actual damage be proved by Russia, she denied such an obligation with regard to moratory interest. The Tribunal, however, refused "to perceive essential differences between various responsibilites. Identical in their origin - culpability - they are the same in their consequences - reparation in money". And, applying a broad analogy, it arrived at the conlusion "that the general principle of the responsibility of states implies a special responsibility in the matter of delay of payment of a money debt, unless the existence of a contrary international custom is proven." But this Turkey was unable to prove. Russia, on the other hand, succeeded in reinforcing her position by invoking precedents in international arbitration[2].

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1) s.the award, Scott, p.315.
2) U.S.-Venezuela, 1885; Mexico - Venezuela, 1903; Columbia-Italy, 1884.

Following the path of analogy, the award proceeded to define the form of this special responsibility. "All the private legislation of the states forming the European concert admits, as did formerly the Roman law, the obligation to pay at least interest for delayed payments as legal indemnity, when it is a question of the non-fulfilment of an obligation consisting in the payment of a sum of money fixed by convention, clear and exigible, such interest to be paid at least from the date or the demand made upon the debtor in due form of law.

Interest, compensatory and moratory

We see that the Tribunal adopted not only the private law form of responsibility - moratory interest - but also one of the formal conditions of such responsibility: the express demand on the part of the creditor, the notice. The fact that "most legislation, following the example of Roman law, requires an express demand in due form of law" seemed to the Tribunal sufficient to incorporate the rule in international law. It held that it would be contrary to equity to subject a debtor state to stricter responsibility than a private debtor, and it was in the position to base its opinion on international precedent[1]. The divergency of the different systems of private law with

The formal demand.

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1) s. award in Orinoco Steamship Company, Hague 1910; U.S.- Chile, 1863, La Fontaine, p.38; U.S.- Venezuela 1885, Moore, Digest 3645,3567.

regard to the form of the demand[1], and the special conditions of international intercourse now gave occasion for the formulation of the rule that diplomatic channels being the normal means of communication between states, a demand for payment made through them is "regular and in due form." And, "as the Russian Government has expressly and in absolutely categorical terms demanded payment from the Sublime Porte, of the principal and interest, by the note of its Embassy at Constantinople", the tribunal held that Turkey is "responsible for the interest for delayed payments from the date of the receipt of his demand in due form of law."

The tribunal dealt shortly with the Turkish exceptions of vis maior, of res iudicata and of the gift character of the indemnity on which interest was demanded. It rejected these exceptions, not on the ground of legal principle forbidding their recognition, but because it refused to admit that the indemnity had the character of a gift, that the judgments of the commission established at the Russian Embassy at Constantinople fell, for the purposes of arbitration, within the scope of res iudicata, or that Turkey was really prevented by vis maior from fulfilling her obligations.

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1) The Code Civil prescribes "Une demande judiciaire " (Article 1154); no requirement of form is attached to the notice in German Law (Art.284).

95. There remained the last exception, a typically private law exception: that of presumptive and unrebutable waiver, of estoppel. The Ottoman Government maintained, and the justice of this assertion appeared clearly from the correspondence produced before the Court, that although the Russian Government demanded, in 1891, the payment of both interest and principle, it did not subsequently reserve its rights to interest on the receipts given by the Embassy or in the notes granting extension of payment and that the Embassy did not regard the received sums as interest. The award deals with admirable clearness with this exception, of which it approves and on which the final judgment of the court is based: "When the Tribunal recognised that, according to the general principles and the custom of public international law, there was a similarity between the conditions of a state and that of an individual which are debtors for a clear and exigible conventional sum, it is equitable and juridical also to apply by analogy the principles of private law common to cases where the demand for payment must be considered as removed and the benefit to be derived therefrom as eliminated. In private law, the effects of demand for payment are eliminated when the creditor, after having made legal demand upon the debtor, grants one or more extensions for the payment of the principal obligation, without reserving the rights acquired by the legal

Waiver (renunciation).

demand." The Tribunal held accordingly that the Ottoman Government is not liable to pay interest demages as demanded by Russia.

96. This judgment of the Court has been severely criticised by positive writers, notably by Strupp and Anzilotti. They are of the opinion that both the rule regarding moratory interest and that relating to the implied renunciation of interest in case of an unconditional extension for the payment of a debt, are rules of private law solely and exclusively; that no process of analogy justifies their reception into international law unless they have been adopted by international custom tor treaty. But Professor Meurer, in a detailed commentary on this arbitration, is clearly of the opinion that the award is just and reasonable, and that it constitutes an important advancement in the development of international law[1]. Criticism of the award.

The several great arbitration cases analysed in this and the preceding chapter are, it is hoped, a confirmation not only of the soundness of the method adopted by the tribunal but also of the fact that it is, on the whole, in agreement with the methods adopted by states and tribunals in former arbitrations. This method is, in turn, in essential agreement with the

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1) Op.cit.

necessities of international intercourse. States cannot refrain from entering into legal relations or from submitting them, in the case of dispute, to a final decision merely because international law, undeveloped as it is, does not specifically regulate the respective legal relation. Having once submitted their dispute to a judicial decision, they do not fail to recognise that they are subject to a rule of law whose provisions, if not found in international custom and treaties, may be sought when necessary in the great system of law which regulates the relations between co-ordinated individuals - the private law.

97. Doubts might be expressed as to whether the principle of moratory interest, as adopted by the Tribunal, is a generally recognised rule. For it appears that the position taken by English law is different in this regard. "In an action for the non-payment of a debt or liquidated demand in money, the measure of damages is the sum due, together with interest, if any is payable; and nominal damages can only be claimed for the detention of the money beyond the day of payment, because the special consequences to the creditor from want of money are not in law considered to be within the contemplation of the parties"[1]. And although interest, to run from the time of the demand, may be allowed... if a written

Is the principle of moratory interest a generally recognised rule? English law considers

1) Leake on contracts p.793.

demand of payment is made upon the debtor, giving him notice that interest will be claimed from the date of the month until payment" the power to award interest is in the discretion of the court or the jury[1]. The interest, if any, so awarded is payable by way of damages. But it may be doubted whether the English exception affects the general rule. It is not possible to trace here the origin and historical foundation of this attitude of English law. But that it is no more in accord with the legal conviction of judges of authority is clearly shown, for instance, in the opinions of Lord Herschell J.C. and Jessel M.R. in the cases London, Chatham and Dover Railway Company v.South Eastern Railway Company[2], and Wallis v.Smith[3], respectively." It has always appeared to me - says Lord Jessel - that the doctrine of the English law as to non-payment of money - the general rule being that you cannot recover damages because it is not paid by a certain day - is not quite consistent with reason. A man may be utterly ruined by the non payment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However, that is our law. If, however, it were not our law, the absurdity would be apparent."[4] This remark relates, of

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1) Halsbury, Vo.21,p.38 and note r.
2) (1893) A.C.p.437.
3) 1882 (Ch.D.) p.243 et seq.
4) p.257; virtually the same was the opinion of Lord Herschell, pp.437-440.

course, only to interest as damages, but it seeks the whole doctrine of moratory interest in English law[1]. In addition, the exceptions to the doctrine are so numerous and comprehensive[2] that they mitigate it considerably. It may be accepted that the Hague award is, in this connection, in accordance with a general rule of law.

98. This arbitration brings to a close the analysis of the most important cases decided by the Permanent Court at Hague. They are at the same time the most illustrative of the theses put forward in these chapters. It is not intended to analyse in the same manner other cases which came before the court at Hague. Their subject-matter is not such as to afford wider opportunity for application of private law analogy. A thorough study, however, of the proceedings of these cases would reveal that in almost all of them the problem became relevant in this or other form. It can only be indicated, in a cursory survey, in which cases the application of analogy was of importance. Other Hague Case.

