



OSZK

OSZK

OSZK

Országos Széchényi Könyvtár

Hungary

273190

Some Opinions,
Articles and Reports
bearing upon the
Treaty of Trianon
and the
Claims
of the
Hungarian Nationals
with regard to their
Lands in Transylvania.

=

VOL. II.



OSZK

Országos Széchenyi Könyvtár

Some Opinions,
Articles and Reports
bearing upon the
Treaty of Trianon
and the
Claims

OSZK

Országos Széchényi Könyvtár

OSZK

Országos Széchényi Könyvtár

273190



Some Opinions,
Articles and Reports
bearing upon the
Treaty of Trianon
and the
Claims
of the
Hungarian Nationals
with regard to their
Lands in Transylvania.

=

VOL. II.

=

INDEX.

| | Page |
|---|------|
| SLESSER-SUTTON : Joint Opinion | 3 |
| SCOTT : Opinion | 11 |
| SIMON-SUTTON : Joint Opinion | 19 |
| BORCHARD : Opinion | 23 |
| RIPERT : Opinion | 45 |
| VALLOTTON : Article from " Zeitschrift fuer Ostrecht," December, 1927 | 63 |
| KAUFMANN : Article from " Zeitschrift fuer Ostrecht," December, 1927 | 79 |
| KUNZ : Article from " Neue Freie Presse," December 2nd, 1927 | 95 |
| WLASSICS : Article from " Pester Lloyd," February 19th, 1928 | 99 |
| MAGYARY : Opinion | 103 |
| SCHIFFER : Opinion (from " Zeitschrift fuer Ostrecht," March, 1928) | 109 |
| FLEISCHMANN : Opinion (from " Zeitschrift fuer Ostrecht," March, 1928) | 119 |
| VERDROSS : Article from " Zeitschrift fuer Oeffentliches Recht," March, 1928 | 133 |
| BRUNS : Opinion | 147 |
| LAPRADELLE : Usurpation of Jurisdiction | 161 |
| WICKERSHAM : Opinion | 211 |
| FACHIRI : Hungarian Optants Case | 229 |
| UDINA : Opinion | 243 |
| PERASSI : Opinion | 257 |
| BRESCHI : Opinion | 265 |
| DEBATE IN HOUSE OF LORDS, June 25th, 1928 | 277 |

HUNGARIAN INTERESTS IN ROUMANIA.
JOINT OPINION of Sir HENRY SLESSER, K.C., M.P.
and Mr. RALPH SUTTON.

Certain Hungarian nationals, who at the date of the coming into force of the Treaty of Trianon, were owners of land in Transylvania, have lodged claims before the Roumano-Hungarian Mixed Arbitral Tribunal alleging that measures have been taken against their property which amount to a violation of the terms of the Treaty. In so doing they claim to be exercising the right expressly conferred upon them by Article 250 of the Treaty of Trianon. The provisions of Article 250 prohibit the liquidation of property of Hungarian nationals situate in that province which would otherwise have been permissible under Article 232, and also require the restoration to the Hungarian owner of all property which has been subjected to measures of that kind between the dates of the Armistice and of the coming into force of the Treaty freed from all such measures and in the state in which it was before such measures had been taken against it.

Transylvania was ceded to Roumania by Hungary under the Treaty of Trianon, and there can therefore be no doubt that the provisions of Article 250 apply to the property of Hungarian nationals situate in that province; and for this purpose it is immaterial whether the owners of that property remain Hungarian nationals by reason of or independently of the exercise of the right of option conferred by Articles 63 and 64.

The measures which the Hungarian nationals complain of are measures taken against their property under and by virtue of a certain law passed by the Roumanian Government which came into force on the 30th July, 1921, that is to say four days after the coming into force of the Treaty, and this fact appears on the face of the claim presented by the Claimants, or such of the claims as we have seen. The law in question is an Agrarian Reform Law having for its ostensible object the distribution of land amongst peasant proprietors, which involves the necessity of expropriating the owners of the land, and also the taking over of such things as forests by the Roumanian State. The law, on the face of it, applies to all owners of land regardless of their nationality, but in fact must operate to the detriment of the claimants, *inter alios*, who therefore complain that their rights under Article 250 have been abrogated.

The Roumanian Government in these circumstances did not put in an answer to the claims of the Hungarian claimants dealing with the merits of the case, but filed a plea objecting to the jurisdiction of the Tribunal to entertain the claims at all.

The Tribunal is a Court owing its existence to the Treaty itself; it is of limited jurisdiction, and, like any court of limited jurisdiction, must from time to time be called upon to enquire and determine whether it has jurisdiction to try a particular case which has been brought before it. This principle must apply whether the court in question be a Municipal or an International court. If it be a Municipal court, its decision on this point of jurisdiction is usually subject to the review of

some higher court in some shape or form: though sometimes, in England at any rate, the legislature may in terms exclude any right of appeal from such a court, in which case the decision which it gives upon its jurisdiction may be final and conclusive. In the case of an International court finality is the usual case and the decision of such a court on its own jurisdiction cannot be reviewed by any other court, at any rate without the consent of the sovereign powers who are parties to the dispute submitted to it. That this is the position in the case of the Mixed Arbitral Tribunal established under the Treaty is reasonably clear from the provisions of Article 239: for no court is either expressly or by necessary implication constituted to review the decisions of such Tribunals, on the contrary, the contracting powers expressly agree that those decisions shall be regarded as final and conclusive. From this it seems to follow that, since one of the matters on which a Mixed Arbitral Tribunal, in common with any other International Tribunal, has both the power and indeed the duty to adjudicate, is the question of its jurisdiction, the decision of any such Tribunal on this point also is final and conclusive, whether it affirms or denies its jurisdiction in any particular case. It is important, however, to keep clearly in mind what is meant by a decision on a question of jurisdiction, for it is easy to fall into confusion of thought on this point. The jurisdiction of the Tribunal to entertain a claim presented before it does not depend upon the truth or falsity of the claim but upon its nature, and the question of jurisdiction is determinable at the commencement and not at the conclusion of the enquiry. No doubt in this particular instance the Tribunal will have to decide, before it can give relief to the claimants, that the measures complained of belong to the class of measure covered by Article 250, and it is easy therefore to slip into the fallacy of assuming that that fact which the Tribunal has to decide is that which constitutes its jurisdiction. This however is not the case. In order to oust the jurisdiction of the Tribunal it must be shewn that the complaint does not, on the face of it, disclose matter over which the Treaty gives the Tribunal jurisdiction, as would be the case if, for instance, an Hungarian national were to bring before the Tribunal a claim for damages because his property had during the year 1923 been taken in execution to satisfy a judgment obtained against him by a Roumanian subject in a Roumanian Court of Justice: and if the Tribunal were to call such execution *saisie ou liquidation* in the terms of the Treaty it would not avail to give the Tribunal jurisdiction: that is to say a case would have been presented to the Tribunal over which on the face of it, *in limine*, the Tribunal would have had no jurisdiction. In such circumstances it would have no power to entertain the question or to commence any enquiries into the merits and its proceedings to a conclusion would not give it jurisdiction.

But when a complaint is well laid, being *prima facie* within the Tribunal's jurisdiction, the Tribunal is bound to commence the enquiry and in so doing it undoubtedly acts within its jurisdiction: but in the course of the enquiry evidence being offered in support of and against the complaint, the proper conclusion to be drawn may be that the alleged infraction of the Treaty has not been committed and so that the case in that sense (and hence the possibility of confusion) was not within the jurisdiction of the Tribunal. This however is not to say that in proceeding with the enquiry the Tribunal was acting without jurisdiction, for in every stage of the enquiry up to the conclusion the Tribunal could not but have proceeded, and if it dismissed the claim the judgment of dismissal would be a binding judgment and one within

its jurisdiction: and even if it upheld the claim, though the judgment might be said to be erroneous, it still would be a judgment on a matter within its jurisdiction.

When therefore an objection is taken to the jurisdiction of the Tribunal by the method of a *demande exceptionnelle*, the matter to be enquired into is the nature of the claim presented before the Tribunal and not its truth: and in order to oust the jurisdiction of the Tribunal the claim must be one which cannot be adjudicated upon by the Tribunal, even assuming that every statement made in it is true, for at this stage it is not possible to enquire into the truth of such statements. The Roumanian Government pleaded that, in order that a complaint should be capable of presentation before the Tribunal, it was necessary that the measure of which complaint was made should have the *double character* of

- (1) a measure of seisure and liquidation, disposition forced administration or sequestration, that is to say an exceptional war measure, or in other words a measure which had effected enemies only and without any indemnity:
- (2) a measure taken from the 3rd November, 1918, to the date of the coming into force of the Treaty and not thereafter,

and then proceeded to plead that, as regards the measure of which the complainant complained, we are confronted not with an exceptional war measure affecting enemies only but a measure of expropriation for the purpose of agrarian reform, that is to say a measure having for its object general social justice, applying to all landed proprietors and in the whole kingdom, without any kind of distinction and to Roumanians equally, and providing further that an indemnity is to be paid to all those who are expropriated.

Had the contention been sustainable that the claims under Article 250 could only be presented in respect of matters which had occurred before the coming into force of the Treaty, it might well have been that the plea would have been unanswerable: but this contention was formally abandoned by the Roumanian advocates at the hearing before the Tribunal: and it therefore became necessary for the Roumanian Government to take its stand upon the position that the measures complained of could not be within the competence of the Tribunal because they were taken under the Agrarian Reform Law and were therefore incapable of being treated as measures of *saisie* or liquidation within the meaning of Article 250.

The difficulty however that the Roumanian representatives found themselves in was that though they were able to advance arguments to show that these measures complained of were not in fact of that class of measure which was prohibited by Article 250, they were not able to show that they *could* not be of that class, which it was necessary for them to establish in order to oust the jurisdiction of the Tribunal: in fact there was the confusion already pointed out between the two senses in which the word "jurisdiction" is used. It was indeed impossible at that stage of the proceedings to show that the Tribunal had no jurisdiction. In the first place it is possible and may be established as a fact that the Agrarian Law though ostensibly applying to

everybody yet from the circumstances existing in Transylvania would only apply in substance to Hungarians even if administered with absolute strictness, still more so if in its administration it was made to apply to Hungarians only. All this raises questions of fact to be determined. In the second place, as regards the question of indemnity, it does not appear on an examination of the terms of the Agrarian Law itself that an indemnity is in fact assured: all that is provided is that a certain amount of paper shall be handed to the expropriated owners in return for their land which is valued, not in terms of paper, but in terms of gold, in other words the value of the land and the value of the paper which is handed over in exchange for it are not commensurable: the paper may have some value or it may have none, and in fact at the present time it may be said to have no value. It may therefore be very seriously contended that an act which provides for the handing over of something which may be valueless in exchange for valuable property does not provide for the payment of an indemnity, and therefore it may be a measure which expropriates property from Hungarians without the payment to them of an indemnity by the expropriating Government, and that is at any rate one of the features of a liquidation which is prohibited by Article 250.

It therefore becomes a question of fact in each case whether an indemnity has been paid, but being a question of fact it is not one which can be enquired into on the preliminary issue whether the Tribunal has jurisdiction to entertain the complaint. It must also be pointed out that, even if it be shown as a fact that an indemnity is paid, it will not even so conclude the question. A certain class of liquidation is permitted by Article 232 (i) which contemplates the payment of an indemnity by the expropriating State direct to the expropriated owner and it may be that the law in question falls within that class of liquidation. This form of liquidation however is as much prohibited by Article 250 as is the other form of liquidation which is permitted by Article 232 (b).

It must also be pointed out that the Agrarian Law, on the face of it, contains provisions which are capable of being construed on the face of them as affecting ex-enemies only, which the Roumanian Government itself concedes would give it the character of a measure prohibited by Article 250, now that the contention concerning the date of the measure has been abandoned: such as the provisions which relate to the so-called absentees. In truth when the provisions are examined it will be found that they are not dealing with absentees in any real sense of that term, for the effect of those provisions as officially interpreted is that the property of anyone who was absent from Transylvania during the period between 1st December, 1918, and 23rd March, 1921, for however short a time or for whatever reason (except some state mission) is to be expropriated in toto. As during this period large numbers of Hungarians fled before or were driven out of the country by the invading armies, while those (it is more than likely) who were in sympathy with the conquering nation would remain, it is not possible to say that the law on the face of it cannot be construed as directed against Hungarians because they were Hungarians.

In view of these considerations—and they are not necessarily the only considerations, though they are sufficient for the present purpose—it seems that it would have been well nigh impossible for the Tribunal

to have declared that it had no jurisdiction to enquire into the claims : and it must be remembered that all it has done at present is to entertain jurisdiction to the extent of saying that the claims presented before it by the Hungarian nationals in the twenty-two cases, which were selected (as we are informed) as test cases and typical of some 350 cases which have been lodged before the Tribunal were of such a nature that they might arguably come within Article 250. It has reserved, as it was its duty to do, the question whether in fact they are within that Article : indeed the Tribunal has been scrupulously careful not in any way to deal with or express any opinion upon the various points raised which go to the merits of the case and which therefore ought not to have been raised on the argument relating to the jurisdiction.

When the decision of the Tribunal was given the Roumanian Government let it be known that it would not obey the decree of the Tribunal ordering the Government to file its defence on the merits and also announced that it would withdraw the Roumanian arbitrator whenever any claim involving the Reform Law came before the Tribunal, thereby preventing the Tribunal from functioning (see the report of the Privy Council in the Irish Boundary Commission Case, 1924) : and it also brought the matter before the Council of the League of Nations under Article 11 of the Covenant, though it is not quite clear what circumstances the Roumanian Government alleged were threatening "to disturb peace or the good understanding between nations on which peace depends," whether for instance those circumstances were that Hungarian nationals were claiming to exercise rights under the Treaty, or the judgment of the Tribunal that they were entitled to do so, or the refusal of the Roumanian Government to abide by that decision. But whatever the reason, the Council of the League of Nations felt it to be their duty to exercise the mediatory functions under the covenant and appointed a Committee of three to report upon the matter.

Independently of Article 11, however, the Hungarian Government requested the Council to fulfil what is, in our opinion, a purely ministerial function under Article 239 and to appoint two persons from whom the Hungarian Government might select one to fill the vacancy on the Tribunal caused by the withdrawal of the Roumanian arbitrator as provided in the Treaty. The Council therefore found themselves asked to perform two duties under the Treaty which are and must be kept distinct : for the one duty under Article 11 is to act as a mediator and to endeavour to effect a settlement of the dispute between two members of the League ; the other under Article 239 is merely the duty to act in a purely ministerial manner, that is to appoint vacancies, in order to enable the Tribunal set up by the Treaty, quite independently of the Council of the League of Nations, to carry out the functions prescribed by the Treaty.

It must also be remembered that the functions of a mediator are in no sense judicial, the mediator can make suggestions and give advice, but he can decide nothing : he can propose but he cannot dispose.

The Committee appointed by the Council made numerous efforts to produce an agreement between the two parties without however effecting any result. Amongst other things with a view, no doubt, to limiting the dispute it attempted to obtain the assent of both parties

to certain views which it expressed on the interpretation of the Treaty. In so far as this represented an effort at mediation no objection can be taken to the course pursued, nor for this purpose is it really relevant to enquire whether the propositions laid down by the Committee are or are not a correct interpretation of the Treaty; if the parties chose to do so there was no reason why they should not agree that the enquiry before the Tribunal should be conducted on the basis that those propositions were to be looked upon as the meaning of the Treaty for the purpose of that litigation, though how far the jurisdiction of the Tribunal could be limited as between the claimants by an extraneous interpretation by the Council or the respective Governments is not so clear.

The Committee do not appear to have had before their minds the distinction which we think ought to be drawn between litigation in which the Hungarian Government are a party and litigation in which there is a particular claimant. If the Hungarian Government were themselves parties to the claim, it might well be that, by agreement in the manner suggested by the Committee or otherwise, they might have precluded themselves from raising some particular matter or pressing some particular construction of law upon the Tribunal.

Apart from some modification of the Treaty itself, however, when once a claim not proceeding from the Hungarian Government as such has raised an issue before the Tribunal, then, though the Tribunal has come to be re-constituted as a result of certain admissions made by the Hungarian Government, it by no means follows that an individual claimant will be precluded from urging facts or a construction of law which the Hungarian Government directly or by implication have agreed shall not be considered by the Tribunal.

It is very doubtful whether in such a case the Tribunal could properly refuse to entertain jurisdiction of a particular claim or refuse to give any particular interpretation of any issue because of an admission made, not by a claimant, but by the Hungarian Government.

In an issue between a particular claimant and the Roumanian Government, the Hungarian Government might well be considered by the Tribunal to be a stranger to the litigation, not competent to limit the jurisdiction of the Tribunal in any way.

Unfortunately the report has not been framed in very felicitous language, with the result that it is at least open to an interpretation which would suggest that the Committee have confused the ministerial function of the Council under Article 239 with its mediatory function under Article 11 of the Covenant, and also have confused mediatory and judicial functions, with the result that they considered that the Council of the League of Nations was in some shape or form a quasi-judicial body entrusted with the power of reviewing the decisions of the Mixed Arbitral Tribunal or of prescribing to that Tribunal the limits within which it was to exercise its jurisdiction. It is clear however that neither the Council nor the League itself has any such powers, and many of the matters on which the Committee have expressed an opinion are matters of interpretation of the Treaty which has been entrusted to the Tribunal and to the Tribunal alone. Opinions on such a difficult point may legitimately differ, as they do on many difficult points of law, indeed in some cases it cannot properly be said

that one opinion is right and the opposite opinion is wrong : both may be permissible though only one can prevail, and in such cases the Court has to decide which shall prevail, and the Court in this particular instance is the Tribunal. What however is noticeable is that there is no suggestion in the Report of the Committee that the Tribunal was wrong in overruling the Roumanian plea, and entertaining jurisdiction ; on the contrary, it is quite clear from what is said in the Report that the Committee consider that that plea was rightly overruled. The Council are not therefore faced with the difficult position which might arise if a Tribunal had with obvious perverseness embarked on an enquiry into which it had no jurisdiction to enter, for it is conceded that no such thing has happened here.

In these circumstances it may be respectfully suggested that the Council have done all in their power in their character of mediators to bring the parties to an agreement, which would either dispose of or limit the extent of the dispute, and having failed to do this they have discharged their duty under the covenant. Without the consent of both parties they cannot exercise any arbitral or judicial functions, and if and in so far as the Report of the Committee suggests that they should do so the Report shows how easy it is to confuse the two duties, which makes it all the more important that the Council should keep the two functions clearly distinct : and, if they do so, they will no doubt find that the only course now open to them is to discharge the ministerial function under Article 239 without imposing any conditions for its performance. That is to say the Hungarian Government should now ask in terms that Article 239 be carried out and that the Council should proceed by the machinery there provided to reconstitute the Tribunal sine conditione.

HENRY SLESSER.

RALPH SUTTON.

THE TEMPLE,

The 12th day of January, 1928.

THE TREATY OF TRIANON and the Claims of HUNGARIAN NATIONALS with regard to their Lands in TRANSYLVANIA.

OPINION

By the Right Hon. Sir LESLIE SCOTT, K.C., M.P.

1. WHETHER UPON THE CORRECT INTERPRETATION OF THE TREATY OF TRIANON, AND PARTICULARLY OF THE ARTICLES OF THE COVENANT, THE LEAGUE OF NATIONS, WHEN ACTING UNDER ARTICLE 11 OF THE COVENANT, HAS ANY JUDICIAL POWERS; OR PERFORMS ANY JURIDICAL FUNCTION.

QUESTION 1.

If I understand the first Question rightly, the answer to it is in the negative.

By the first part of the Question (judicial powers) I understand that I am asked to advise whether the High Contracting Parties have conferred upon the League of Nations a consensual jurisdiction of an arbitral character to adjudicate upon any question that may be brought before it under Art. 11 of the Covenant, so as in any way to bind the Powers themselves by its decision. To make any exhaustive definition of the different kinds of action which the High Contracting Parties, by their Treaty, have authorised the League of Nations to take with the object of preserving peace would be a difficult task, and one which it is unwise to undertake in the abstract. As various problems present themselves in the course of time it will be possible, often without difficulty, to answer such a question in relation to, and limited by the facts of the particular case.

But limiting my answer to the aspects which are relevant to the broad questions of the controversy in relation to which I am asked to advise, my opinion is that whereas the League of Nations is under Art. 11 free to take whatever action it considers best suited to attain the ends contemplated by that Art., viz. : to safeguard the peace of nations, to deal with matters which may affect international relations prejudicially, and generally to preserve goodwill between nations, judicial determination is the one form of action which is definitely excluded from their powers. Their main function is consultation and mediation, but not to decide which side is right and which wrong. This distinction is brought into prominence by Art. 12.

The second part of the Question (juridical functions) I understand means—"is the function of legal interpretation of the provisions of the Treaty to any, and what, extent and in what aspect, committed to the League of Nations?" If this be the meaning intended, my answer again is in the negative, in this sense, that the duty is not entrusted to the League of interpreting the Treaty for the purpose of guiding any legal tribunal, whether the Permanent Court of International Justice, a Mixed Arbitral Tribunal, or a national court. Whilst expressing this definite opinion, I must guard myself from being thought to mean that the League is not entitled for the purpose of taking such action as falls within its powers and duties to interpret the Treaty for its own guidance. It is obvious that it ought and must do so—for instance, for the purpose of conciliation under Art. 11. Without forming a clear opinion as to the meaning of the Treaty, and it may be as to the meaning of some other document, whether Treaty or rules of international law or National law, it could not in many cases take action effectively under Art. 11 in order to bring disputing parties together unless it has a clear understanding of what it conceives

to be the legal rights and obligations of those parties; and for this purpose it is entitled to utilise the assistance of jurists to the fullest possible extent. None the less, this duty must be clearly distinguished from the duty either of adjudication or of guiding a legal tribunal on legal matters.

The fundamental ground for the opinion that on the true interpretation of the Treaty the League of Nations has no judicial powers or legal functions in connection with any question which falls within Art. 11 of the Covenant, is that in order to found such a jurisdiction the intention of the Parties to the Treaty to confer it must be manifested in the language of the Treaty itself; and I can detect no words which either expressly or by necessary implication indicate such an intention.

2. WHETHER UNDER ARTICLE 239 OF THE TREATY OF TRIANON WHEN AN ARBITRATOR DIES, OR FROM ANY OTHER CAUSE CEASES TO ACT, AND THE VACANCY IS NOT FILLED BY THE GOVERNMENT WHICH NOMINATED THE ARBITRATOR SO CEASING, THE COUNCIL OF THE LEAGUE OF NATIONS

(a) HAS A DUTY, UNDER PARA. 1 OF THE ANNEX TO THAT ARTICLE, TO MAKE THE NECESSARY NOMINATIONS IN ORDER THAT THE TRIBUNAL MAY BE RECONSTITUTED, AND

(b) HAS ANY AND WHAT DISCRETION IN THE MATTER, BEYOND THAT OF SELECTING SUITABLE PERSONS; AND IN PARTICULAR WHETHER

(c) IT IS ENTITLED TO IMPOSE ANY SANCTIONS AS A CONDITION OF ITS AGREEING TO MAKE SUCH NOMINATIONS.

My answers to the different parts of this question are as follows :—

- (a) Yes.
- (b) No.
- (c) No.

My reasons are as follows :—

Article 239 Par. (b) provides that the Mixed Arbitral Tribunals constituted in accordance with the provisions of Par. (a) are to perform the function of adjudicating upon differences which are assigned to their jurisdiction by Sections III., IV., V., and VII. of the Treaty. This provision is in terms mandatory, and confers an exclusive jurisdiction over the subject matters so defined. Article 250 is equally mandatory and exclusive. By it the Powers entrust the judicial settlement of disputes within the Article to the exclusive jurisdiction of the Mixed Arbitral Tribunal, thereby making an express addition to the categories of subject matters mentioned in Article 239 (b).

By Article 239 (g) the High Contracting Parties enter into an express contract that they will each and all treat the decision of the Mixed Arbitral Tribunal as "définitive," a word which, in my opinion, means both final and binding; and in order to make this meaning doubly clear, they have each and all undertaken by the same paragraph to make such decisions binding on their nationals—an undertaking which imports a promise that they will pass such legislation as may be necessary for the purpose.

Whatever duty rests upon the League of Nations in regard to the Mixed Arbitral Tribunal, the source of obligation is the contractual undertaking imposed in the Treaty itself by reason of its execution by the High Contracting Parties to it. This observation may seem a truism, but if it be borne in mind it is of assistance in appreciating the true answers to the questions now under consideration. The duties of the League under Art. 11 of the Covenant and Art. 239 of the Treaty, being referable to the contract of the High Contracting Parties, the question is one of the true interpretation of the written instrument.

Article 239 (a) imposes, in unambiguous language, a duty upon the High Contracting Parties to constitute the Tribunal in the first instance ("un tribunal arbitral mixte sera constitué.") Such tribunals are to be constituted as between Hungary on the one side and each of the Allied and Associated Powers on the other. In regard to each such tribunal, each of the two Governments concerned gave, by signing the Treaty, an absolute undertaking to designate one of the three members of the tribunal, the President being chosen by agreement between the two Governments concerned. In default of such agreement, the Council of the League is directed to nominate a President and two other persons, nationals of neutral Powers, who shall be capable of acting as President if required.

If, on a vacancy occurring, a Government concerned (*i.e.*, the Government whose nominee has ceased to act) does not within a month nominate a successor, the opposing Government has the right to fill the vacancy by choosing one of the two persons nominated as above by the Council of the League (although they were in fact nominated in the first instance in order to replace the President, if required).

Paragraph 1 of the Annexe provides that in case of a member of the tribunal ceasing to act for any reason whatsoever ("pour une raison quelconque") the same procedure has to be followed as is provided for by Par. (a) of Article 239 in the case of an initial vacancy—*i.e.*, upon the original constitution of the tribunal.

The above provisions are plain and unequivocal; absolute and not conditional. The duty of the Council to nominate two neutral persons from whom the opposing Government may choose one to act as arbitrator in place of the arbitrator who has ceased to function, is not made contingent upon any event, nor is it expressed to be permissive or discretionary. The moment a vacancy occurs, the duty of the League attaches, in order that the tribunal may be reconstituted and function again. No discretion is given to the Council; neither the Article nor the Annexe contains any language from which an intention to confer such a discretion can be inferred.

If the duty of the Council be absolute and not discretionary, it follows that it is *ministerial* in character—a duty imposed in order that the continuous functioning of the arbitral tribunal may not be interrupted by the death of one of its members, or by any other cause whatsoever which may prevent his continuing to act.

It follows equally that the High Contracting Parties have not by their agreement conferred upon the Council any power to attach any conditions to the performance of its duties in connection with the reconstitution of the tribunal; still less has the Council power to impose any sanctions as a condition of doing that which the Article directs it to do. That any such rights should be vested in the Council would require express language in the Treaty, and no such language is to be found there.

The above opinion rests upon the language employed in Article 239 and its Annexe; and it is unnecessary for the purpose of such opinion to look elsewhere in the Treaty. But it is to be observed that the general conclusion indicated by a perusal of Article 239 and its Annexe is in conformity with the general principles of the Covenant by which all members of the League, and all signatories to the Treaty, are encouraged to refer their differences to arbitration or to the Permanent Court of International Justice, and the Council itself is given no such arbitral powers (see particularly Articles 13, 14 and 15). Neither the Council nor the Assembly have arbitral power. Indeed the greatest possible care is taken in Article 15 to make it clear that the League, both through its Council and through its Assembly, is strictly limited to the function of rendering advisory assistance. In my opinion it would be inconsistent with these fundamental principles upon which the League of Nations rests, that the Treaty should be interpreted as conferring upon the Council any power to attach conditions or sanctions to the performance of its ministerial duty in regard to the reconstitution of a Mixed Arbitral Tribunal.

3. WHETHER THE MIXED ARBITRAL TRIBUNAL IS BOUND BY ANY LEGAL OR OTHER OPINIONS EXPRESSED BY THE LEAGUE OF NATIONS THROUGH ITS ASSEMBLY OR COUNCIL: OR ON THE CONTRARY HAS A JUDICIAL DUTY TO EXERCISE ITS OWN INDEPENDENT JUDGMENT ON ALL MATTERS PENDING BEFORE IT WHETHER RELATING TO QUESTIONS OF COMPETENCE OR MERITS —(DU FOND).

QUESTION 3.

My answer to the first part of this question is in the negative, and to the second part in the affirmative.

Similar reasoning to that expressed by me in the latter part of my answer to Question No. 2 is applicable to the first part of this question. It would be inconsistent with the fundamental principles of the Covenant, on the true legal interpretation of its language, that a Mixed Arbitral Tribunal should be bound or in any way affected by, any legal or other opinions expressed by either the Assembly or the Council of the League. Such a function, in any national system of justice, belongs either to a Court of Appeal, particularly a "cour de cassation," by way of correction of the legal errors of subordinate tribunals. In our English system it belongs to the King's Bench Division of the High Court of Justice, by way of appeal from arbitrators on questions of law, or of supervision of inferior courts by way of prohibition against excessive jurisdiction or by certiorari, *i.e.*, a quashing of decisions by inferior courts when they are erroneous in law.