The Japanese House Tax case of May 1905[3] is of interest, not so much with regard to the questions The Japanese House Tax Case.

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1) That the position of the law is not satisfactory in this regard was held in the same case by Lord Watson and Lord Shand, who made reference to the law of Scotland as following the opposite principle (in accord with Roman and Continental law).
2) s. Halsbury, loc.cit.
3) For a short summary of the case, s. Scott op.cit.p.77.

decided by the Tribunal, as with regard to those in which it refused to pronounce an opinion. The issue before the Tribunal was prima facie one of interpretation. Article 18 of the revised treaty of July 1894 between Japan and Great Britain provided that after the foreign quarters existing in Japan shall have been incorporated in the respective communes "the existing leases in perpetuity under which property is now held in the said settlements shall be confirmed, and no conditions whatsoever, other than those contained in such existing leases, shall be imposed in respect of such property."[1] The Japanese Government contended before the Tribunal that lands alone are exempted from the payment of imposts, taxes and other charges, and not also the buildings constructed on such lands, as claimed by Germany, France and Great Britain. Both parties based their argument on their own private law. The Japanese Government, which claimed the right to impose taxes on buildings maintained that although the ownership of the land remains vested in the Government, the ownership of the buildings belongs to the holders of perpetual leases who have purchased or erected buildings at their own expense[2]. It stressed the fact that

The juridical nature of leases.

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1) The same were the provisions of the treaties with Germany and with France of 1896.

2) Reply of the Japanese Government to the objections of the governments of France, Germany and Gr. Britain p.23.

that Code of Japan, far from adhering to the civil and common law principle of accession in respect of buildings, consecrates the ancient custom of dualism of land and buildings,[1] and it denied that the indivisibility of land and buildings constitutes a principle of natural as well as of general positive law[2]. But the European powers invoked their codes, the pandects and the general principles of law, natural and positive, in support of the contention that accession is a mode of acquiring ownership and that the building shares the legal position of the land on which it is erected[3].

The question thus submitted to the Tribunal was not one of private law pure and simple; neither was it a problem of international private law. It was a question of private law which, by the fact of having become object of a legal relation between states, has become a question of international public law. Whether seals are feras naturae or not, and whether they are under the rules of ownership when outside actual possession is a question of private law; but it becomes one of international public law when the parties to the dispute are states. This is also the case in this particular question. The Court, however, declined to enter

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1) Statement of objections of the Imperial Japanese Government to the contre-memoire and conclusions of the Governments of Gr. Brit., France and Germany, p.43.

2) p.88, ibid; Articles 553 and 664 of the French Civil Code were adduced, as well as the "bail and covenant" in which the preservation of ownership of the land in the hands of the lessor co-existe with the acquisition of the ownership of the buildings by the lessee, p.21.

3) Renonce présente...aux objections du gouvernement Japonais

into discussion of private law and based its decision on the interpretation of the intention of the parties. But a difficult problem is not solved by a refusal to answer it.

Rules of interpretation and the special character of international law.

With regard to the interpretation of treaties, the Tribunal rejected the argument of the Japanese case based on the rule much quoted in international law and expressed by Japan in the following manner: "Conventional provisions in derogation or the sovereign authority of the state must be interpreted strictly, and no argument based on analogy or presumable intention of the parties to such conventional stipulations is to be admitted."[1] This rule is often being invoked in international arbitration and the parties under obligation very willingly make use of it. It is regarded by many as typical of the special character of the relations between states. The tribunal, however, was not prepared to see upon this principle. It is submitted that the course adopted was a right one. No special rules of interpretation can be admitted as a consequence of the alleged specific character of international law, if they would result in disregarding the real intention of the parties. This is, for instance, clearly expressed in the award of the Permanent Court of International Justice of August 1924 in the case of "Wimbledon": "This fact (the

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pp.21,34,36; Contre-memoire et conclusions pp.17.

1) Japanese statement of objections pp.11,65,68.

limitation of Germany's sovereign right over the Kiel Canal) constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted."[1]- This argument that the sovereignty of the state is restricted by obligations assumed in a treaty must always be counterbalanced by the no less true fact that it is by the conclusion and fulfilment of treaties that sovereignty of a state finds its real expression[2].

99. In the Grisbadarna case, decided by the Hague Tribunal in October 1909, judgment was given on grounds amounting virtually to a recognition of the doctrine of prescription in international law, although the term itself was not used by the Tribunal[3]. It awarded to Sweden the Grisbadarna region in view of the fact "that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions are Swedish" and in recognition of "a settled

The Grisbadarna case. Prescription

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1) p.24.25.

2) Von Martitz, analysis of the case in Schucking op.cit.p.337. vol.1.The European powers distinguished in their "réponse" between the case where it is to be decided whether the application of a treaty provision should be extended to cases not expressly mentioned in the treaty (here they conceded the admissibility of the rule of strictum ius); and between the case of interpretation of a treaty where the real intention of the parties is to be elucidated.

3) For summary and award s.Scott's reports p.121-133.

principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible"; and it awarded the Skjoettegrunde, an insignificant part of the disputed territory, to Norway - on similar grounds. But it is of special interest to note how both states, especially Sweden, supported their claim by argument and rules drawn from private and especially from Roman law. This is the more characteristic since in both countries the influence of Roman law was and is very small so far as their municipal law is concerned. Sweden quoted the Roman law writers of the sixteenth and seventeenth century,[1] and had recourse to such Roman law notions as possessio nec vi, nec clam, nec precario. This and similar facts may not be in accord with the theory of positive writers[2], but they are nevertheless expressive of the legal conviction of states. Recourse to Roman Law.

1008 The second boundary dispute decided by the Hague Tribunal had its origin in differences of opinion between the Dutch and Portuguese Governments as to the proper interpretation of some conventions concerning the delimitation of their respective possessions on the Island of Timor.[3] The award of the Tribunal is noteworthy because of the full The Island of Timor Case.

1) s.Strupp's analysis of the case in Schuecking, loc.cit.vol.2, pp.115, 136-9.
2) They are sharply criticised by Strupp p.128 op.cit.
3) The Island of Timor Case of June 1914, s.Scott op.cit.354-386.

adoption of the general rule of interpretation of treaties as formulated by Rivier: "Principles of treaty interpretation are, by and large, and mutatis mutandis, those of the interpretation of agreements between individuals, principles of commonsense and experience already formulated by the prudence of Rome." The arbitrator cites in full the provisions of the code civil (article 1156-7), of the German Civil Code (article 133) and of the Swiss Code of obligations (article 18) - all of them to the effect that it is the common intention of the parties and not the literal meanings of the word "which should be aimed at in the work of interpretation", and he adds: "it is useless to dwell on the entire coincidence of private and international law on this point."[1] [2]

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1) Principe du droit des gens, Vol.2, Nr.157.

2) Other cases decided by the Court at Hague do not throw much light on the problem. It is impossible to say in the absence of published reports of the proceedings how far the parties availed themselves of private law rules and analogies. That they did it occasionally may be seen from the German Memoire in the Casa Blanca Case, where the analogy of Roman law is invoked in support of the contention that he who takes the law in his own hands, without waiting for the help of the local authority, is precluded from invoking afterwards the right he claims (French contre-mémoire p.36) and those parts of the argument and of the award which deal with the degrees of culpa of the persons in question (comp.Gidel,l'arbitrage de Casablanca, Rev.G. Dr.In.Pub 1.,1910, p.394-395), the Orinoco Steamship Company (Scott, 226-234) and the Canevaro case (Scott, 284-296) - the former being concerned with the rules governing the revision of an arbitral award; the second is a typical case of international private law.

CHAPTER VIII

Private law as a source of international law in international arbitration.