For the creation of such an appellate or supervisory jurisdiction it is obvious that express enacting words are required. It suffices to say that there are none such in the Treaty of Trianon.

But whilst expressing a categorical opinion that neither the Assembly nor the Council can bind the Mixed Arbitral Tribunal by the expression of any opinion, and that the tribunal must judge in complete independence of any such outside influence applying its own mind to the questions of law and fact which arise for its determination in any case before it; I desire to guard myself from possible mis-

conception. The duty incumbent upon the Council of the League to use every possible effort by way of conciliation and mediation, and to prevent disputes, or to bring about their solution by agreement between the Parties, entitles it—and indeed may well impose a duty upon it in an appropriate case—for the purpose of conciliation—to form and to express legal opinions, and to convey those opinions to the disputing Parties or to the Governments interested in the dispute and even to invite the Parties to accept them. Provided that no attempt is made by the Council to pass beyond the function of conciliation and mediation, and that it does not seek directly or indirectly to interfere with the independent jurisdiction of the Mixed Arbitral Tribunal or to impose such sanctions as in answer to the last question I have said are, in my opinion, forbidden by the language of the Treaty, no occasion for criticism arises.

4. WHETHER THE DECISION OF THE MIXED ARBITRAL TRIBUNAL GIVEN ON THE 10TH JANUARY, 1927, THAT IT IS COMPETENT TO ENTERTAIN CERTAIN CLAIMS OF HUNGARIAN NATIONALS UNDER ARTICLE 250 OF THE TREATY OF TRIANON IS FINAL, OR WHETHER THE TREATY OF TRIANON CONTAINS ANY PROVISION WHICH DIRECTLY OR INDIRECTLY SUBJECTS THAT DECISION TO THE POSSIBILITY OF REVIEW EITHER BY THE ASSEMBLY OR COUNCIL OF THE LEAGUE OF NATIONS OR BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

QUESTION 4.

The answer to the first part of this question is in the affirmative, and to the second part in the negative.

On general principles, *i.e.*, on the general question of the interpretation of the Treaty, I have sufficiently dealt with both parts of this question in my answers to questions 2 and 3.

All that remains is the particular question of the form of the decision of the Mixed Arbitral Tribunal dated the 20th of January, 1927. I have perused it carefully. It purports to be final. Its language is clear and I see no reason for thinking there can be any doubt as to its validity or finality. The question of competence is disposed of irrevocably. The Treaty contains no machinery by which that decision can be impeached, modified or in any way reviewed.

5. COUNSEL IS ALSO REQUESTED TO ADVISE IN PRINCIPLE IN REGARD TO THE MORE IMPORTANT QUESTIONS OF LAW AND FACT UPON WHICH THE SUCCESS OF THE HUNGARIAN CLAIMANTS WILL DEPEND UPON THE TRIAL OF THE MERITS (LA QUESTION DU FOND), WHEN THE MIXED ARBITRAL TRIBUNAL IS RECONSTITUTED. FOR THIS PURPOSE COUNSEL IS NOT ASKED TO ADVISE UPON THE EVIDENCE IN DETAIL.

QUESTION 5.

(1) *The meaning of "saisie ou liquidation" under Article 250.*

As Article 250 is an exception from the general scope of provisions of Article 232, and that Article is either by reference or expressly made subject to the provisions of Article 250 in the case of certain liquidations (see Clause 1 paras. (b) and (i), it is both legitimate and proper to look to Article 232 for assistance in arriving at the correct interpretation of "saisie ou liquidation" in Article 250.

(2) "Mesures exceptionnelles de guerre" and "Mesures de Disposition," referred to in Article 232 (1) (a) and defined by Par. 3 of the Annexe to that Article, are clearly intended to be included within the two general words "retenir" and "liquidier" under Article 232 (1) (b). It follows necessarily, in my opinion, from the premises that the words "saisie" and "liquidation" in Article 250 are the substantives corresponding with the verbs "retenir" and "liquidier" and must be regarded as covering all the operations mentioned in Par. 3 of the Annexe to Article 232.

The provision of Article 250, second paragraph, that Hungarian property situate in territory of the old Austro-Hungarian Monarchy shall be restored to its owners "libérés de toute mesure de ce genre" would have been sufficiently wide to cover everything intended, but lest anything should have been omitted from the categories enumerated in Par. 3 of the Annexe to Article 232, express words are inserted in the second paragraph Article 250 (*ex abundanti cantela*) in order to sweep in every similar measure: "ou de toute autre mesure de disposition, d'administration forcée ou de séquestre."

It follows that any compulsory expropriation of property falls within the generality of the language of Article 250.

But it is common ground that an expropriation "pour cause d'utilité publique" on payment of full compensation would not fall within the real ambit of the Article, and an Agrarian Law might involve an expropriation of this character. In such a case no breach of Article 250 would result. A criterion is afforded by a consideration of the essential character of the Treaty. It is a Treaty of Peace. Primarily Articles 232 and 250 deal with War measures, but they both speak of the future (Article 232 (1) (b) and Par. 3 of the Annexe and Article 250, first par.); that is to say the measures with which they deal include measures to be taken or not to be taken after the ratification of the Treaty of Peace. But both Articles assume that such measures are similar in character to measures previously taken during the War. The element of hostility between the two sides is thus made relevant and whereas Article 232 authorises the Allied Powers to liquidate the property of Hungarians generally, obviously in their capacity of ex-enemies responsible to make reparations for the damage done by them as enemies, so by Article 250 Roumania for instance is forbidden within any territory which was once part of the ancient Austro-Hungarian Monarchy to take any such measures against their old enemies, the Hungarians. "Liquidation" therefore presupposes what has been called, for brevity, an element of "connexité" with the War; with an "expropriation pour cause d'utilité publique contre compensation equitable," Article 250 has no concern. But if on consideration of the whole of the facts of the case, including the history of the negotiations which led up to the Treaty, the history of the conduct of Roumania since the Armistice towards Hungarians having property in Transylvania, whether before or after the ratification of the Treaty of Peace; of the character of Roumanian legislation or administration concerning land in Transylvania as compared with her legislation or administrative action in other parts of Roumania; of the character of the so-called Law of Agrarian Reform as judged by its terms and its application in practice; of the broad Agrarian facts in regard to landholding historically and actually in Transylvania, and the comparative number of Hungarians, Roumanians and other nationals owning land in Transylvania and the small extent of "latifundia" in Transylvania as compared with other parts of Roumania—if on such a consideration of all the facts of the case (and I do not suggest that

the above list is exhaustive or anything more than illustrative), it appears that the Agrarian Law in question has in its operation been directed against Hungarians, with the result of eliminating the Hungarian owners and transferring their property to Roumanians, then the facts would clearly disclose a case of "liquidation" in breach of Article 250.

For the purpose of answering the question put to me it is necessary to point out that the Hungarian claimants may succeed in proving their case by establishing one or more of the evidential facts above enumerated and without establishing them all or even most of them. Their case is cumulative. It may well be that, as many distinguished jurists consulted in the case have said, one or more points are individually sufficient to entitle the Hungarian claimants to judgment. But I desire to emphasise the view which on a perusal of the large mass of opinions and arguments presented in the case seems sometimes to have been lost sight of, that the question whether there has been a "liquidation" of the kind forbidden by Article 250 depends on an issue of fact, and that on this there is already a large mass of evidence from different points of view which, taken cumulatively, points irresistably to one judicial inference, viz. : that there has been a plain case of forbidden "liquidation" entitling the claimants to relief under Art. 250.

If I were asked to select any one point of fact which is more strongly in favour of the Hungarian contention than the others, I should select the provision of the Agrarian Law itself in Article 6, that the land of all absentee landlords (above 50 jugars) is to be subjected to total expropriation. In the light of the Statutory and subsequent administrative definitions of the word "absent" it seems to me quite impossible to avoid the inference that this section of the Law was directed against Hungarians as such (see for instance the reasoned statement by M. Charles Dupuis, Recueil edited by M. Lapradelle, p. 73, and the history of the previous legislation traced by Mr. Bellot, Recueil, pp. 538—540). This matter is also dealt with powerfully by several of the other jurists who gave opinions or argued on the side of the claimants. I select the two former merely as illustrations.

It may be possible to call additional evidence before the Mixed Arbitral Tribunal, but as the facts of the case, in my opinion, constitute a cumulative case which no other evidence adduced by Roumania could answer, it may well be that the Tribunal will consider that the case is proved, and that it would be idle to permit under its rules of procedure a "contre-preuve" when by reason of the inability of Roumania to challenge the main facts already admitted or proved, such "contre-preuve" could not affect the final decision of the case.

It may perhaps be worth while to deal with one or two matters which seem to me to have been looked at from the wrong angle, and to have been treated as matters of law, when on the real issue between the Parties they should have been regarded rather as matters of fact. Let me take three illustrations.

(a) It has been said that the derisory amount of compensation recoverable, viz. : less than 1%, shows an expropriation of private property of foreigners which is contrary to the recognised rules of international law. The observation is no doubt sound, but the relevance of this point to the issue is that as a matter of evidence it helps to prove a liquidation in fact. It shows that the Agrarian Law was of a most exceptional character, and therefore not likely to have been an expropriation "pour cause d'utilité publique."

(b) In the second place, the Agrarian law discloses differentiation against proprietors in Transylvania who were almost wholly Hungarians. When its terms are compared with the Agrarian Laws for other parts of Roumania and when the full compensation in gold given for instance to Allied Nationals in Bessarabia is contrasted with it, it is difficult to avoid such a conclusion. But although proof of differentiation is affirmative evidence that the "Agrarian reform" in fact amounts to "liquidation" within the meaning of the Treaty, to avoid any misconception I wish to add that it does not follow, and I do not assent to the proposition that if there were no differentiation there would be no liquidation.

(c) It is said by some of the Jurists supporting the Hungarian claimants that a breach by Roumania of the provisions of Article 63 of the Treaty

(i) by expropriating the Hungarians under the Hungarian law

(ii) by the amendment of the Roumanian Constitution so as to forbid foreigners to hold land in Roumania shows that the action of Roumania is necessarily and as a matter of law, not merely of fact, a "liquidation" forbidden by Article 250. My own view is that no conclusion of law can be drawn from the above-mentioned facts, but that they have probative force of considerable weight on the question of fact. If Roumania was prepared to disregard her Treaty obligations in regard to Hungarians, in a matter so inextricably interwoven with her Agrarian law, it surely is evidence of that element of "commexité" which I agree is involved in the conception of "liquidation" under Article 250.

In answering question No. 5 I desire to repeat what I have already said, that I have only given illustrations and made no attempt to cover the whole ground. I desire also to repeat that in each of my illustrations I have only drawn attention to certain aspects of each point; there may be many others that will be equally relevant at the trial. Finally, I desire to emphasise that my opinion expresses a preference for a particular legal method of approach, rather than disagreement with certain legal opinions which have been already advanced by other jurists on behalf of Hungary, who regarded the case as concluded as a matter of law, by certain considerations upon which they rely. They might be right, but even if the Tribunal should not agree with some of their legal views, the cumulative case of facts seems to me likely to prove irresistible.

Goldsmith Building,

TEMPLE, LONDON, E.C.4.

29th November, 1927.

THE VACANCY IN THE HUNGARIAN-ROUMANIAN
MIXED ARBITRAL TRIBUNAL

JOINT OPINION

of the Right Hon. Sir JOHN A. SIMON, K.C.V.O., P.C., K.C., M.P.
and Mr. RALPH SUTTON

In common with other treaties which terminated the Great War, the Treaty of Trianon incorporates "the covenant of the League of Nations," and the provisions relating thereto constitute the first part of the Treaty. Articles 11 to 16 of the covenant deal particularly with those matters which threaten to disturb international peace or the good understanding between nations upon which peace depends, and contain elaborate provisions to prevent such matters leading to rupture and war, by causing them to be submitted to arbitration or enquiry by the Council, as representing the League, who shall "endeavour to effect a settlement of the dispute" and, if necessary, may refer the matter to the Assembly. In short, the mediation of the Council can be sought besides arbitration, but it must be borne in mind that the objects of arbitration and mediation are different.

"These matters are often discussed as if they were practically the same: but in reality they are fundamentally different. Mediation is an advisory, Arbitration a judicial, function: mediation recommends, arbitration decides. While nations who might for this reason accept mediation might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted."

Moore. Digest of International Law (1906) Vol. VII. Paragraph 1069.

In addition to these powers to act as mediator, under Article 239 of the Treaty certain functions are assigned to the Council of the League of Nations with reference to an arbitral Tribunal, known as the Mixed Arbitral Tribunal, established by that Article between each of the Allied and Associated Powers on the one hand and Hungary on the other, for the purpose of deciding certain questions under different parts of the Treaty. Each of the Governments concerned is to appoint one of the three members constituting the Tribunal and the President is to be appointed by agreement: and "in case of failure to reach agreement 'the President of the Tribunal and two other persons either of whom 'may in case of need take his place shall be chosen by the Council of 'the League of Nations, or until this is set up by M. Gustave Ador 'if he is willing.

"If in case there is a vacancy a Government does not proceed 'within a period of one month to appoint as provided a member of 'the Tribunal, such member shall be chosen by the other Government 'from the two persons mentioned above other than the President."

And by paragraph 1 of the Annex to the Article "Should one of 'the members of the Tribunal either die, retire or be unable for any 'reason whatever to discharge his functions the same procedure will 'be followed for filling the vacancy as was followed for appointing him."

Under this Article it is reasonably clear that the functions of the Council are in no sense mediatory or advisory. There is in fact nothing on which they can mediate, nor are they called upon to advise or determine whether there should or should not be an arbitral Tribunal. The Treaty has provided that it shall be established, and the signatory powers have agreed that certain matters should be referred to its

arbitrament: and the functions of the Council are, like those of M. Gustave Ador—for there is no difference between the two—purely ministerial, and are entirely analogous to the powers conferred by numerous agreements to submit future disputes to arbitration on some designated person to appoint the arbitrator or arbitrators if one of the parties refuses to appoint or concur in appointing according to his agreement, or by the Arbitration Act, 1889, upon the Court so to appoint in like circumstances. The phrase “if he is willing” applies only to M. Ador: the Council by nominating is merely discharging a duty. Being purely ministerial, the function is not discretionary in the sense that the Council can in their discretion refuse to act under the Treaty or refuse to act except upon conditions which they think fit to impose.

The functions therefore of the Council under this particular Article of the Treaty are distinct from, and are not in any way to be confused with, their functions under the Articles of the Covenant.

The Tribunal itself is, no doubt, in a somewhat peculiar position; its jurisdiction is limited, and cases therefore must occur in which the questions fall for decision whether or not they are within the jurisdiction of the Tribunal, and the Tribunal has to decide that question. This particular difficulty occurs frequently enough in municipal law, and it has also arisen before in international matters. In this country, for instance, the legislature may entrust any tribunal with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction, on finding that it does exist, to proceed further or do something more, and may enact that there shall be no appeal from their decision: and in such a case the tribunal has jurisdiction to determine all the facts including the existence of the preliminary facts upon which the further exercise of its jurisdiction depends, and there is no appeal from the exercise of their jurisdiction.

In international matters again the difficulty occurred in an arbitration under the Jay Treaty between England and the United States, relating to various actions taken against American shipping during the Napoleonic wars, and the question arose whether the Tribunal had jurisdiction to enquire into claims on which the Lords Commissioners of Appeal in England had already adjudicated: and the answer of Lord Loughborough, who was then Lord Chancellor, was “that the doubt respecting the authority of the Commissioners (as the arbitrators were called) to settle their own jurisdiction was absurd and that they must necessarily decide upon cases being within or without their competency” (Moore: Digest of International Law (1906) Vol. VII. Par. 1073) and similarly in another arbitration between the United States and Mexico in 1839, where the question again arose, Mr. Daniel Webster was equally emphatic, “The mixed commission under the convention with Mexico has always been considered by the Government essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions. Its rights and duty therefore, like those of other juridical bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims that might be laid before it.” Moore: International Arbitrations (1898) Vol. II. P. 1242.

A perusal of Article 239 of the Treaty leads irresistably to the conclusion that the powers of the Mixed Arbitral Tribunal are the same. No court is established either expressly or by necessary implication which can exercise any control over it, or act as a court of appeal from its decisions; on the contrary the High Contracting parties

agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive: and this in itself seems to be merely applying the general maxim that "the decision of an international Tribunal over matters as to which it is made the supreme arbiter is final, and is not the subject of revision, except by the consent of the contesting sovereigns." Moore: Digest of International Law (1906) Vol. VII. Par. 1081.

Whether therefore the Tribunal affirms or denies its jurisdiction in any particular instance, it appears that there is no means of questioning its decision, apart from a fresh agreement to refer the matter to some other Court—a proposal which in fact was made in this particular instance, but not accepted.

Among the matters referred to the Mixed Arbitral Tribunal are claims by Hungarian Nationals under Article 250 of the Treaty. Such claims have in fact been preferred, and the Roumanian Government in answer thereto put in a "demande exceptionnelle" raising the point that the Tribunal had no jurisdiction to entertain them, on the ground that the measure under which the acts complained of were taken, that is the Roumanian Reform Law of July 30th, 1921, by its nature did not constitute a measure of "saisie ou liquidation" within the meaning of Article 250. The Tribunal however decided that it could not on *a priori* grounds reject the claims submitted by the Hungarians, or declare itself incompetent to entertain them, and therefore overruled the "demande exceptionnelle."

Thereupon Roumania withdrew her arbitrator, thus creating a vacancy which is alleged to prevent the Tribunal from functioning, and brought the matter before the Council under Article 11 of the Covenant; Hungary on the other hand requested the Council to exercise its functions under Article 239.

In these circumstances the Council thought it proper to attempt to act as mediator under the covenant, and appointed a Committee to report upon the whole matter.

The Committee in fact made numerous efforts to bring the parties to an agreement, but those efforts have proved fruitless. Amongst other things it sought to narrow the dispute by obtaining the assent of both parties to certain principles which it laid down; or at any rate recommended the Council to endeavour to obtain the adherence of both parties to these principles. So far this has not been effected, and if it cannot be effected the efforts at mediation by the Council will have failed.

The success or failure, however, of the Council's efforts as mediator does not and cannot in any way affect the exercise of its functions under Article 239, which remain, as they always have been, ministerial, nor from the purely juridical point of view has anything occurred which can alter the position created by that Article. It is possible to conceive a case in which a Mixed Arbitral Tribunal, under colour of deciding on the question of its jurisdiction to entertain a claim, might perversely arrogate to itself power to deal with matters which are not within its jurisdiction. It is, however, quite unnecessary to consider what the position of the Council would be in such a case, for there is and can be no suggestion that anything of the kind has occurred in this instance. The Tribunal has done nothing more than declare that it cannot at the present stage of the proceedings decide that it is incompetent to entertain the claims submitted to it, as it was invited to do by the Roumanian Government. None will venture to say that this is a perverse decision and not one which could be legitimately

given by a Tribunal which, amongst other things, has "necessarily to decide upon cases being within or without its competency," for the conclusion at which it has arrived has the support of eminent jurists and is also the conclusion of the above-mentioned Committee. Indeed, the report of the Committee recognises that the Roumanian objection to competency was rightly overruled.

In the face of these considerations it is impossible for any one to say that the preliminary decision given by the Tribunal on the "demande exceptionnelle," however much he may dispute its correctness, was perverse or one which it had no jurisdiction to give, so as to make its decision a nullity—for no doubt a decision of an international arbitration court given entirely outside its jurisdiction is a nullity, as, for instance, the so-called award of the King of the Netherlands in 1831 purporting to define the boundary between Canada and the United States.

The position therefore is that the Mixed Arbitral Tribunal has, at a preliminary stage of the case, investigated the question of its jurisdiction, a question which it has power to investigate and is under an obligation to investigate, and on this question has decided that it could not at that stage of the proceedings refuse to entertain the claims presented to it as being without its jurisdiction, a decision which cannot be treated as a nullity: a vacancy now exists on the Tribunal which can only be filled by the Council taking action under Article 239: it is more than permissible for the Council now to say that they have discharged the duty laid upon them by Article 11 of the covenant, and therefore, as far as relates to the carrying out of the provisions of the Treaty, their only duty is to exercise the ministerial function assigned to them by Article 239.

In this connection, perhaps, the Report of the Committee is open to slight criticism, for the performance of a ministerial act does not require justification, since it is, or ought to be, automatic: and it may be respectfully suggested that the imposition of terms as a condition of performing a ministerial act is not therefore legitimate.

JOHN SIMON.

RALPH SUTTON.

Temple,
30/xi/1927.

OPINION

On the Roumanian-Hungarian Dispute before the Council of the League of Nations, arising out of the Application to Hungarian Nationals in Transylvania of the Roumanian Agrarian Law of 1921,

BY

EDWIN M. BORCHARD,

Professor of International Law.

1.

By the Treaty of Trianon, ratified July 26, 1921, the province of Transylvania and other Hungarian territories were transferred from Hungary to Roumania. Hungarian nationals resident in old Roumania and those resident in the annexed provinces, were dealt with differently.

With respect to those in old Roumania or who had property there, Art. 232 of the Treaty of Trianon (Peace Treaty) gave Roumania the privilege of confiscating their property—called “seizure,” or “retention” and “liquidation”—and after paying certain obligations due to Roumanian nationals, of turning the balance over to the Reparation Commission or to the original owners. Hungary was to compensate the dispossessed owners.

With respect to those Hungarians domiciled in the Hungarian provinces ceded to Roumania or who had property there, a different arrangement was made. Those who were domiciled in the annexed provinces were given the privilege of opting for Hungarian nationality and removing their domicil within a year, but by Art. 63 of the Treaty of Trianon they were “entitled to retain their immovable property.” With respect to these optants as well as to those Hungarians not domiciled in the annexed provinces, but who had property there, a special protective provision was inserted in the Treaty, namely, Art. 250, by which it was provided that notwithstanding the provision for confiscation in Art. 232, the property of these Hungarian nationals “shall not be subject to retention (seizure) or liquidation.”

It was further provided in a separate paragraph of Art. 250 that “such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration taken since the 3rd November, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal, provided for in Art. 239.”¹

¹ In addition, the Minority Treaty of December 9, 1919, between the Allied Powers and Roumania provides, Art. 3, parag. 3, that “persons who have exercised the above right to opt. . . will be entitled to retain their immovable property in Roumanian territory.”

By Art. 1 of the same Minority Treaty, “Roumania undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognized as fundamental laws, and that no law, regulation, or official action shall conflict or interfere with these stipulations, nor shall any law, regulation, or official action prevail over them.”

II.

On July 30th, 1921, Roumania enacted a so-called Agrarian Reform Law for Transylvania designed, as alleged, to subdivide large estates and distribute the subdivisions among the peasants. Laws of somewhat the same kind were enacted on May 15th, 1920, for Bessarabia, on July 17th, 1921, for old Roumania, and on July 30th, 1921, for Bukowina.

The effect of these laws in the former Hungarian provinces, with their peculiar provisions for the expropriation of those who had been absent at any time between December 1, 1918, and March 23rd, 1921—necessarily primarily Hungarians—was to deprive of their property the several hundred owners of land in the annexed provinces. In the land registers covering this property, amounting to several hundred thousand jugars—a jugar is about 1.42 acres—the Roumanian State was entered as the owner, without any adversary proceeding. The owners were remitted to the acceptance of Roumanian bonds in paper lei, estimated to have a value of approximately one per cent. of the original gold value of the property.

The Hungarian owners at once invoked the aid of the Hungarian Government against this alleged confiscation, which for the most part occurred in 1923. That Government raised the issue with Roumania through diplomatic channels, charging a violation of Art. 250 of the Treaty of Trianon which, it was claimed, was designed to assure Hungarian optants and nationals of the continued possession and ownership of their immovable property. The good offices of the Council of the League of Nations were invoked by Hungary, and at Brussels and Geneva in 1923 efforts were made to find a formula which would reconcile the differences between the parties. While these negotiations, which ultimately proved abortive, were proceeding, a number of Hungarian nationals owning estates of varying size² brought their claims before the Mixed Arbitral Tribunal between Roumania and Hungary, established by Art. 239 of the Treaty, for a declaration that the seizure of their property under the Agrarian Law and its supplementary ordinances was a "retention or liquidation" of this property in violation of Art. 250 of the Treaty and hence invalid. They also asked for indemnity.

Roumania filed a demurrer to the jurisdiction of the Tribunal, asserting that an "expropriation" under the terms of the Agrarian Law and applying to both Roumanians and Hungarians could not be a "retention or liquidation" under Art. 250, which was designed, it was argued, to prevent only certain war measures directed for war purposes against Hungarian nationals "as such."

The Tribunal in a decision of January 10th, 1927, decided, contrary to the Roumanian contention, that it had jurisdiction of the case on the ground that an "expropriation" under the Agrarian Law might by its application be deemed a "retention or liquidation" under

² Up to December, 1926, 285 claims had been filed with the Roumanian-Hungarian Mixed Arbitral Tribunal. 170 of these cases are brought under the allegation that the claimants were poverty stricken through the loss of their property. In size, the estates sued for vary as follows: 15 are under 5 jugars (about 7½ acres), 15 are from 5 to 20 jugars, 49 are from 20 to 100 jugars, 47 are from 100 to 200 jugars, 56 are from 200 to 500 jugars, 35 are from 500 to 1000 jugars, and 68 are above 1000 jugars. Of the 22 claims passed upon in the test cases, decided on the jurisdictional issue on January 10, 1927, 5 are for less than 5 jugars, 2 for less than 10 jugars, 2 for estates between 10 and 100 jugars, 6 for estates between 100 and 200 jugars, and 7 above 200 jugars.

Art. 250, that that Article was designed to place the property of Hungarian nationals in the annexed provinces under the régime of general international law, that an expropriation without consent and by implication without compensation was a measure of "liquidation" under Art. 250, and that it was necessary to examine each case independently on the merits to determine whether actually the expropriation or seizure in question constituted a "retention or liquidation." The Roumanian Government was given two months within which to answer the complaints of the Hungarian nationals on the merits. (See Appendix, p. 35.)

Instead of filing an answer within the allotted time, the Roumanian Government on February 24th, 1927, through its Counsel, M. Millerand, notified the Court that it would "decline to accede" to the decision, and that "it will refrain from submitting any answer regarding the merits of these suits, and that, in consequence, its arbitrator will no longer sit on the Mixed Roumanian-Hungarian Arbitral Tribunal in any of the agrarian cases submitted by the Hungarian nationals."³

Both Roumania and Hungary then appealed to the Council of the League of Nations, but for different reasons. Roumania invoked the aid of the Council under Art. 11 on the ground that it was the right of each member of the League "to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."

³ The letter of M. Millerand, Counsel for the Roumanian Government, to the President of the Mixed Arbitral Tribunal, reads as follows:

"On December 15, 1926, I had the honor to state before the Mixed Roumanian-Hungarian Arbitral Tribunal our reasons for considering that the requests of the Hungarian nationals, optants and non-optants—claiming that the steps taken in pursuance of the agrarian reform, carried out a few years ago by Roumania to the lasting credit of her sovereign, her statesmen and her governing classes, fell within the category of measures of liquidation prohibited under Article 250 of the Treaty of Trianon—constituted a purely political move with only a thin disguise of legal justification.

I hastened to add that it was only out of deference for international justice that we appeared before the Mixed Arbitral Tribunal to offer these explanations, and that on no consideration whatever could we consent to discuss the substance of these suits, and that therefore as the legal proceedings were in this case merely a formality, I must expressly reserve my right, on behalf of the Roumanian Government, to adopt any decision or attitude which, having regard to the course of events, it might consider advisable.

The decision which the Mixed Arbitral Tribunal rendered, by a majority, on January 10th shows only too well how fully these reservations were justified.

The Arbitral Tribunal declares in fact, by a majority, that, in order to establish its competence, it need only satisfy itself that the case before it is one of the expropriation of a Hungarian estate without the consent of the owner, and that the fact that the measures complained of were taken under the Agrarian Reform Law and were not of a discriminatory character is a point which does not affect its competence and must be argued when the substance of the case is examined.

Thus, when invited to state whether or not it is competent, the Tribunal declines, by a majority, to express an opinion on the points which constitute the essential distinction between measures of liquidation, in respect of which it is competent, and measures of expropriation, in respect of which it is not competent.

The Tribunal summons the Roumanian Government to its bar with a view to the discussion of a national law which has been recognized as consistent with the Treaty of Trianon by the Hungarian Government in an agreement concluded under the auspices of the League of Nations and forming the basis of the Council's resolution of July 5, 1923—a national law which, by its very nature, can be referred to no other jurisdiction than that of the Roumanian courts. The results of the agrarian legislation, which was the fruit of prolonged struggles and of a compromise between the interests of classes and which has already been enforced for a number of years,

Hungary invoked the aid of the Council under Art. 239 of the Treaty of Trianon which provides that in the event of a vacancy in the arbitrators on the Mixed Arbitral Tribunal, of which Tribunals there are some forty now operating in Europe, the Council "shall" choose two other persons, nationals of countries that remained neutral in the war, from whom the other Government (Hungary here) may select one to fill the vacancy.⁴

The Council at its meeting in March, 1927, heard at length the representatives of Roumania and Hungary. Instead of nominating the two "neutral" nationals, the Council appointed a Committee of Three from among its membership to study the problem and make a recommendation to the Council for its consideration. The Committee of Three consisted of Sir Austen Chamberlain, Chairman or Reporter, and Viscount Ishii of Japan and Mr. Villegas of Chile. The Committee of Three invoked the aid of certain unnamed jurists and at the September meeting of the Council brought in a Report. (Appendix, p. 58.) This document constituted the basis of prolonged discussions at the meetings of September 17th and 19th, at which representatives of the two countries were heard.