101. The discussion of arbitration cases in these three chapters does not purport to show that arbitral tribunals availed themselves of every opportunity of applying a rule of private law, although they undoubtedly illustrate the fact that international tribunals apply private law whenever they deem it advisable. What is intended to show is, firstly, that the parties to those arbitrations the states, resort frequently to application of private law analogies. Mention was already made of the very characteristic note of Hall: "There is no place for refinement of courts in the rough jurisprudence of nations." (1) This may be true, but it certainly does not apply to states as parties to an international dispute. The refinement of municipal courts is a repeated and surpassed before an international court. The Venezuelan preferential claim illustrates this fact in a striking manner. - The discussion will show, secondly, that in cases where international tribunals decide upon questions which would be governed by private law but for the fact that the parties to the dispute are states they adopt as a rule a solution in conformity with that generally obtaining in

1) 8th ed. p. 395. n. 2.

private law. The Russian Indemnity Claim case is a clear illustration of this tendency. - Of course, there are deviations from this path on both sides. It happens that a state rejects an adverse contention of its opponent by referring to an " inadmissable analogy"; it occurs, on the other hand, that an international tribunal aiming at a practicable settlement, refuses recognition to a private law rule of obvious application. This, again forms only an exception. But be it as it may, the instances of international arbitration - both the attitude of judges and states - show at least the urgent necessity of an unprejudiced treatment of the whole problem. Such a treatment would certainly offer some guidance to arbitrators often confused by the requirements of the actual case before them and by theoretical arguments on the specific public character of international law. - We proceed now with the examination of minor, though nor less instructive, arbitration cases.

102. Among the numerous arbitral awards which, at the beginning of the second half of the 19th century, mark the advent of an era more abundant in international arbitrations, the awards rendered by the Senate of Hamburg occupy certainly a prominent place so far as their juridical value is concerned. This relates especially to the cases: Croft, and Mylius and Shortridge, and Comp.

In the Croft case (1856) Portugal appeared as the defendant for an alleged denial of justice to Mr. Croft, a British

subject, to whom the Portuguese administrative authorities denied a patent of registration notwithstanding a judicial decision in his favour. (1) It was now claimed by the British Government that the authorities acted illegally and that the Portuguese Government is responsible for the consequences of the illegal proceedings. Both allegations were rejected by the arbitrator on grounds into which it is not necessary to go in this connection. It is interesting, however, that one of the chief arguments of Great Britain was that Portugal is estopped by its conduct from denying the truth of the British allegation. It happened namely in November 1851 that the Portuguese Government - acting under the influence of strong representations on the part of Great Britain - issued a decree in which the attitude of the administrative organs has been described as a denial of justice, and the contested right granted to Mr. Croft. Was the tribunal prepared to admit the plea of estoppel? It was - under certain conditions. "If what was contained in the statement of the 17th November 1851 had been expressed in a note or other diplomatic communication, addressed to the British Government by the Portuguese Government as its view of the case, it might have been justly said, that the one government had by

The Croft case.

The plea o estoppe

1) Moore, Arb., the award, p. 4979 - 4983; Lapradelle, op. cit. p. 1 - 37.

thereby of itself made an acknowledgment and an admission to the other by which the latter was now altogether exonerated from the task of proving that the case really stood as it was represented there."[1] It was held, however, that this act being solely an address from the government to the Council of state, cannot be regarded as an internationally binding declaration. Should such an act have taken place "Then there could be no doubt that a perfectly valid title to satisfaction or indemnification from the Portuguese state would arise therefrom." The attitude of the tribunal is clear enough: only an international act, not an internal one, may be regarded as sufficient for the purpose of evidence. This solution may not be altogether satisfactory,[2] but it is important as the first instance of an exhaustive juridical treatment of admission (or estoppel) by an international tribunal.

103. The case Mile, Shortridge and Comp. - again a case of denial of justice to British subjects by Portuguese authorities - offers another example of recourse to Roman law in order to fill a gap in the rules of international law. The tribunal, after having arrived at a decision in favour of the British claim, was rather embarrassed by the British demand for

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1) Moore, Arb. p. 4981.
2) S. Ingradelle, p. 36.

interest in the amount of 3,417 £ for a period of 22 years the principal being no more than 2,589£.[1] There exists in international law now statutory period of limitation for the recovery of arrears of interest.[2] But the Commission had no hestitation in adopting the Roman law rule of ultra alterum tantum. "Comme, d'apres le droit commun, seul applicable ici, le cumul des interets arrieres a'arrete lorsqu'ils atteignt le principal(Dig. de cond. indeb.,12,6.) on a du restreindre les interet de ce chef a £2589".[3] This adoption of a rule of one particular system of law may be adversely critisised- expecially on the part of positivist writers. But it is clear that the analogy to Roman law embodice in this case a principle recognised by all systems of private jurisprudence. There may be different regulations as to whether the period of limitation ought to last five or six years, or whether the total amount of interest ought to be restricted to the principal amount, but it is clear that these differences in detail do not affect the general rule which commands itself from many a point of view. - With regard to the measure of damages to be awarded the Commission affirmed the principle, the general principle of private law,

The case Yuile, Shortridge and Comp.

Recourse to Roman law. Arrears of interest.

1) award, p. 108; s. Lapradelle, p.p. 79 - 118.
2) for instance five years in French law (Art. 2277); six years in English law (Real Property Limitation Act of 1833, s. 42)
3) "droit commun" is the common Roman - German law.

followed by the great majority of previous and subsequent tribunals: causa proxima non remota spectatur.[1] It recognised, in a lucid exposition of the principle, direct damages only, without putting, however, a too limited construction on the "directness" of the damage.[2]

The case of "Colonel Lloyd Aspinwall". The rule governing damages for lost profits.

104. The opinion may be ventured that out of the conflicting practice of international tribunals rejecting and recognising claims for indirect and prospective damages, the rule gradually emerges - a rule of both international and private law - that the remoteness of damages when coupled with the fact that they are not yet actually sustained, that they are only prospective, acts to defeat the respective claim. In all other cases damages are awarded. This is seen clearly in the case of "Colonel Lloyd Aspinwall".[3] The arbitrator had here no doubts in awarding damages for prospective earnings. He did not regard governments as entitled to a privileged position; on the contrary - and this is of interest - he thought, in a rather drastic exaggeration, that "a government more even than an individual should be held to

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1) s. for instance the case of "William", U.S. - Mexico 1842, Lapradelle, vol. 1, p. 470.
2) s. Lapradelle, II. p. 117; an amount for prospective profits was also included in the award.
3) Moore, Arb. pp. 1,008 - 1,018; Lapradelle, II. pp. 668 - 675.

make most liberal compensation for an unwarranted interference with legitimate business," and he proceeded, on the ground of the distinction between lucrum cessans and damnum emergens, to define the amount of the sum to be awarded for the 114 days of interruption of trade. The Fabiani case.