The Report discusses briefly the historical background of the dispute, points out the failure theretofore to reach a satisfactory conclusion through direct conciliation, and continues:

"The Committee was, therefore, obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seems to be of primary importance. It, therefore, formulated the following questions:

1. Is the Roumanian-Hungarian Mixed Arbitral Tribunal competent to take cognizance of complaints resulting from the application of the Roumanian Agrarian Law to Hungarian optants and citizens?
2. If so, to what extent and under what circumstances is it competent to do so?"

The Committee then undertakes to make an examination of what it believes to be the jurisdiction of the Tribunal and undertakes to set forth certain "principles" "which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary."

could not be called in question for a moment without jeopardizing social peace in Roumania and even the peace of Europe.

You will not, I am sure, be surprised that, for the different reasons that I had the honor to state before the Mixed Arbitral Tribunal as well as for those which were advanced by my colleagues, the Roumanian Government, abiding loyally by the Treaty of Trianon and conscious alike of its rights and its obligations, should decline to accede to such a ruling.

I have the honor to add that I am instructed by the Roumanian Government to inform you that it will refrain from submitting any reply regarding the substance of these suits, and that, in consequence, its arbitrator will no longer sit on the Mixed Roumanian-Hungarian Arbitral Tribunal in any of the agrarian cases submitted by the Hungarian nationals."

⁴ Article 239 reads: . . . Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, These persons shall be nationals of Powers that remained neutral during the war.

If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President"

The Committee then comes to the following conclusion :

"(1) The provisions of the Peace Settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

(2) There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.

(3) The words 'retention and liquidation' mentioned in Art. 250, which relates only to the territory ceded by Hungary, applies solely to the measures taken against the property of an Hungarian in the said territories, and in so far as such owner is an Hungarian national."

The Committee of Three then suggests that the Council should :

"(a) Invite both parties to comply with these three principles ;

(b) Invite Roumania to reinstate her Judge on the Mixed Arbitral Tribunal."

The Committee then recommends certain alternative sanctions as follows :

(1) In case of refusal by Hungary, the Council would not be justified to proceed to the nomination of substitute judges in conformity with the Treaty of Trianon.

(2) In case of refusal by Roumania, the Council would be justified in taking the necessary steps to assure the functioning of the Mixed Arbitral Tribunal.

(3) If both parties refuse, the Committee thinks that the Council has exhausted the rôle incumbent on it by virtue of Art. 11 of the Covenant."

Hungary, represented at the September meeting by Count Apponyi, renewing a demand made on several previous occasions, requested that the Report be not adopted by the Council, on the ground that the issue as to whether the Mixed Arbitral Tribunal had jurisdiction was purely a legal one and not political; and that, though Hungary could insist that Roumania be bound to adhere to its agreement to regard the decision of the Mixed Arbitral Tribunal as "final" (Art. 239 of the Treaty), Hungary offered to have the case submitted to the Permanent Court of International Justice at The Hague, to have that Court determine whether or not the Mixed Arbitral Tribunal had jurisdiction of the claims of the Hungarian nationals. It was asserted that it was not the function of the Council to sit as a court of appeal from the Mixed Arbitral Tribunal. Roumania, represented by M. Titulesco, requested that the Report be adopted, arguing that the acceptance of the decision of the Mixed Arbitral Tribunal would have created social disturbances in Roumania, and perhaps even threatened international peace, and that on the adoption of the principles suggested by the Report, Roumania would proceed with the case as recommended in the Report. Sir Austen Chamberlain, the Reporter, argued for the adoption of the Report, on the ground that the Council, having been invoked under Art. 11, could not decline to offer a suggestion which might settle the dispute between the two nations, and that while the Council had no power to compel the acceptance of its proposals, it should adopt the proposals as a recommendation to the two powers concerned, and upon their acceptance the Council might then proceed to appoint the two substitute Judges as Hungary had requested.

Although in submitting the matter to the Council on final motion, the "sanctions" recommended by the Committee of Three were omitted from the proposal, the Council was much divided as to what course it should pursue. It failed to adopt the recommendations of the Committee of Three. The matter was, therefore, adjourned to the December, 1927, meeting of the Council with certain verbal suggestions to the representatives of Roumania and Hungary to seek in the meantime to compose the differences between the two nations on the basis of the Report of the Committee or otherwise.

III.

Thus the matter stands to-day and the questions on which an Opinion is desired are :

(1) Did the Mixed Arbitral Tribunal have jurisdiction of the issue presented by the complaint of the Hungarian property owners,

(a) If the Agrarian Law was applied discriminatorily against Hungarians,

(b) If it was applied without discrimination against Hungarians?

(2) What is the jurisdiction and the power of the Council of the League in the premises?

IV.

To understand the issue raised by the Roumanian expropriation of the land of Hungarians in Transylvania and other annexed provinces, it is necessary to recur to the origin of certain clauses of Art. 232 and 250 of the Treaty of Trianon, and the identical Articles 49 and 267 of the Treaty of St. Germain between Austria and the Allied Powers.

Article 232 (b) of the Treaty of Trianon like Art. 49 of the Treaty of St. Germain provides that :

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Kingdom of Hungary or companies controlled by them, and are within the Territories, Colonies, Possessions and Protectorates of such Powers (*including Territories ceded to them by the present Treaty*) or which are under the control of those Powers" (italics ours).

Whatever might be said of the confiscation of the private property of the citizens of Austria or Hungary situated in the Allied countries—and from the point of view of an ordered development of human affairs under the reign of law, very little, if anything, can be said in its favor—⁵, the confiscation of the private property of Austrians

⁵ This view of the unwisdom of the precedent mentioned, created for the first time in modern history on any such scale, is not weakened by the relegation of expropriated nationals to their own Governments for redress. Those Governments were in no position to make compensation on such a vast scale, but in fact their effort in some measure to do so has been interfered with by the Powers on the ground that reparations would thereby be impaired. Under eminent domain or legal expropriation the taking Government must pay; to assign the duty of payment to some other Government, especially a bankrupt one, is to evade compensation. See (1924) 18 American Journal of Int. Law, 523, and the Resolution of the International Law Association at Stockholm, 1924, reading :

"Resolved, that this Conference is firmly of opinion that the revived practice of warring states by which they confiscate the available private property of alien citizens is a relic of barbarism worthy of the most severe condemnation."

and Hungarians in the Austrian and Hungarian territories transferred in 1918 to the several succession states, seemed to the Austrian and Hungarian delegations at the Peace Conference not only a startling assault on the institution of private property and on a fundamental principle of international law and morality, but one so exceptionally unjust that on June 23rd, 1919, the Austrian delegation made a protest against the proposed provision. The delegation asserted that the principal properties of the six million Austrian nationals were in territories about to be transferred to the succession states, that such a vast confiscation would impoverish many of them, and that "no Government would have either the right or power to subscribe to stipulations constituting so violent an impairment of the private rights of its citizens," an impairment without precedent in history." They added that the liquidation of the Austro-Hungarian Monarchy based upon a liquidation of all the property belonging to Austrian citizens in the succession states, would constitute a physical impossibility, and that Austria could not possibly make compensation for such confiscation after the loss of most of its assets, including those of its citizens abroad. They, therefore, requested that Art. 49 (Trianon 232) be struck from the Peace Treaty.

The protest was heeded. By a note of July 8th, 1919, the Allied Powers advised the Austrian delegation that Art. 49 would be modified. It was supplemented by Art. 267, identical with the first two paragraphs of Art. 250 of the Treaty of Trianon, which prohibited all "retention or liquidation" of the property of Austrian citizens by the Governments of the succession states, and required the return of all that had been sequestered, seized or controlled between November 1st, 1918, and the coming into force of the Peace Treaty. In a note of September 2nd, 1919, addressed by the Powers to the Austrian delegation, it was stated that "the property of Austrian nationals in the territories ceded to the Allied Powers will be returned to its owners; this property will be free from all measures of liquidation or transfer adopted since the Armistice and a similar exemption from all measures of seizure or liquidation is guaranteed them for the future."⁶

The first two paragraphs of Art. 267 as applied to the Treaty of Trianon (Art. 250) read as follows:

"Notwithstanding the provisions of Art. 232 and the annex to section IV, the property, rights and interests of Hungarian nationals and companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy, shall not be subject to retention or liquidation in accordance with these provisions.

Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration taken since the 3rd of November, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question."

Inasmuch as the first two paragraphs of Art. 250 of the Treaty of Trianon are identical with the first two paragraphs of Art. 267 of the Treaty of St. Germain and were drafted by the same body, their interpretation, made in the letter of September 2nd, 1919, by the draftsmen of both treaties, is doubtless to be deemed identical.

⁶ Bericht über die Tätigkeit der deutsch-österreichischen Friedensdelegation in St. Germain au Laye, Wien, 1919, II, 313, cited by Ch. Dupuis, Georges Scelle and others, in De Lapradelle, Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes. IV, Competence, Paris, 1927.

Notwithstanding the concession made by Art. 250 (267 of the Treaty of St. Germain), the Hungarian delegation was fearful of the effect upon Hungarian nationals of certain measures, then recently enacted by Czechoslovakia and Roumania, looking to the confiscation of the rural property of aliens situated in the territories ceded to them by Hungary. The Roumanian Law of September 10th, 1919, provided that all the immovables located in territory ceded by Hungary to Roumania and belonging to aliens or to persons whose domicile or place of business was outside of Roumania shall be "expropriated."

Inasmuch as Hungarians were practically the only aliens who had any considerable property in these ceded territories, the Hungarian delegation demanded guarantees from the Peace Conference that the property of Hungarian nationals would not be subjected to these confiscatory measures. Art. 250 seemed to assure these owners against the application of such laws. Yet inasmuch as Hungary had then been but recently (1919) invaded by Roumanian troops and property estimated at a value of five hundred million dollars carried off, the Hungarians asked for further protection against any Roumanian law which might confiscate the property of their nationals. The delegation added that the provisions of paragraph 1 of Art. 250 might be evaded by laws which, while in appearance directed against nationals as well, would in practice be applied only against Hungarian nationals. They, therefore, asked for a special reassuring declaration to the effect that no Hungarian property in Roumania (Czechoslovakia) would be sequestrated or expropriated by virtue of any legal provision or special measure which under the same circumstances did not apply to Roumanians. They also stated that Art. 250 contained no provision for compensation for injurious measures taken against Hungarian nationals contrary to the Treaty, by failure to return sequestrated property or by other arbitrary measures. They asked that the Arbitral Tribunal established by the Treaty be given power to award such damages.

The Allied Powers instead of allaying or removing these apprehensions in detail, stated that they involved "a question of the interpretation of the Treaty of Peace"; but they consented to add to Art. 250 a paragraph giving jurisdiction to the Mixed Arbitral Tribunal provided for in Art. 239 of the Treaty, of all complaints of Hungarian nationals against any measure "relating to the restitution . . . of their property, rights and interests situated in the ceded territory, as provided for in Art. 250 of the Treaty."

The added paragraph reads :

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Art. 239."

In a note addressed by the President of the Peace Conference to the Yugoslav delegation, March 1st, 1920, it is stated that while the Yugoslav State retains the sovereign right to regulate the transmission and enjoyment of property in the territory transferred to it, and is, therefore, free to take the measures which it thinks necessary or useful, nevertheless this liberty is limited by the provisions of the Treaty and "provided naturally that the measures do not result by a disguised confiscation of the property in question, in evading the prohibition stipulated in the Treaty."

Although the note from the Peace Conference to the Hungarian delegation mentioned only "restitution," it cannot be doubted that reference was intended to all complaints arising out of "liquidations or retentions" of the property of Hungarian nationals.

The text and the purport of Art. 250 were unquestionably intended to preserve intact, in accordance with the rules of international law, and thus in contrast to the provisions of Art. 232, the property owned by Hungarian nationals in the ceded Hungarian territory.

V.

The law of September 10th, 1919, expropriating the property of all aliens in the annexed territories was not enforced by Roumania because it was in flagrant contradiction to Art. 250 of the Treaty. By Art. 3 of the Minority Treaty with Roumania of December 20th, 1919, Austrian and Hungarian nationals opting for Austrian and Hungarian nationality are entitled "to retain their immovable property in Roumanian territory." By Art. 1 of that Treaty, Roumania recognizes the provisions of the Treaty as "fundamental laws" with which no municipal law or regulation may conflict or interfere.

Roumania on July 30th, 1921, enacted its so-called Agrarian Reform Law for Transylvania. It provides, among other things, that the property of "*absentees*" shall be completely expropriated, and "*absenteeism*" is defined as follows:

"An absentee is any person who is absent from the country between December 1st, 1918, and [March 23rd, 1921], unless such person was then discharging official duties abroad." (Art. 6, c.)

It appears in the record that this was the period during which Transylvanian territory was overrun by Roumanian troops and that most Hungarians were either compelled to flee or found it desirable to do so. It appears, moreover, that those who desired to return to the territory from abroad were refused visés to do so by Roumanian consuls abroad, acting under instructions from their Government, and that even a short absence within the prohibited period sufficed to bring about a seizure of the property of the person in question for "*absenteeism*" (Ordinances of July 29th, 1922, and August 14th, 1922, carrying out Art. 6, c). The absentee provision was not to apply to the owners of estates under 50 jugars.

These measures of expropriation for absenteeism would appear to have been imposed for supposedly wrongful acts committed in Transylvania some months or years prior to the time when Roumanian sovereignty commenced in the territory, namely, July 26th, 1921.

It appears in the record that eighty-seven per cent. of the property in Transylvania was owned by Hungarians, about equally divided among large, intermediate and small estates. The Law, therefore, even though applied to everybody, would necessarily strike Hungarians primarily. In the rest of Roumania, by the Constitution of 1860, renewed in the Constitution of 1923, foreigners were not permitted to own rural land.

The compensation to be made to the expropriated owners was measured by the assessed value of the land in 1913. This gold lei valuation was then to be paid in paper lei, which had a value only one-fortieth or two and one-half per cent. of the gold value. The amount thus due was not paid in cash but in Roumanian fifty year bonds, which, it is said, have a market value of only thirty to forty per cent. of their face value, so that in fact the owner was to receive something less than one per cent. of the value of his property. The Hungarian Government has, therefore, asserted in a Request upon the League of Nations that this "expropriation on these lines differs very slightly from confiscation pure and simple."