105. On the same Roman law distinction between actual and prospective damages, as well as between the different degrees of fault, is based the outspoken decision of the President of the Swiss Confederation in the dispute between France and Venezuela in the Fabiani case of 1896.[1] The award, which in some parts resembles a dissertation and private law of damages and which is one of the best arbitral awards rendered in the 19th century, is quite emphatic in awarding damages for prospective gains, although it defines them as indirect damages. This is important, because under the influence of the Alabama award international law writers began building up a theory of inadmissability of prospective damages in claims against states. There is no question here, says the arbitrator, that the damages claimed are not of a merely speculative character, and it would be highly unjust not to take account of them in the present case. More than one-third of the awarded ~~demand~~ amount was covered by this head.[2]

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1) Moore, Arb. the award, p. 4878 - 4915.
2) There are, however, steps backward in this evolution of a well-fixed rule: in the case, for instance, of "Canada" the arbitrator went very far in disallowing damages for prospective

106. In what measure the interests of one state stand in some cases in the way of the recognition of a private law rule may be seen from some instances of the application of the doctrine of prescription. In the arbitration between the United States and Chile of 1863 ("the Macedonian") the plea of prescription put forward by Chile was resisted by the United States as of doubtful application in international law.[1] "Equally in the case between United States and Brazil (1878, the "Canada") the first took great pains to support their position by reference to the Maxim saws of common law "nullum tempus occurrit regi".[2] - We find, on the other hand, a thorough exposition, and the adoption, of the dotrine of prescription by Commissioner Little in William's case in the United States and Venexuelan commission under the convention of 1885.[3] "On careful consideration of the authorities on the subject (it took 14 pages to the learned arbitrator to review them) we are of opinion that by their decided weight - we might say by very necessity - prescription has a place in the international system, and is to be regarded in these adjudications."[4] The case may certainly be quoted

Prescription

"Macedonian"

"Canada"

"William"

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profits "for the ship and the whole capital might have been lossed early in the voyage, or the expedition might have been entirely unsuccessful and without profits (Moore, 1746).

1) Moore, Arb. pp. 1449 - 1484. 2) Moore, Arb. pp. 1733 - 1747½
3) ibid. pp. 4181 - 4199.
4) The arbitrator did not ommit to mention the recent Butterfield.

as one of the loci classici of the doctrine of prescription.

107. Instructive from many a point of view is the arbitration between Great Britain and Argentine arising out of a decree of the Government of Argentine, then at war with the republic of Uruguay, prohibiting vessels arriving from Montivideo to enter Argentine ports. Great Britain sought now to recover the losses of British subjects resulting from this prohibition.[1] The arbitrator (the President of the Republic of Chile, August 1870) held that Argentine is not responsible because a valid blockade of Montivideo has been officially proclaimed by her and that it is "a principle of universal jurisprudence that he who uses his right offends no one"[2]. The old principle of private law: neminem laedit qui suo iure utitur, is thus, in the form of a principle of universal jurisprudence, adopted as a source of decision. It is of interest to note that three authors who regard this rule as belonging primarily and exclusively to private law.[3]- Of no less interest is another point raised by Argentine which, however, has not been answered bu the arbitrator: the plea of estoppel. In November 1849 the two governments signed a convention settling the claims arising out of the blockade. No mention has been

Great Britain and Argentine (1870).

The rule neminem laedit qui suo iure utitur.

Estoppel

(1890, Moore, 1186-1207) in which the umpire refused to reject a claim because six years have elapsed between the event and the prosecution of the claim. This short period and the special circumstances of the case may account for the decision of the umpire.

1) Moore, pp. 4916-4925, Lapradelle, II. 636-667. 2) award, Moore, 4925.
3) Meyer, Deutsche Verwaltungsrecht, II. p. 358, referred to by Lapradelle, II. p. 335.

made in this document of the losses sustained by British subjects in consequence of the blockade. Proofs have been further adduced by Counsel for Argentine to the effect that British representatives repeatedly recognised - expressly and implicitly - the validity of the blockade; and that, therefore, the present claim cannot be admitted. It is to be regretted that the arbitrator did not deal with this argument. The position was here different than, for instance, in the case of "Canada" [1] or in the case of the Hudson's Bay Company Claims [2] when it was being attempted to use as evidence varios offers put forward in the course of abortive negotiations.

108. The Venezuelan Arbitrations of 1903 will, it is believed, prove of permanent value for the discussion of many questions of international law, [3] although they had to deal primarily with the question of damages for denial of justice, for losses sustained in the course of riots, a.s.o. It is, however, intended to draw here attention to such decisions only which illustrate the problem under discussion, especially to the questions of damages and prescription. With regard

The Venezuelan Arbitrations of 1903.

1) Brazil was here constantly referring to the fact that the U.S. at one time " offered to accept a reduced sum as a compromise for the claim". The quite obvious answer of the arbitrator was, that after Brazil had declined this offer there was nothing to regard the U.S. as bound by it. Comp. Lapradelle, II. 636 and n.1. 2) Moore Arb.p.
3) Compare the excellent reports of Ralston, Venezuelan Arbitrations of 1903, Govern. Printing Office, 1904.

to damages for prospective losses, the commissions seem to follow a uniform line. They reject claims for lost profits then only, when they speculative, uncertain and indefinite. "It is not to be supposed - says for instance the umpire in the Caro case - that during a period of destitution, plundering and destruction of all sorts de Caro would successfully have carried on any business whatsoever."[1] But when the profits were not entirely speculative the umpire had no hesitation, while quoting decisions of municipal courts, to admit that "if a clear measure of damages exists with relation to future business, it may invoked."[2] - In the question of prescription the opinion of the arbitrator in the Genting case, an opinion based both on international and private law precedents and authorities, did much to strengthen the doctrine of prescription much shaken as a result of the rather misunderstood award of the Hague Court in the Pious Fund case.[3] Althoug in some cases the plea of prescription has been rejected, it appears clearly from the opinion of the arbitrator that he recognised the principle of prescription as such.[4] -

1) Ralston's report p. 817; similarly in the cases: Valentiner, p. 562, Orinoco Asphalt, p. 586. In the Dix case indirect damages are rejected because "international law as well as municipal denies compensation for remote consequences, in the absence of deliberate intention to injure", p. 7.; s. also Rudloff case where speculative and contingent profits are rejected, the umpire referring to a decision of a municipal court (p. 198).
2) Martini case, ibid. p. 844.; also I. Roberts case, p. 145.
3) ibid. pp. 724-730.
4) f. i., Tagliaferro case. p. 764., Giacopini case 766., Roberts c. p. 577 and Stevenson case (in the last two cases the delay in the presentation of the demand was due to the action of the defendent Government).

109. To give an exhaustive account of the recourse to private law in the particular arbitration cases would mean, as already mentioned, to cover almost the entire field of international arbitration - a task which, naturally, cannot be attempted in this monograph. It is being intended, therefore, to draw attention mainly to such cases which are most illustrative of the question under discussion. A considerable number of such cases is to be found in the decisions of the British-American Claims Arbitral Tribunal constituted under the Convention of 1910. Most of them have been rendered in the course of the last four years.

The British-American Claims Arbitral Tribunal under the Convention of 1910.

The convention of August 18th 1910, signed between the United Kingdom and the United States of America "for the settlement of certain pecuniary claims outstanding between the two parties"[1] provided for the settlement of four classes of claims, amongst which those based on alleged denial of real property rights, on acts of authorities in regard to private vessels and "on damages to the property of either Government or its nationals, or on personal wrongs of such nationals, alleged to be due to the military or naval operations or to negligence of civil authorities" proved to be the most important. According to Art. 7. of the Convention the tribu-

1) Treaty Series, 1912, No. 11. (Cd. 6201).

nal had to decide "in accordance with treaty rights and with the principles of international law and equity". In the terms of submission agreed upon subsequently to the conclusion of the convention, two questions forming usually a disputed point in other arbitrations and decided generally by recourse to private law have been settled by an agreement of the parties: (a)"The arbitral tribunal shall take into account as one of the equities of the claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward." This provision provided the Tribunal with a clear rule for handling the much disputed question of admission, acquiescence and estoppel. We shall see that the parties made frequent use of this provision; (b)"The arbitral tribunal, if it considers equitable, may include in its award in respect of any claim interest at a rate not exceeding 4 per cent. per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the party and that of the confirmation of the Schedule in which it is included." Both rules are a noteworthy contribution to the respective parts of international arbitral law, although the provision relating to interest seems to be strongly influenced by the common law rule governing the right to interest. 1)

Admission and estoppel.

Interest.