VI.

Nearly three hundred expropriated Hungarian owners brought their claims before the Mixed Arbitral Tribunal between 1923 and 1926, alleging that the Roumanian measures of expropriation were contrary to Art. 250 of the Treaty of Trianon, and asking either for the restitution of their property or for indemnity. The Roumanian Government demurred to the jurisdiction of the Tribunal on the ground that Art. 250 applied only to property seized by way of "exceptional war measures," that the Agrarian Laws are not such, but were enacted "in the interest of social justice" and affect equally foreigners and nationals, and that the owners receive "full and just" compensation.

The Mixed Arbitral Tribunal decided that it had jurisdiction over the cases submitted, in the following paragraphs:

"Whereas, in order to appreciate the import of this measure it is not necessary to examine whether the indemnity promised to the Claimant was or was not to be considered as an adequate indemnity, which, moreover, is essentially a question of merits; whereas indeed the other facts brought forward by the Claimant are sufficient to show that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner and without his consent; and this measure constitutes a violation of the general principle of the respect of acquired rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Art. 250 and is by its very nature to be classed among the measures referred to in the said Article;

Whereas, the Respondent holds that the measure referred to in Art. 250 under the name of "liquidation" is a war measure taken for war purposes, the most characteristic feature thereof being that it affects ex-enemy property "as such," whereas the expropriations arising under the agrarian reform, from their very nature are not liquidations, since they are not in any respect differential measures, and, at any rate, are not measures taken for any war purpose, and therefore are not in any way incompatible with Art. 250;

Whereas, it results clearly from the terms of Articles 232 and 250, as well as from para. 3 of the Annex to Section IV that the liquidation within the meaning of Art. 250 may be either a war liquidation or a post-war liquidation, and the meaning of either of such liquidations is the same and it is only by their object that they are differentiated; and whereas either case involves subjecting ex-enemy property, rights or interests to a treatment which constitutes a derogation from the rules generally applied as regards the treatment of aliens and the principle of respect of acquired rights"

VII.

The question therefore arises whether the Mixed Arbitral Tribunal may be properly deemed to have had jurisdiction.

The Tribunal claimed jurisdiction to determine whether under paragraph 1 of Art. 250 the Agrarian measures of Roumania constituted a "retention or liquidation" of the property of Hungarians. The Roumanian Government has argued that the terms "retention or liquidation" refer, first, to exceptional war measures only; and second, to measures taken against Hungarians alone "as such." The Committee of Three, in their Report to the Council, state that the provisions

of the Treaty "do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform," but that "there must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or the way in which it is enforced"; and that the words "retention and liquidation . . . apply solely to the measures taken against the property of an Hungarian in the said territories, and in so far as such owner is an Hungarian national."

The Report states that :

"If it could be established in a particular case that the property of an Hungarian national was the object of a seizure or liquidation or of any other measure of disposition in the terms of Articles 232 and 250 as a consequence of the application to the said property of the Agrarian Law, and if a request was presented to obtain restitution, the Mixed Arbitral Tribunal would have jurisdiction to accord satisfaction."

The contingency contemplated in the last quoted paragraph appears to accord with the view of the Mixed Arbitral Tribunal itself. The Tribunal determined that the measures of seizure or liquidation of Hungarian property, though executed by virtue of an agrarian law, would or might constitute a violation of the terms of Art. 250 of the Treaty of Trianon. As it was alleged in the claimants' petition that the law and its particular application to them did constitute a violation of Art. 250, and as the Mixed Arbitral Tribunal found that the measures taken under the Agrarian Law might or would, under certain circumstances, constitute a seizure or liquidation in violation of that Article, the Tribunal would seem to have had jurisdiction over the case. That jurisdiction will depend upon the meaning assigned to the words "retention or liquidation" and under paragraph 2 of Art. 250 to the words "measure of this kind." The Tribunal also added that any expropriation of ex-enemy property in its entirety, without the owner's consent, constitutes a violation of vested rights and of common international law, and thus presents the character of a liquidation within the terms of Art. 250. It is to this conclusion that the Roumanian Government has particularly objected in its arguments before the Council.

The Tribunal reserved for future examination on the merits the determination whether in fact such acts or measures had been carried into effect.

VIII.

Jurisdiction has been defined as "the power conferred on the courts by constitution or statute, to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try and determine issues, and render judgment according to the general rules of law upon the issues joined, be they either of law or of fact or both."⁷

The United States Supreme Court has defined jurisdiction as follows :

"The power to hear and determine a cause is jurisdiction; it is '*coram judice*' whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an

⁷ See Brown, T. Commentaries on the jurisdiction of courts. 2nd ed. Chicago, 1901, p. 5 and cases there cited.

undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the *exercise of jurisdiction* conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."⁸

The question of jurisdiction does not depend upon the truth or falsehood of the charge but on its nature; it is determinable on the commencement and not at the conclusion of the inquiry.⁹

Jurisdiction has also been defined as "the power to hear and determine a cause, and it exists whenever an officer or tribunal is by law clothed with the capacity to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."¹⁰

The mere fact that a case is brought before an international tribunal, having necessarily a limited jurisdiction, on the assertion that the nature of the case brings it within the jurisdiction of the court, is not alone sufficient, it is believed, to give such court jurisdiction. There must also be a possibility that the allegation of jurisdiction over the subject-matter is sustained by the facts to be proved, and for that reason a preliminary examination of those facts may become necessary to determine whether there is a possibility of their coming within the limits prescribed for the tribunal's jurisdiction. So in the *Mavrommatis* case, Judgment No. 2, the Permanent Court of International Justice declared:

"The preliminary question to be decided is not merely whether the nature and subject of the dispute laid before the court are such that the court derives from them jurisdiction to entertain it, but also whether the conclusions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case."

Again in Advisory Opinion, No. 4, involving the question of citizenship in Tunis and Morocco, the Permanent Court of International Justice said:

"It is certain—and this has been recognized by the Council in the case of the Aaland Islands—that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15."

It is also possible that the protocol or treaty conferring jurisdiction may be so grossly misinterpreted that an excess of jurisdiction rather than a mere error of law could be charged. So, for example, it was said by the Permanent Court of Arbitration at The Hague in the *Orinoco Steamship Company* case that:

"Excessive exercise of power may consist, not alone in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect to the way in which they are to reach their decision, notably with regard to the legislation or the principles of the law to be applied."¹¹

⁸ *United States v. Arredondo* (1832) 6 Peters 691, at 709.

⁹ *Regina v. Bolton* (1841) 1 Q. B. 66, 74, 113 English Reports, Full Reprint, 1054, 1057.

¹⁰ *Woodruff v. Stewart* (1879) 63 Alabama 206, 211; *Lamar v. Gunter* (1864) 39 Alabama 324, 334.

¹¹ (1911) 5 Amer. Journal of Int. Law, 233.

In the present case Roumania implicitly appears to object not merely to the fact that the Court exercised jurisdiction to decide the case submitted, but that in determining that the Court had jurisdiction it was of necessity compelled to determine whether there was a plausible chance that the Agrarian Law in its application to Hungarians might constitute a "liquidation" of their property. The Court evidently decided that it might, and then went further to add that if any seizures under the Agrarian Law breached the rules of international law, it would constitute a "liquidation." It may be inferred that this tentative and preliminary conclusion on the merits rather than the mere assumption of jurisdiction caused Roumania's dissatisfaction with the decision and resulted in the withdrawal of its Judge. It might even be assumed, by hypothesis, that the preliminary conclusion of the Court on the merits was erroneous, though this is by no means conceded. But in view of the allegations of the complaint and the possibility that those allegations might be sustained by the facts, and that the application of the Agrarian Law might result in so violent a confiscation as to constitute a "liquidation" within the terms of Art. 250, it would be difficult to say that the Tribunal did not have jurisdiction over the case.

Every international tribunal has in first instance the duty to decide on its own jurisdiction. This was well stated by Commissioner Gore, sitting on the Commission under the Seventh Article of the Jay Treaty, in the case of the *Betsey*. Commissioner Gore stated :

"A power to decide whether a claim preferred to this board is within its jurisdiction, appears to me inherent in its very constitution, and indispensably necessary to the discharge of any of its duties . . . To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet on authority to decide that a case is within its jurisdiction, appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favor of one party only—in favor of the party complained against, but not in favor of the complainant—cannot be true."¹²

The issue as to whether the Commissioners had jurisdiction, having been laid before Lord Chancellor Loughborough, that jurist stated :

"The doubt respecting the authority of the Commission to settle their own jurisdiction was absurd; and they must necessarily decide upon cases being within or without their competency."¹³

Secretary of State Webster, in speaking of the functions of the Mixed Claims Commission, United States and Mexico, under the Treaty of 1839, stated :

"Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it."¹⁴

¹² Moore's Arbitrations, 2278, 2282, 2289.

¹³ *Ibid.*, 327.

¹⁴ *Ibid.*, 1242.

In our municipal courts, an allegation of absence or excess of jurisdiction is always deemed a judicial question to be determined, if challenged, by appellate courts. In the case of international tribunals where there may be no appellate court, a difference on the jurisdiction of an arbitral tribunal must often be settled diplomatically. Where, however, there is an appellate court, or at least a forum of the highest rank, for which provision is made by the Covenant of the League of Nations, such a distinctly legal issue as the alleged abuse of jurisdiction of an arbitral tribunal can and should be placed, in case of doubt, before the Permanent Court of International Justice. To refuse to permit it to be decided judicially and to insist that the difference is political seems an unusual proceeding.

IX.

(a) Let it now be assumed that the application of the Agrarian Law was accompanied by discrimination against Hungarians. Such discriminatory application of the law has been alleged by the claimants. If verified by the facts, it would seem to constitute a "retention or liquidation" of the property of those to whom it is applied, within Art. 250 of the Treaty of Trianon. The Report of the Committee of Three admits that such discriminatory application would be a violation of Art. 250, though this may seem to be more of a determination on the merits than on jurisdiction. The Report states :

"Every execution of a general plan of agrarian reform which might create expressly or by necessary implication a special position for Hungarians to their prejudice, and to the advantage of Roumanians, or of citizens of other states in general, would be of a kind to create a presumption of a disguised retention or liquidation directed against the property of Hungarian nationals *as such* in violation of Article 250 and would thus authorize the Mixed Arbitral Tribunal to assume jurisdiction. The same result would follow in the event of a differential application of the Agrarian Law.

A prohibition to Hungarians to possess immovable property in the territories transferred to Roumania, even though extended to all aliens, would not be in conformity with the obligation which Roumania contracted by the Treaty of permitting Hungarian optants to retain their immovable property, though that would be a question outside of Art. 250."

There are numerous allegations in the Record to the effect that the Law was applied unequally and discriminatorily against Hungarians. Whether this is in fact true can only be determined by an examination of each case, and possibly by a detailed examination of the terms of the Law and of the persons whom it strikes.

It has been suggested by the Roumanian Government that the motives back of the law were, not to deprive Hungarian nationals of their property, but to institute a much needed social reform. There is some material in the Record which would indicate that in view of the many small estates in Transylvania, there was no such necessity of an agrarian reform in Transylvania as in old Roumania.¹⁵ But in fact the motives actuating the Law have little to do with the practical or legal results. The immateriality of motives or even of method is evident from the description or definition of "measures of disposition,"

¹⁵ Székely, János. *La reforme agraire en Transylvanie et l'histoire*. Paris, 1927.

“measures of transfer,” and “exceptional war measures” contained in the Annex, Section 3 to Art. 232 of the Treaty of Trianon, reading as follows :

“In Article 232 and this Annex, the expression ‘exceptional war measures’ includes measures of all kinds, legislative, administrative, judicial or others, that have been or will be taken hereafter with regard to enemy property, and which had had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motives, under whatsoever form, or in whatsoever place. Acts in the execution of these measures include all retentions, instructions, orders or decrees of Government Department or Courts applying these measures to enemy property, as well as Acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses or the collecting of fees.

‘Measures of transfer’ are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such measures directing the sale, liquidation or devolution of ownership in enemy property or the cancelling of titles or securities.”

Inasmuch as by paragraph 2 of Art. 250, Hungarian owners in Transylvania are safeguarded against the application of any measures of retention or liquidation or “measures of this kind,” it is perhaps proper to assume that the terms “seizure” (retention) or “liquidation” are broad enough in their scope to include all such measures of transfer as are described in the Annex, section 3, to Art. 232 above quoted. These prohibitions are directed to the result rather than to motive or mere method. Any method of accomplishing the illegal result is condemned.

X.

(b) Assume now that the Law is applied without discrimination to Hungarians and Roumanians. Here we are on more difficult ground and must make distinctions. Two different situations must be taken into consideration :

(1) Even though the Law is applied without discrimination, it may so happen that its terms strike peculiarly those of Hungarian nationality and few others. In that event, the mere fact that it is applied without discrimination would not save it from constituting an unequal measure, and it would be justly condemned as resulting in a “liquidation” of property. It was this type of law which the President of the Peace Conference doubtless had in mind when he stated to the Yugoslav delegation in his letter of March 1st, 1920, that there must be no disguised seizures or liquidations of Hungarian property. We may call this ostensible equality, but actual inequality.

(2) The Law may be applied equally to every one without distinction, and it does not by its peculiar terms strike Hungarians any more severely than it does Roumanians or foreigners generally. This would be actual equality.

1. *Ostensible Equality.* If there is discrimination against Hungarians, either expressly or by the necessary implication of the statute of July 30th, 1921, there can be no doubt that it is inhibited by

the Treaty. This is recognized in the Report of the Committee of Three in the paragraph quoted above. Diplomatic records are full of protests against discriminatory legislation or judicial procedure, as constituting violations of international law or of treaty.¹⁶

A case of peculiar interest in this connection arose a few years ago before the United States Supreme Court. An amendment to the Oklahoma Constitution provided that no person was to be registered as an elector unless he be able to read and write any section of the Constitution; "but no person who was on January 1st, 1866, or any time prior thereto entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution." On its face, this statute exhibits no discrimination against anyone. By the Fourteenth Amendment, the states must extend the equal protection of the laws to the persons within their jurisdiction, and by the Fifteenth Amendment they may not deny to citizens of the United States the right to vote "on account of race, color or previous condition of servitude." Some of the Southern states had, by various provisions of their election laws, sought to find methods of preventing negroes from voting. Oklahoma adopted the particular method above described. Its purpose was not to apply the literacy test to those who could vote prior to January 1st, 1866. Practically no negro could vote before that date. The Supreme Court, speaking through Chief Justice White, concluded that the Constitutional provision was obviously discriminatory against the negro and on that account was unconstitutional. The Chief Justice added:

"It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence, since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage."¹⁷

So in the present case, the provision for "absentees" upon whom the penalty of expropriation is visited can, it has been charged, apply practically only to Hungarians who were forced to flee from their Transylvanian homes during the period of the Roumanian occupation. Professor Pillet, the eminent French jurist, who has studied this question, has reached the conclusion that:

"In this Law, made in appearance for all Roumanians, it is apparent that, in the first place, it was the Hungarians whom it was intended to strike and that the Government never had any intention other than to despoil them."^{17a}

I am not prepared to express so vigorous a conclusion. Nevertheless there is evidence in the Record which warrants the closest examination of the statute itself, and of its application, to determine whether it does, though in appearance uniform, strike particularly Hungarian nationals. It is not even certain that the mere fact that eighty-seven per cent. of the property owners of Transylvania are Hungarians would not, if true, alone serve to condemn the law on the ground of its discriminatory application against Hungarians. If in

¹⁶ Borchard, *Diplomatic Protection of Citizens Abroad*, New York, 1915, pp. 95, 100, 291, 333, 334 *et seq.*

¹⁷ *Guinn v. United States* (1915), 238 U. S. 347, 364.

^{17a} See De Lapradelle, *op. cit. supra*, note 6, p. 61.

practical effect, therefore, the law discriminates against Hungarians, there seems little difficulty in concluding that it constitutes a "seizure" ("retention") or "liquidation" of their property in violation of Art. 250.

2. *Actual Equality.* Assuming that the Law of July 30, 1921, was applied equally to Roumanians and Hungarians and others, and that there was no discrimination expressed or implied against Hungarians, we face the question whether under such circumstances, the Law could constitute a "liquidation" contrary to Art. 250, and whether the mere fact that the Mixed Arbitral Tribunal concludes that the application of the statute violates the rules of general international law would make of it a "liquidation."

As a general rule an alien must abide by the local law. He can, as a general rule, and under ordinary circumstances, claim no privileges as against nationals. The only exception to this rule would arise if the local law falls below the standard of civilized justice or international due process of law. No state may by domestic legislation violate the rules of international law. Should it do so, the result would be that even though the national can invoke no remedy except the local political or legal one, the alien may make complaint internationally and invoke the diplomatic protection of his own government, and the international forum if necessary.¹⁸ It is, however, not at all settled, and cannot be by any general rule, when a particular measure of legislation falls below the standard of civilized justice or international due process of law.

If the Roumanian Agrarian Law is a sustainable "general scheme of agrarian reform," as the Committee of Three seems possibly to assume, regardless of its results in confiscating private property, the question arises whether it escapes by virtue of its generality the condemnation of international law. If it does, then the rather extreme Soviet legislation confiscating private property and the milder Mexican legislation, which is said to have somewhat the same effect, would require only general application to citizens and aliens alike to be deemed valid. The fact is, however, that the question how far a nation may go in depriving a foreigner of his vested rights without violating international law, when it also deprives nationals of those rights, is far from settled, and can only be settled by an authoritative determination of an impartial tribunal whose decision must be accepted by an international community which boasts of its civilization. Such a question involves matters of degree, and civilized society leaves such questions to be determined not by force, but by impartial tribunals.¹⁹ In the United States we are continually faced with this issue, and the United States Supreme Court is almost daily asked to determine the line of division between the police power of the states and the Fourteenth Amendment of the Federal Constitution, between federal and state power in the matter of interstate commerce and similar questions. In international affairs, such questions of degree are most appropriately submitted to the Permanent Court of International Justice, or other international

¹⁸ It appears in the record that France and Great Britain protested against the application to French and British nationals of the Roumanian agrarian reform in the province of Bessarabia. French and British nationals thereupon were paid forty times as much as Roumanian nationals, receiving thereby practically full compensation for their property. The Roumanian Government has stated that this was part of the price paid for the recognition by France and Great Britain of the annexation of Bessarabia.

¹⁹ See Proceedings of the 21st Annual Meeting of the American Society of International Law (1927) p. 23.

court, to determine whether particular acts of alleged confiscation constitute merely police power measures to which all foreigners like nationals must submit, or whether admitted acts of confiscation, when uniformly applied, constitute or not violations of international law. The Committee of Three seem to have reached a definite conclusion on this issue, and thus to foreclose a very doubtful and difficult question of international law. In my judgment, such a question can only be determined by an authorized judicial body, unless the world is already prepared to admit that the confiscation of all private property in a country, when applied both to natives and aliens, is not a violation of international law. At this moment it would seem preferable to reserve judgment on this important issue until an international court has had opportunity to examine it in its application perhaps to Soviet Russia and other countries.

But in the instant case, the Hungarians complaining before the Mixed Arbitral Tribunal had the protection not only of international law but of a specific treaty. In that respect they have a Treaty privilege which Roumanians have not. It was evidently the purpose of the Treaty to preserve to Hungarians in the annexed provinces their immovable property, and it seems doubtful whether it could have been intended to submit that property to expropriation with practically no compensation, four days after the coming into force of the Peace Treaty, by an agrarian law. The protection of the Treaty would thus prove a delusion. The Mixed Arbitral Tribunal evidently concluded that confiscation, if proved, was in violation of the Treaty, and was prepared to find (a) that confiscation constitutes "liquidation" and (b) that any violation of international law in dealing with the property constitutes "liquidation."

In the latter conclusion, the Tribunal would seem to be sustained by the decision of the Permanent Court of International Justice, in Judgment No. 7, Polish Upper Silesia. In that case Poland had concluded the Geneva Convention with Germany for the protection of private property in Polish Upper Silesia against liquidation, with a certain single exception. (Art. 6.) The question was whether Articles 2 and 5 of the Polish Law of July 14th, 1920, violated this Treaty and thus effected the prohibited liquidation. The Permanent Court held that any violation of international law in dealing with German property in the territory in question, outside the permitted limit, constituted a "liquidation" prohibited by the Treaty.

Poland, like Roumania, demurred to the jurisdiction of the Court in passing upon the Law of July 14th, 1920, which, it was said, applied to everyone in the territory, and that it could not, therefore, constitute a "liquidation" within the terms of the Geneva Convention. The Court decided (page 19):

"There is nothing to prevent the Court's giving judgment on the question whether or not in applying that Law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."

The Geneva Convention (Art. 6) permitted to Poland certain "expropriations" of major industrial undertakings and large rural estates. Inasmuch as this Convention is well known and inasmuch as, according to the claim of Roumania, her Agrarian Reform Law had long been in contemplation, the question naturally arises why Roumania did not endeavour to reserve to herself the right to expropriate the Hungarian land in the annexed provinces. Quite possibly the attempt

would not have been successful, but the effect of the Roumanian legislation, without permission or reservation, would seem to be somewhat analogous to that accomplished by Poland with special and express permission. In so far as concerns property other than that mentioned in Art. 6 of the Geneva Convention, permitting expropriations of certain property, the Permanent Court took the view that such property was protected by the rules of international law, and that any violation of these rules would constitute "liquidation." The Court said (Judgment, page 21):

"Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorizing expropriation, the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law. . . .

Any measure . . . which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is, therefore, incompatible with the régime established under the Convention." (Judgment, page 22.)

With respect to the allegation that the law applied to everybody, without regard to nationality, the Court said: (pages 32—33)

"Even if it were proved—a point which the Court does not think it necessary to consider—that in actual fact, the Law applied equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals."²⁰

Similar conclusions follow from Judgment No. 6 and Judgment No. 9, relating to certain expropriations at Chorzow, Upper Silesia, in which cases indemnities were allowed.

XI.

Roumania raised certain objections to the jurisdiction of the Mixed Arbitral Tribunal, on the argument of the demurrer, which deserve brief consideration. The argument that the "expropriation" was effected under an agrarian law and not by war legislation directed against enemies or ex-enemies "as such" is answered by the Tribunal, correctly, it is believed, by the statement that the name assigned to a measure cannot be determinative of its legality. Whether "liquidation" prohibited by Art. 250 applied only to measures directed against enemies (Hungarians) "as such," as the Committee of Three seems to assume, is a question of the interpretation of the Treaty. In first instance, that function would undoubtedly rest upon the Mixed Arbitral Tribunal, for in passing upon its jurisdiction it must of necessity determine the question. It has already been observed that if discriminatory in practical effect, though not necessarily in express terms, the law would be obnoxious to the Treaty, and the Committee of Three approves this conclusion. The interpretation of treaties is a legal and not a political function, and courts if in existence or capable of being created, should be permitted to determine such questions.

²⁰ See, for other illustrations, Borchard, *op. cit.*, Section 44.

The meaning to be assigned to the term "liquidation," which is the main issue between the parties, is also essentially a legal question. In the light of the jurisprudence of the Permanent Court of International Justice, it would seem improper to remove the question to the political forum, especially when one of the parties insists that it be submitted to judicial determination.

Roumania has objected that an agreement had been reached in 1923 at Brussels and Geneva by which Hungary had accepted the view that Art. 250 did not prevent the expropriation of Hungarian private property. The Mixed Arbitral Tribunal in its decision of January 10th, 1927, disposes of this allegation by pointing out that there was no agreement and that the willingness of the Hungarian negotiator to admit that expropriation might take place for public purposes, was conditioned upon payment in full for the expropriated property. The question might be raised whether the Treaty provision, as a necessary limitation on Roumanian sovereignty, as were also the Minority Treaties, was not intended to prevent the expropriation under any circumstances of such Hungarian-owned real property; but in any event it can hardly be supposed that the Treaty did not prevent an expropriation without compensation four days after its ratification. The term "expropriation" is not always clear, for it is used sometimes as implying compensation, and at other times as the equivalent of confiscation. It can hardly be supposed, however, that Hungary ever intended to permit the confiscation of this property.

XII.

The question now arises as to the function of the Council of the League of Nations. Hungary invoked the powers of the Council under Art. 239 of the Treaty of Trianon, which provides that when a vacancy occurs in the Mixed Arbitral Tribunal, the Council "shall" appoint substitute judges from whom selection may be made to fill the vacancy. This function has been performed on numerous occasions by the Council and seems mandatory. To refuse to perform it seems a violation of the Treaty, and an improper interference with the judicial process.

Roumania invoked the good offices of the Council under Art. 11 of the Covenant, after having taken the unusual step of withdrawing its judge from the Tribunal and refusing to abide by the decision. A withdrawal from certain cases can hardly be deemed otherwise than a refusal to permit the Court to function. Such withdrawal is a most exceptional measure and can hardly be justified under any circumstances. The question arises what is the "circumstance . . . affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." (Art. 11.) One circumstance may be deemed the decision of the Court; another, Roumania's withdrawal of its judge. The only argument advanced by M. Titulesco, the Roumanian Government's delegate before the Council in September, 1927, though unsupported by evidence was, that the acceptance of the decision would cause social unrest in Roumania; and we have M. Millerand's letter to the President of the Tribunal, February, 1927, that the "peace of Europe" would be jeopardized by the acceptance of the decision. Inasmuch as Hungary was not threatening the peace, it may be inferred that only Roumania was in a position or mood to threaten it. Is it possible that a country may decline to accept the decision of a Mixed Arbitral Tribunal on a question of law, and then because that country threatens to break the peace, may invoke the intervention of the Council of the League to set the decision aside? If so, international arbitration has experienced an

unfortunate setback. As a matter of fact, Roumania can hardly be permitted to break the peace of Europe to escape the execution of the Treaty of Trianon or the decision of a competent court, and it is questionable whether the Council should have heard the case at all until Roumania had reinstated its judge or until the Council had nominated substitute judges.

The Covenant of the League of Nations gives the members of the League and the Council ample power to deal with legal cases, and particularly cases involving the interpretation of a Treaty. By Art. 13, the members of the League, which includes both Roumania and Hungary, agree that :

“ Disputes as to the interpretation of a Treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.”

The issue here involved comes directly within these terms, and the question naturally arises why the Council did not use its influence to have Art. 13 carried into effect. Were the Council to accept the Report of the Committee of Three, it would, in effect, overrule the decision of a Mixed Arbitral Tribunal. One of the parties having declined to approve the Report, the Council should make no effort to compel its acceptance. It can hardly be deemed a useful extension of the functions of the Council, a purely political body, to overrule the decision of a tribunal established by treaty and dealing with a purely legal question, whenever an influential member of the League objects to an unfavorable decision of such tribunal. This is especially so when there is in existence an appellate court, the Permanent Court of International Justice, before which questions of the interpretation of a treaty may be brought. Hungary, though standing on its legal rights to the effect that the Mixed Arbitral Tribunal had complete jurisdiction over the cases before it, and that the decision was *res judicata*, nevertheless conceded and requested that the Council submit the matter of jurisdiction and of necessity the interpretation of the Treaty to the Permanent Court of International Justice, either by a request for an Advisory Opinion or by recommending formal submission to the two parties. Such a proceeding seems obviously natural and one calculated to preserve confidence in the Council and in the arbitral process. The Permanent Court has itself said in Judgment, No. 7 (page 18) :

“ There is no lack of clauses which refer solely to the interpretation of a treaty ; for example, letter “a” of paragraph 2 of Art. 36 of the Court’s Statute. There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty ; rather would it appear that this is one of the most important functions which it can fulfil. It has in fact already had occasion to do so in Judgment No. 3.”

The jurisdiction of the Permanent Court has been invoked most frequently for the very purpose of interpreting disputed clauses of the several treaties of peace.

The Report of the Committee of Three would seem to contain “ principles ” designed either to overrule the decision of the Mixed Arbitral Tribunal or to foreclose its decision on the merits. It is questionable whether the Committee of Three should have ventured upon this perilous enterprise. But to make the acceptance of these

"principles" a condition precedent to the performance of the Council's duty of nominating substitute judges, as recommended in the Report, would seem to be a somewhat unusual proceeding for the Council to adopt. It was stated by Sir Austen Chamberlain that the question would not be submitted to the Permanent Court for Advisory Opinion, because Roumania objected. It is not without interest to Americans to note that when the United States reserved the privilege of raising such objection to the submission of requests for Advisory Opinion, the representatives of certain European powers seemed to oppose the American policy.