1) The work of this tribunal, it seems, is not paid sufficient attention in the literature of international law. It would to be regretted, if the relative smallness, in terms of money, of the cases decided by the tribunal, should influence unfavou-

110. Already in the first case, in "The Lindisfarne", [1] took the tribunal as a ground for its decision an implied admission of liability on the part of the United States as precluding them from denying ~~them~~ liability in the course of the arbitration. The fact that the Congress has defrayed the cost of the repairs of the ship damaged in the collision was regarded by the tribunal as sufficient for establishing the liability of the United States. The tribunal attached so much weight to the fact of the previous admission that it dispensed with the proof of actual pecuniary loss as a result of demurrage. [2]

Cases of admission and estoppel.

"The Lindisfarne"

-. In the case of "William Hardman" [3] both parties availed them-

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rably the consideration due to its findings and its deliberations.- The awards, printes cases, memoranda of oral arguments and - in some cases - the printed reports of the proceedings before the tribunal are available in the Fry Library(London School of Economics).

1)Claim No.1. - This was a claim by the U.K. for one day demurrage for the British steamship Lindisfarne, injured in a collision with the U.S. Army transport Crook in the New York harbour(May,1900). On the day following the collision the necessary repairs to the injured vessel were made by order of the army transport officials; the costof these repairs was subsequently defrayed by an appropriation of the Congress. No action was ,however, taken by the Congressin order to satisfy the claim of the shipownners for one day's demurrage. - S. award,answer of the U.S. and the memor. of the oral argum. of Gr.Br. in support of the claim.- It is of interest to note, in this as well as in other arbitrations that both parties regard as binding upon them the rules of maritime law as given expression in their respective municipal laws.

2) The decision included interest on the sum awarded; the tribunal did not find it necessary to refer in the award to the contention of the U.S. that according to their public law no interest is due on State debts.

3) Claim No.2.- Gr.Brit. claimed damages from the U.S. for the destruction of the personal property of William Hardman during

selves of the argument of admission. Counsel for Great Britain pointed out that there was an admission of the United States State Department to the effect that the claim is a meritorios one(although the State department rejected on the ground of international law [1]), and contended that if, therefore, the claim is from the point of view of international law a good one,then the U.S. ought no longer to contest it. The United States relied, in turn, on the letter of Sir Michel Herbert to the State Department in which he impliedly accepted the adverse report of the Senate as correctly expressing the rules of international law, and put forward the claim as a matter of grave [2]. - The tribunal, however, did not answer the plea of admission because it gave a decision on the merits of the case in accordance with a recognised rule of international law [3]. - In the case of the steamship "Eastry" [4] the award is based wholly on admission on the part of the United States. " The course adopted by the United States authorities, both at the time the injuries oc-

"William Hardman".

"The S.S Eastry".

The war between the U.S. and Spain. While the town of Siboney in Cuba , was occupied by the U.S. armed forces, certain houses - in one of these was the property of Hardman- were set on fire and destroyed by the military authorities in consequences of sickness among the troops and from fear of an outbreak of yellow fever, The tribunal hold that this act was a necessity of war which does not give right to a legal compensation and disallowed the claim.

1) Proceedings,p.8. 2)ibid.p.8. 3) awrd,p.4.

4)Claim No.3. - Gr.Brit. claimed here damages growing out of injuries sustained by the "Eastry" while delivering coal at Manila Bay to coalhulks belonging to the U.S.

curred, and in making the preliminary repairs, is wholly inconsistent with the contention now made that the United States were not responsible for the damage inflicted." [1] - Again in the case of "The King Robert" the British argument was based on an alleged admission of the United States - an allegation rejected by the tribunal. [2]

A clear instance of estoppel is given by the case of "Yukon Lumber" [3], where both the argument of the United States and the award are based on estoppel. This was a claim on the part of Great Britain for dues and value, alternatively, of some timber cut in tresspass upon Canadian territory, sold subsequently to the Government of the United States and used by it in the construction of certain military bridges in Alaska.- It is not possible to go here into the details of the case, but it is sufficient to state that the following contention of the United States has been fully adopted by the tribunal. They contended that Great Britain, by the course taken by her officials , is estopped from denying that a full and complete title to the timber has properly and legally vested in the United States; that the Canadian land and timber agent stood by silently and watched the Government of the United

1) award p.4. 2) Claim No.4.
3) Claim No.5.

States acquire bona fide this timber and continue for six months to make full payment for it; that, accordingly, Great Britain cannot now be heard in a demand that "the United States pay it for the same timber which it thus permitted the United States to acquire under false representations."[1] It has been further established in the course of the proceedings that the only claim put forward subsequently by Great Britain was that for payment of dues. "The opinion of the tribunal is, that it is impossible to admit that after having at the beginning ratified the tresspass and claimed during thirteen years for only the paym ent of dues.... the British Government is entitled that they retained the ownership of the said timber..." "The Yukon Lumber"

The cases of "The Favourite"[2] and "The Wanderer"[3] offer another instance of the plea of estoppel. It was contended by the United States in both cases that the action of the British Naval authorities in releasing the two vessels, seized, while in the Behring Sea, by the United States officers for an alleged contravention of an act of the Congress passed in pursuance of the Behring Sea arbitral award of 1894, was in direct violation of a diplomatic agreement between the two governments and that Great Britain was " therefore estopped from "The Favourite" and "The Wanderer"

1) The U.S. quoted here about twenty English and American cases on estoppel; s.U.S. memoran, on the oral argument pp.15-22.; award, pp.5,6.; also "Reply of the U.S." p.15.
2) Claim No.12. 3) Claim No.13.

asserting any liability on the part of the United States, since by their own wrongful act they rendered it impossible to determine in the only competent manner the legality of the seizure" [1].

In the case of the "S.S. Newchwang" [2], apart from the argument of res iudicata, the plea of estoppel following admission of liability on the part of the United States has been brought forward by ~~the~~ Great Britain. It is of interest to note how strikingly the decision of the tribunal resembles that given "S.S.Newchwang". under similar circumsatances by the senate of Hamburg in the Croft case. "An admission imposing an international obligation, must, to be considered by the Tribunal, be formal and communicated through official channels.... H.M.'s Government contend that this letter contains an admission of liability which estops the United States from denying responsibility. It appears, however,...that this letter was merely a personal or private recommendation to the Chairman of the Committee on Claims, and has never been officially published, and for this reason in the opinion of the Tribunal it cannot be regarded as an admission of liability on the part of the United States."

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1) Answer of the U.S. p.13.- The tribunal rejected, on other grounds, this part of the argument.
2) Claim No.21.; s. award p.7; for res iudicata s. "list of authorities p.5 et seq., answer of the U.S.p.10, award p.2.; for estoppel s. "list of authrities" pp.11 et seq., answer of the U.S. p.11. and award p.3.

111. A number of cases decided by the tribunal is of importance owing to the clear decisions of the arbitrator in the question of the measure of damages. The decisions are in totøal accord with the tendency of awarding damages for prospactive profits, and they are at the same time illustrative of the most recent practice of international tribunals in this regard. - Thus in the already mentioned case of "The Favourite" Great Britain demanded damages based upon "a reasonable estimate of the sums which the owners would have received as the proceeds of the voyage, if it had been completed". The United States availed themselves, this time, of the argument that international law does not allow damages of this nature.[1] The tribunal, however, taking as a basis the number of the seal skins taken by the vessel in the 24 days preceding the seizure, considered that"although it does not necessarily follow that "The Favourite " would have continued to take skins at the daily average of the first 24 days" the loss of the prospective catch should be compensated. Similar is the decision of the tribunal in "The Wanderer"[2] and in "The Kate"[3], in the latter case the ac-

1)U.S.answer,p.19; award,p.5.
2)s. Memorandum to the or.arg. of the U.S.pp.23 et seq. for ample references to the practive of intern. tribunals.
3) Claim No.23.; s.,however, answer of the U.S.p.10. and Memor. to the or.arg.pp.18-30.;award,pp.7,8.- S. also "The Canadienne"(Claim No.26.).

tual catch of another steamer forming the basis of computation.[1] - The same principle of awarding damages for prospective profits is adopted in the case of the "Tattler ", a United States schooner seized by the Canadian authorities for an alleged contravention of the treaty of 1818. The Tribunal admits that "no evidence is produced as to the certainty of this prospective catch. Nobody can say whether the vessel would have made such a catch or whether it would have encoutered some mishap of the sea." [2]. But the award shows that this uncertainty does not result in the exclusion of damages for prospective earnings, as some authors or even arbitrators maintain; it results in a more or less considerable reduction of the amount claimed. [3]. So, for instance, in the case of "The R.T.Roy"[4]. the evidence of damages being "inconclusive and unsatisfactory" the amount of the awarded consequential damages is substantially reduced. The awards in the Fiji Land Claims show, on the other hand, that the purely speculative character of the prospective gains excludes altogether the damages being awarded.[5] But the

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1) Award, pp.7,8. 2) Award, p.4.
3) Comp. also the case of "Coquitlam", Claim No.29.
4) Claim No.17, award March,1925,
5) See, for instance the case of G.R.Burt, Claim No.44; "We cannot avoid the impression that the bill as presented comprises a large element of speculative valuation and prospective profits, and we have reached the conclusion that upon the whole, just as would be done by a lump award of £10,000 (Award p.14; the amount claimed was 232,929 dollars); or in the case of "Isaacs M.Brower";: "Passing to the question of damages, it is plain that the

admission of damages for prospective earnings does not necessarily mean that the Tribunal recognised all damages indirectly consequent upon an injurious event. "It is a wellknown principle of the law of damages that causa proxima non remota inspicitur" says the award in fixing the amount of liability in the case of the "S.S.Newchwang".[1] [2]

112. The question of interest has been disposed of by the above mentioned provision of the arbitration treaty, and the Tribunal used its discretion in awarding or disallowing interest whenever such a course seemed equitable. [3]

Interest.

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island forming the subject matter of this claim had only a speculative and precarious value..... In these circumstances we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages " (Award,pp.6,7.).

1) Claim No.21.

2) The Tribunal allowed damages for prospective profits to the full amount demanded by Great Britain in the case of the "Sidra" (Claim No.23.). The case is of interest because not only was the question argued by both parties at considerable length, but also because Great Britain was much at pains to prove that the Alabama award by no means excluded, as a rule, the admissibility of indirect damages (see Comments upon the memoran. of the Oral Argument of the United States p.9-14 with ample references to the practice of international tribunals; award p.6.)

3) But we see even here that, notwithstanding the clear provision of the arbitration agreement, attempts are made to apply the rule of municipal public law which liberates states from paying interest. The U.S. invoked for instance in the case of "The King Robert" (Claim No.4) federal statutes according to which no interest should be allowed on any claim against the U.S. up to the time of judgment, unless upon a contract, expressly stipulating for the payment of interest. - The argument shows clearly how slowly Counsel become familiar with the fact that a claim after having been recognised as an international one, is no longer governed by the Public Law of one state. The privileged

113. Another group of cases decided by this Tribunal is of interest as showing how in a quite recent series of arbitrations private law is freely, sometimes too freely, invoked by the parties. In the "Yukon Lumber" case, for instance, the argument of Great Britain showing that the U.S. could not acquire property in the timber cut in trespass, was based on a large number of Roman and common law authorities on the law of accession and tresspass. [1] The case of the "Union Bridge Company" furnishes a clear instance of this tendency. In this case, the U.S. claimed damages arising out of a wrongful interference, after the annexation of the Orange Free State, with certain rich material which belonged to the Union Bridge Company, an American firm. It was argued by the U.S. that the ~~maximum~~ seizure of this Bridge material by the British authorities, with intent to appropriate the same to their own use "Was such an exercise of right of dominion over them as to

General recourse to private law.

The Union Bridge Company.

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position of a state in relation to its subjects or individuals generally cannot be maintained in relation to another state.

1). See list of authorities in support of the claim, pp.20 et. seq. and the memorial of Great Britain, p.3.

constitue a conversion "for which Great Britain should respond in damages. The whole case was conducted by both parties as if it were an action before a municipal tribunal of Great Britain or of the U.S. Sedgwick and Pollack and numerous English and American cases were being quoted in extenso in support of the contention that conversion really took place [1]; that it is not necessary for this purpose that the defendents should acquire actual property in the thing converted; that it is immaterial that the conversion was the result of a mistake, and so on. The oral argument was almost totally devoted to the discussion of this private law aspect of the case. The difference between an action of trover and an action of conversion was discussed in detail.[2] - The Tribunal, however, seems to have preferred a construction of the case based on a principle of international law, for the award says: [3] "that action constitutes an international tort committed in respect of neutral property, and falls to be decided not by reference to nice distinctions between trover, tresspass and action of the case, but by reference

1) Memor. to the Oral Arg. of the U.S. pp.1-34.
2) See especially Oral Arg. pp.35-41.
3) Award; p.7.

to that broad and well-recognised principle of international law which gives what, in all the circumstances, is fair compensation of the wrong suffered by the neutral owner. "
The course taken by the Tribunal is, it is submitted, quite justified. There is not necessity to have recourse to private law where there is a clear-cut rule of international law.
In the case of "William Hardman" the problem of the sources of decision and of application of private law is discussed in detail by Counsel for the U.S. in a statement containing the views of the U.S. Government on the scope and meaning of the phrase contained in the arbitration agreement that the tribunal has to decide in accordance with the principles of international law and equity. In the absence of a rule of strict international law - was the opinion of Counsel of the U. S. - it is the duty of the Tribunal to apply international private law and the principles of maritime law; in the absence of rules from this sources, the Tribunal should apply "the fundamental principles of the jurisprudence of the various systems of laws, particularly the common law .... and the principles of civil law. Whatever is fundamental to those two main systems of law is properly applicable by this Tribunal to guide its decisions";[1] in the absence of a clear rule

1) Proceedings, p.56; see also p.68.

from these sources the law common to both countries, and in the last resort, the law of the defendent nation is applicable. After these sources have failed it is for the Tribunal to apply the rules of equity. - The exact order of these sources may be a subject of discussion, but the argument itself is highly instructive from the point of view of the question under discussion in this monograph.

114. The necessity of resorting to private law in the event of international law not supplying a rule of decision is clearly recognised by other recent arbitral decisions. The umpire in the Mixed Claims Commission between the U.S. and Germany adopts as a source of decision in determining the measure of damages not only the Treaty of Berlin, international conventions and international custom, but also "rules of law common to the U.S. and Germany established by either statutes or judicial decisions" and "the general principles of law recognised by civilized states". [1] In determining the measure of damages in cases of death, he examines meticulously the respective rules of the statutory, common and the German law and of the jurisdictions where the civil law is administered.[2] He recognises, with the consent of both

1) Administrative decision No.1. Nov.1923, Amer.J.I.L.1924,p.175.
2) Opinion in the Lusitania case, p.363, ibid.

national commissioners, that the amounts "which the decedent, had he not been killed, would probably have contributed to the claimant" have to be compensated. He has recourse to be laws of some American States, to the Code Civil and to other systems of private law. 1) 2)

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1). P.363. ibit; for an interesting contribution, by the same umpire, to the question of direct and indirect damages, see ibid. pp.173 et sq.

2). Some decisions of the Supreme Court of the U.S. settling controversies between states of the Union and bearing upon the problem under discussion may be mentioned in this connection. A part of them remains to the question of interest to be paid by states ~~xxxxx~~ on their debts (Comp.esp.U.S.v.State of South Carolina in Scott's "Judicial Settlement of controversies between states of the American Union Vol.II, 1063; analysis p.253; U.S.v State of New York II, 1157, analysis p.313; State of Virginia v. State of West Virginia Vol.II, 1008; analysis p.508.). In all of them the Supreme Court let itself be guided by the statutory rule that Southern States are not liable for interest, unless their consent to pay interest has been manifested by an act of the legislation or by a lawful contract of its executive officers. These decisions are not, it is hardly necessary to add, in accord with the practice of international tribunals. With regard to the doctrine of prescription, however, the decisions of the court rank together with those establishing this doctrine firmly in international law (Scott, op.cit. Vol.II.pp.1152, analys. p.298, 299.)

CHAPTER IX.

Conclusions.

I.

It is time to recapitulate - chapter after chapter - and paragraph after paragraph - the conclusions reached in this monograph.

This short recapitulation will not be followed by a dogmatic statement of general rules. The subject has been hitherto too much neglected by an uncritical rejection even of the necessity of its closer examination, that one should be tempted to assume that a solution has been reached which permits the laying-down of hard and fast rules.

The question of application of private law in international public law is, from the beginning, strongly influenced by the positivist tendencies rejecting any other source of international law than custom and treaty (1 - 3). The authority of private and especially of Roman law as a source of intern. law is formally rejected by Gentilis, Grotius, Bynkershoek and other writers in the formative period of international law (3 - 5). It is equally rejected in a systematic manner, by the predominant positivist school on the Continent (6), which explains the actual similarity of a great deal rules and conceptions in both systems of law by the fact of the "legal univer-

sality" of the respective rules and conceptions, or by the fact that they are the expression of the reason of the thing or the embodiment of common sense(7). English, and, partly, American publicists have, on the other hand, no hesitation in attributing to Roman law the capacity of filling the numerous gaps in international law (8 -9). French writers do not pay special attention to the problem, but Italian publicists follow closely in the footsteps of the German positivist school (10). However, a critical examination of the classical writers shows that although they rejected formally the analogy to private law, they took over its rules and conceptions under the form of the law of nature, (Grotius) or of "reason" of the thing (Bynkershoek) (10 -13). The modern positivist school does the same, but it puts in the place of the law of nature or "reason" "conceptions of general jurisprudence" or "general principles of law" (14) which expressions prove, on closer investigation, and in the majority of cases, to be identical with general conceptions of private law (15). - If, on one hand, international publicists, are unable to dispense in their systems with the use of private law, the practice of states does not warrant this sweeping rejection of analogy - neither in the past, (the patrimonial conceptions usually resorted to being quite unable to explain all cases of analogy), nor in modern times

where states have frequent recourse to private law notions and doctrines (16). This last fact is abundantly proved by the history of international arbitration in the XIX and the XX century (17).

The problem of the relation between international and private law is a part of the question as to the positive character of international law - a question which, in turn represents another aspect of the doctrine of sovereignty. The Modern international law is, in its sphere, the expression of that metaphysical and idealistic conception of state in which the absolute - legal and moral - supremacy of the state is coupled with the idea of its sovereign will as the exclusive source of law, national and international (18). But neither the practice of states, nor the positivist writers themselves confirm the view that custom and treaty are the exclusive sources of international law. It has been submitted that there is a "customary "rule of international law to the effect that rules of law quite independent of custom and treaty are regarded by states as binding in individual cases. On the other hand, many positivist writers not only acknowledge the existence of an 'objective" and "necessary" international law, but in many cases expressly exclude the necessity of the express consent of a given state for a rule of international law becoming existent, or for the continued existence of such a rule (19). It is specially this "positive" aspect of the doctrine sovereignty that is now rejected by leading writers

in legal philosophy and political theory as running counter to the very foundations of international law. The conception of equal states with subjective fundamental rights necessarily involves the conception of a law standing above them and regulating their respective scopes of power (20). This opinion is, in nuce, expressed in the classical English doctrine - especially in the formulation given to it by Blackstone - that international law is a part of the law of the land, in the meaning that those Acts of Parliament which are made to enforce universally recognised international law are only of a declaratory value. It is not right to say that this doctrine has been discarded by the recent practice of English courts. The fundamental idea underlying this doctrine finds occasionally clear expression in the writings of modern philosophers (T.H.Green) or international publicists (Westlake) (21). In an international law, freed from the fetters of a rigid positivist system, private law gives legal expression to those principles of " common sense", of "equity and justice" and of "general principles of law" to which the practice of states and international publicists have frequently recourse. The application of private law, when this is possible and necessary, emphasises, on the other hand, the fact that the commands of international law are directed to individual men and that the heterogeneity of interests protected by international law is not so great as the positivist school under the influence of the doc-

doctrine of sovereignty was ready to assume(22).

So with regard to treaties the practice of states and international publicists stands between two conflicting tendencies: a) to base the conception of treaties on the foundation of a consensual obligation as developed in private law; b) to dispense with the two essential elements of the private law conception - with the free consensus of the parties (admissibility of duress) and with the objectively binding character of the obligation (the clausula rebus sic stantibus). Treaties and contracts being in strict law identical notions the predominant opionion- from Grotius until to-day has no hesitation in treating them as identical, or analogous conceptions(23). Although it is an accepted rule - in theory and practice - that the use of force does not vitiate a treaty, there is a parallel current of opinion from Grotius and Vattel to most modern writers that the respective treaty is only then binding when force is used in execution of a rule of international law, and that, in all other cases the actual enforcement by the stronger party does not imply the juridical validity of the agreement. In general, the lack of analogy, which is a result of the admissibility of duress, is coextensive with the lacking legal development of international law (24). The same applies to the clausula rebus sic stantibus as developed by the

modern theory under the influence of the doctrine of sovereignty. In both cases the latest legal development reveals a tendency towards assimilation to private law (25). Analogy to contracts in private law is further adopted by international publicists in cases of fraud and error, although no historical instances of real value seem to justify such a step (26). Analogy, however, is and may be resorted to only when the rules of private law to be applied are universally accepted in practically all systems of private jurisprudence. This is seen, for instance, in the question of interpretation of treaties and of pacta in favorem tertii. However, reasons connected with the history and the development of international law caused that rules of Roman law are resorted to although in many cases they no longer express a general rule now obtaining in private jurisprudence (27). The legitimate occasion for application of analogy arises prima facie in such cases in which an international treaty makes use of a conception of private law (28). This takes place, for instance, in the case of international leases. A part of them, although political in nature, closely follows, in the respective conventions, the rules of an ordinary lease under private law (29). With regard to the second category of leases, the "political" leases, the predominant opinion adopts a construction which, while rejecting all analogy to the corresponding conception of private law, attempts to give a political interpretation of the new institute

and to attributed to the lessee to sovereignty over the leased territory. This explanation, however, is neither confirmed by the provisions of the respective treaties, nor by the facts of international life (30). As the science of international law is not called upon to give a political interpretation of conventional international law, but to elucidate the juridical meaning of the declared intentions of the parties, the generally accepted juridical meaning of the term "lease" cannot be ignored. Whenever in a treaty a generally accepted term of private law is being used, the interpretation and construction of the treaty must follow the principles generally recognised as implied in this particular term (31). The same applies to the conception of international mandates and especially to the question of sovereighty over the mandated territory - notwithstanding the attempts of a political interpretation in terms of a disguised annexation (32). The decisions of the Council of the Assembly and of the Mandates Commission of the League of Nations, the decisions of national courts and of the Permanent Court of International Justice, and the terms of the mandates provisions themselves do not favour the statement that full actual sovereignty is vested in the mandatory(33). On the other hand, a strictly juridical interpretation of the Art.22 of the Covenant leads - in accordance with the rule of interpretation mentioned above - to attributing to the League of Nations the ultimate sovereignty over the mandated territories (34). The acceptance of the view that a conception of private law when used in a treaty looses its usual meaning would deprive international law of an

important source of development (35). The acceptance of the ultimate sovereignty of the League of Nations far frombeing affected by the fact that the League neither chose the mandatory nor fixed the terms of the mandates, provides a solution for the case of the termination of the mandate(36). As, however, only those rules flowing from the conception of mandate can be applied which have been universally accepted in practically all systems of private jurisprudence, the prima facie adoption of analogy in no way impedes the development of the new conception in accordance with the necessities of international life (37).

It is especially with regard to this part of international law which relates to acquisition of territorial sovereignty that the influence of private law is most visible. There is, firstly, the principle that the forms of acquisition of territory are regulated by law; there is, secondly, the principle of connection of animus and corpus (38). The historical function of the last mentioned principle as an organizing element of great legal value in the period following the discovery of the New World is totally independent of the so-called patrimonial conception of State(39). This influence can be explained to a large extent by the fact that the intrinsic analogy between territorial sovereignty and property of private law cannot be ignored, although the two notions are by no means identical (40). The influence of

this part of private law is not confined to acquisition of territorial sovereignty. The writings of early international lawyers, especially of Grotius and Bynkershoek show that the chief legal arguments in the development of the conception of the freedom of the sea and of the territorial waters were drawn from private law rules of possession and property(41-42). The recent discussions turning on the sovereignty of the air, serve as a further illustration of this point (43). The principle of prescription is,on the other hand, generally recognised in theory and practice, and denied only by those writers who, claiming the special character of international law, assert that, in international law, every possession is lawful (44). With regard to restrictions of territorial sovereignty, international law has taken over the notion of state servitudes without being able, however, to define clearly to what cases of restrictions of sovereignty the analogy should apply. The confusion resulting from of the great latitude with which this particular analogy is applied finds recently expression in the tendency to eliminate altogehher this conception (45) In the theory of succession the analogy to private law is followed by the prevalent majority of writers and, on the whole, by the practice of states, notwithstanding the attempts to base the fact of a change in sovereignty on the mere will of the state acquiring it. Neither do theory

or practice follow the recent attempts of positivist writers to dispense with the reqgirement of culpability as a condition of the liability of states for international torts (48-49). With regard to allowance of interest on state debts or on sums awarded against states the practice of states and of international tribunals clearly discards the notion that the special character of states liberates them from paying interest unless expressly stipulated(50). Also the attempts to introduce in international law a special measure of damages which reduces the liability of states to direct damages actually sustained - with the exclusion of damages for prospective profits - is gradually discarded by the practice of states and international tribunals (51-52).

That those principles of private law which are generally accepted, and which embody a rule of justice and common sense, are accepted as principles applicable to international law, even if they are of a technical and formal character, is clearly shown by the fact that the notions of admission, waiver and especially of estoppel play an important part in international arbitration, and are adopted not only by states, but also by arbitral Tribunals (53-54). The same applies to the principle of res indicata(55) and to many private law rules of evidence and procedure (56). It is especially with regard to the right of an arbitral court to pass over its own jurisdiction and to the question of the finality of an arbitral award (appeal, revision) that private law is being freely invoked and the final development shaped,

on the whole, in accordance with principles of private law (57-58). In international arbitration the fact is clearly brought to light that recourse to private law is a practical necessity (59-60).

The great British-American arbitrations furnish a striking example of the inapplicability, in practice, of the strictly positivist doctrine rejecting all recourse to private law (61). In the Alabama arbitration both parties to the dispute resort to private law for the purpose of interpretation of the term "due diligence" and the opinion of the arbitrators, largely based on private and Roman law distinctions between different degrees of fault, is in accord with the general principle of private law in this question (62-63). The answer of the Tribunal to the question of the measure of damages runs counter to the respective rules of private law. This decision, however, must be viewed in connection with the circumstances of the cases, especially in connection with the character of the claims for indirect damages put forward by the United States, and with the fact that damages for prospective profits as well as interest have been included, eventually, in the lump sum awarded by the Tribunal. Both questions - damages and interest - as those of the burden of proof and the right of the Tribunal to pass over its own jurisdiction - were argued by the parties with the help of frequent references to private law rules and authorities (64-66). The Behring Sea Arbitration furnishes a clear example of the application of the doctrine of prescription on the part of the U.S.

and the American members of the Tribunal. The Tribunal itself refused to deviate from the path of private law in defining the rules of possession in and property over animals ferae naturae (67-69). The questions of the measure of damages and of the burden of proof were again discussed (70). The British Guiana Arbitration shows how the recourse to private law in the question of occupation is by no means a matter of the past (71-73). The problem of the interpretation of a term of private law (prescription) used in a public treaty (72), and the application of the doctrine of estoppel (74) receive here a lucid illustration both on the part of the states in dispute and on the part of the Tribunal. We see, on the other hand, in the Alaskan Boundary dispute that the application of analogy does not take place when there is no gap in international law, or when the decision can be easily founded on a clear provision of a treaty (75). The same arbitration is an instructive instance of the application by the parties of private law rules of evidence, and it throws light on the respective importance of common and Roman law rules (76). In the Pious Fund Arbitration the principles of res indicata is admitted by both parties to the dispute (77) and the decision of the tribunal with regard to the scope of res indicata is in accord with the respective general rule of private law (78); so is also that relating to the competence of an international abbitral Tribunal (79). The plea of estoppel is expressly put forward by one party and implicitly recognised in the award (80). It is obvious, on the

other hand that the principle of prescription recognised by both parties to the arbitration has not been rejected by the Tribunal(81). In the Venezuelan Preferential Claim arbitration recourse to private law is most frequent; both sides expressly recognised Roman law as the law which should govern the decision of the arbitrators (82-83). The rules of hypothecation and lien, of negotiorum gestio and of bankruptcy were ~~fully~~ freely invoked by the parties (84-86). The plea of estoppel has been put forward with vigour and, implicitly, recognised by the Tribunal (87). Other instances of analogy to private law occurred in the course of this arbitration (88). The North Atlantic Fisheries case, far from being an instance of a compromise incorporated in the award, is an instance of a meticulous application of the rules of servitudes in private law to an analogous conception in international law, which the Tribunal did not reject, although it demanded an express proof of such a right having been granted (89-91). In the Russian Indemnity case rules of private law are being applied by the Tribunal in a systematic way and the necessity of applying such analogy explained by the identity of the respective legal relations and by the requirement of international relations. It refused to see any difference between the legal position of an individual debtor and that of a state so far as the responsibility for delay in payment is concerned (92-94). In this, as in the preceeding cases the parties resort frequently to private law, and the final decision of the Tribunal is based totally on the adoption of a presumptive and unrebutable waiver as given clearly by a

respective rule of private law (95-97). The Japanese House Tax case (interpretation of a term of private law defining private rights; 98), the Brisbarma case (adoption of prescription;--99) and the Island of Timor case (formation of rules of interpretation in analogy to private law; 100) are further instances of the problem in question.

The minor arbitration cases of the last seventy years are no less instructive in this regard. In the cases decided by the Senate of Hamburg (Croft; Yuile, Shortridge, and Comp.) recourse to Roman law in the question of interest, and to private law with regard to admission and to the right to damages for prospective profits (101-103). This last principle is also adopted in the cases of "Colonel Lloyd Aspinwall" and "Fabrani"; in both cases Roman and private law is resorted to by the arbitrators (104-105). Apart from other cases (106-107), the Venezuelan Arbitrations of 1903 (108) and the British-American Claims arbitral Tribunal under the Convention of 1910 (109-114) are full of instructive instances of application of private law. This relates especially to the numerous awards and to the deliberations of the last mentioned Tribunal.-

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