Hungary has thus far refused to accept the proposals of the Report on the ground that they purport to overrule or foreclose the decision of a Tribunal having jurisdiction. It has not been denied by the Council or by any member of it outside the Roumanian delegate, that the Mixed Arbitral Tribunal did have jurisdiction of the case. In fact the recommendations of the Committee of Three presuppose such jurisdiction, for if the "principles" suggested are accepted by both parties, the Council is requested to invite Roumania to reinstate her judge, whereas if Roumania refuses to accept the "principles," the Council is asked to proceed to the nomination of substitute judges "in conformity with the Treaty of Trianon." If Hungary refuses, the Council is asked not to fulfil this function. While the Council may, abstractly speaking, be deemed to have the power of making any recommendation for the purpose of adjusting differences between nations, it seems a somewhat unusual conception of its function to suppose that it would be justified in overruling the decision of a Tribunal admitted to have jurisdiction over a case involving the interpretation of a treaty and to make the acceptance of such decision of its own a necessary condition of the performance of its duty to appoint substitute judges on a Mixed Arbitral Tribunal from which a dissatisfied party has withdrawn its national judge.

EDWIN M. BORCHARD.

New Haven, Conn., November 15, 1927.

Translated from the French.

THE JURISDICTION OF THE MIXED ARBITRAL TRIBUNAL AND THE INTERVENTION OF THE COUNCIL OF THE LEAGUE OF NATIONS IN THE MATTER OF THE HUNGARIAN NATIONALS

BY

Mr. GEORGES RIPERT,

*Professor of the Faculty of Law at Paris University and at the Ecole Libre des
Sciences Politiques.*

I.

The action brought before the Roumanian-Hungarian Mixed Arbitral Tribunal by certain Hungarian nationals on 29th December, 1923, might and ought to have remained a legal action proceeding according to the rules laid down by the Peace Treaty which established the jurisdiction. It has, in reality, been disturbed by a dispute which has arisen between Roumania and Hungary as to the application of the Treaty of Trianon. As this dispute arose on the very question which was the subject of the legal proceedings and even preceded this action, it was too readily admitted that the discussion carried on between the Governments of the two countries, before the Council of the League of Nations, ought to have conditioned the course of the action before the Mixed Arbitral Tribunal. The political question has unfortunately become mixed up with the legal discussion.

Such a confusion would certainly not arise in either of the interested States, if the question were a purely national one. Neither the one nor the other would admit that a political discussion could influence or interfere with the course of an action. The separation of powers and the complete independence of jurisdiction in respect of the executive are nowadays principles so securely disentangled by public law that there is no fear of a denial of justice being acknowledged.

But, because international jurisdiction is still in its initial stages, certain minds have not been able to acknowledge its true character of jurisdiction. They will only consent to allow it to function under the control and authority of the executive power, in this case the Council of the League of Nations. They revert in this respect to the delegated system of justice withheld and thus resuscitating juridical ideas which had happily disappeared.

It is this confusion which we would like to endeavour to dissipate, while abstaining voluntarily from taking any side in this paper as to the actual merits of the dispute and being desirous simply to demonstrate, as jurists, that the action brought before the Mixed Arbitral Tribunal should be pursued before this Tribunal, which has declared itself to have jurisdiction to take cognizance of it.

II.

The Mixed Arbitral Tribunal was constituted by Art. 239 of the Treaty of Trianon. This text laid down the composition of this Tribunal.

On the other hand, Article 250 of the same Treaty indicates what are the measures which may not be taken in the territories of the former Austro-Hungarian Monarchy against Hungarian nationals. And Par. 3 of this Article provides: "Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

On 29th December, 1923, the Mixed Arbitral Tribunal was seized of a claim presented by M. Kulin and others, the operative part of which requested it, as the first head to "declare and pronounce that the measures restrictive of property rights which have been applied by the Roumanian State to the movable and immovable property of the Applicant, are contrary to the stipulations of Article 250 of the Treaty of Trianon."

With regard to this claim, Roumania was free to submit on the merits that the measures taken by her were not contrary to Article 250. She did not do so and merely submitted that the Mixed Arbitral Tribunal had no jurisdiction.

It seems obvious to us that Roumania sought, by means of this taking exception to the jurisdiction, to force a decision on the merits and the discussions on this point are singularly conclusive. The representatives of the Applicants endeavoured to show that the measures taken by the Roumanian Government fell within the category of the measures of retention and liquidation provided for by Article 250 of the Treaty. The representatives of Roumania, on their part, maintained that the Hungarian optants had not been the subject of exceptional measures, but that the provisions of the Agrarian Law, made for the whole of Roumanian territory, had been applied to them.

Such discussions, while doubtless indispensable in fact, in order to enlighten the Mixed Arbitral Tribunal as to the importance of the proceedings and the character of the claim, were in reality inoperative on both sides. Since Roumania objected to the jurisdiction of the Mixed Arbitral Tribunal, the only question to be examined was that of whether the claim was justly based upon Article 250 of the Treaty. Without doubt it was not sufficient that the Applicants should cite this Article in their claim, for this to cause the Mixed Arbitral Tribunal to have jurisdiction. But it was not disputed in fact that the claim presented referred to measures taken by the Roumanian Government against Hungarian nationals in territories of the former Austro-Hungarian Monarchy. The jurisdiction of the Mixed Arbitral Tribunal was therefore recognised in substance by both parties.

What did remain in doubt, and is still disputed, is whether a measure of liquidation, in the sense in which Article 250 of the Treaty understands these words, took place. This question is a question of the merits and not one of jurisdiction.

The Applicants complain of being victims of measures of liquidation, and request the protection of the Mixed Arbitral Tribunal, which has jurisdiction according to the terms of Article 250 of the Treaty. The Roumanian Government answers "You are not victims of such measures, therefore the Mixed Arbitral Tribunal has no jurisdiction." Its reasoning appears to us to be defective; it ought in reality to plead, "You are not victims of such measures, therefore your application should be rejected."

The mere fact that the discussion before the Mixed Arbitral Tribunal was founded entirely on the application of Article 250 shows clearly that this Tribunal had jurisdiction to take cognizance of the same, otherwise conclusion would be inevitable that only actions which the Mixed Arbitral Tribunal is bound to admit on the merits should be brought before it.

When the defendant raises a plea to the jurisdiction, he does not dispute the justice of the application, he merely alleges that this application ought to have been brought before some other Tribunal than the one which has been seized of it. Now, in the present case, the Roumanian Government maintained on the contrary, that the application could not

be presented before any Tribunal whatsoever, that is to say that it was ill-founded. It did not dispute the jurisdiction of the Mixed Arbitral Tribunal by alleging that this Tribunal had no jurisdiction to deal with violations of Article 250 of the Treaty, it maintained that Article 250 had not been violated, which was precisely the question submitted to the Mixed Arbitral Tribunal.

It appears to us certain that there has been, in this discussion, a singular want of recognition of what is, in reality, the question of jurisdiction—in the procedure of all countries in the world—as opposed to that of the merits. Here is a classical definition of jurisdiction reproduced by MM. Garsonnet and Cézard-Bru (*Précis de procédure civile*, 9th ed. 1923, No. 189): “Jurisdiction *ratione materiae* is the right for the tribunals classed in a definite order of jurisdiction to take cognizance of a matter to the exclusion of Tribunals of another order.” This right to take cognizance of the matter depends on the nature of the action and not upon its well-foundedness. If the Respondent, on the pretext of disputing the jurisdiction of the tribunal, is forced to combat the merits of the application, he thereby himself implicitly recognises that the question of jurisdiction is not raised, seeing that the Tribunal can only settle it in his favour by deciding upon the merits.

Under these conditions, the solution could not be doubtful and it might have been reached without such long discussions. In its Judgment of 10th January, 1927, the Mixed Arbitral Tribunal gives the following reasons, which, by themselves alone, suffice fully to justify its declaration of its jurisdiction.

“Whereas it is therefore essential, in order to arrive at a true estimation of the question of the jurisdiction of this Tribunal, that it should be proved whether the measures complained of in the present case have or have not characteristic features of one or other of the measures which, under Article 250, may give rise to claims which may be submitted to the Mixed Arbitral Tribunal; and whereas, this Tribunal, if it finds such to be the case, can already show sufficient cause to establish its jurisdiction, though it is only by examining the merits of the claim that it will be in a position to ascertain whether the circumstances of the case are, in truth, of a nature to cause the application of Article 250.”

The whole of the rest of the Judgment is devoted to demonstrating that the argument raised by the Roumanian Government concerns the merits of the dispute and must be reserved, and the judgment concludes on this point:—

“Whereas, under these circumstances, there is no doubt that the Tribunal has jurisdiction to take cognizance of claims made under the head of such measure by a Hungarian national; and that it is reserved for the examination on the merits to prove whether, in applying this measure, the Respondent is or is not authorised by the nature of the measure to cause a derogation from general international law.”

Thus the Mixed Arbitral Tribunal has asserted that its jurisdiction was not doubtful and it appears to us indeed that the action, in the form in which it was brought, could only result in a decision on the jurisdiction. Moreover, in order to be convinced of this, it is sufficient to read the Dissenting Opinion of the Roumanian Arbitrator. (1)

(1) *In extenso* in the “Receuil de la Jurisprudence des Tribunaux Arbitraux Mixtes,” Vol. IV, Jurisdiction by Mons. A. de Lapradelle, p. 431 et seq.

The Arbitrator is compelled, in order to contest the jurisdiction of the Mixed Arbitral Tribunal, to discuss on the merits the character of the eviction undergone by the Applicants.

The decision of the Mixed Arbitral Tribunal is extremely cautious. The Tribunal has reinstated the action under its true form, which tended to become lost in the ramifications of the proceedings. A plea against the jurisdiction having been submitted, it gives a pronouncement solely upon the question of jurisdiction. It does not *de plano* reject the arguments put forward on several points by the Roumanian Government ; it defers their examination until the moment when judgment will be given on the merits. In so doing the Mixed Arbitral Tribunal defines, much better than the Respondent had done, the true character of the objection to the jurisdiction.

III.

It has been submitted, against this declaration of jurisdiction, that the Mixed Arbitral Tribunals constitute an exceptional jurisdiction (A. Prudhomme, *Journal de Droit international*, 1927, p. 862), with the idea of deducing from this, that such jurisdiction can only declare itself competent in certain strictly specified cases, and it was added that : " this is a solution which involves a derogation from general international law."

It is impossible for us to understand in what way the legal designation of exceptional jurisdiction given to the Mixed Arbitral Tribunal can weaken the significance of a decision passed by that Tribunal as to its own jurisdiction.

If the Mixed Arbitral Tribunal had affirmed that it had jurisdiction to decide all claims presented by Hungarian nationals against the Roumanian State, whatever might be the cause and the nature of the claim, it might indeed be objected that only a Court of common law can claim such jurisdiction.

But in international matters there are no such things as courts of common law and exceptional Tribunals. The distinction can only be understood in internal legislation, because it must then be determined which is the Tribunal having jurisdiction, in default of any other one specially declared by law to have jurisdiction, and, on pain of committing a denial of justice, there must be competent jurisdiction when the law has not provided that the dispute should be brought before a definite Tribunal. Now, in international matters, the competence of the jurisdictions created depends solely upon the terms of the Treaty which established them and the Treaties never establish them except for certain definite disputes. In this sense it is indubitable that international jurisdictions are exceptional jurisdictions.

It must not be attempted to draw from this expression a conclusion unfavourable to the appreciation of their jurisdiction. Everyone agrees in stating that the Roumanian-Hungarian Mixed Arbitral Tribunal can only give decisions, if the text of an agreement gives it jurisdiction, and the Mixed Arbitral Tribunal has never denied this. It has not based its own jurisdiction upon any general jurisdictional powers, which it might have in respect of any claims presented by Hungarian nationals against Roumania ; it has declared itself to have jurisdiction, because the action was based upon Article 250 of the Treaty, which gives it jurisdiction regarding claims relating to liquidation of property.

But it does seem that, in describing the Mixed Arbitral Tribunal as an exceptional jurisdiction, an attempt was made to cause it to be believed that its jurisdiction was subordinate to the will of the parties which appear before it, or, at least, to that of the States which created it. Thus M. André Prudhomme, in his article previously quoted, after having designated the Mixed Arbitral Tribunal as an exceptional jurisdiction, adds that it constitutes an *arbitral jurisdiction*. "The Mixed Arbitral Tribunal," he says (p. 862), "like any other arbitral jurisdiction, only holds its jurisdiction and its powers under the will of the Contracting Parties who have accepted in advance the terms of this jurisdiction and of this power."

There is a singular confusion here. It is certain that the jurisdiction of the Mixed Arbitral Tribunals was created by the common will of the contracting States, but it is none the less certain that when once created, their jurisdiction cannot depend on the will of those States as to whether or not a certain dispute shall be submitted to them.

The Mixed Arbitral Tribunal is not in fact an Arbitral Tribunal constituted in advance, in order that the contracting States should refer to it particular cases, which they decide by a special agreement to submit to it. It is a jurisdiction constituted by the Treaty with a competence determined by the text and which is no longer dependent on one of the Contracting Parties for modification. This is all the more evident in that this jurisdiction is open to the nationals of the contracting States. These nationals have the absolute right, so long as the Treaty remains in force, to avail themselves of the provisions of the Treaty and to bring their claims before the jurisdiction created by the Treaty.

Professor Martin, in a noteworthy article on "Treaty law viewed as a source of private international law in France" (Journal de Droit international, 1927, p. 5), showed that the rule laid down in a Treaty is, in each contracting State, a *compulsory legal regulation*. "The Treaty in each of the contracting States *operates after the manner of a law*, operates as a new law in that State would operate" (p. 18). He admits that the Treaty can modify the law and that the judge should apply it as a matter of course, the interested party being able to avail himself before a jurisdiction of appeal or error with regard to the violation of clauses of the Treaty in the same way as he could with regard to violation of the law.

If this is the case with regard to national jurisdictions, it must *a fortiori* also be the case with regard to the international jurisdiction which has been specially created by the Parties for the application of the Treaty. The Treaty becomes, for this jurisdiction, the only law applicable.

But this application no longer depends upon the Signatory Powers, any more than the jurisdiction of the Tribunal is subject to their will. The legal regulation applicable was indeed created by their common will; but it is a genuine legal regulation which governs the Parties and their nationals.

Thus it must not be supposed that the rôle of a jurisdiction can be weakened by declaring it to be an exceptional or arbitral jurisdiction. If it is simply desired to point out by this means that that jurisdiction is created by an agreement between the States and only has jurisdiction in respect of such disputes, as these States have decided to submit to it, then this is an expression of an obvious truth which has never been disputed. If, on the other hand, an attempt is made to maintain that that jurisdiction only exists and has jurisdiction under the persisting will of the States which created it, then an undoubted legal error is

committed by the failure to recognise the value of the compulsory rules created by a Treaty and the right of a State and its nationals to avail themselves of the provisions of the Treaty.

IV.

It has further been stated, that the decision by which the Mixed Arbitral Tribunal has declared itself to have jurisdiction is sullied by *usurpation of jurisdiction*, because the Tribunal has arrogated to itself the right to decide upon a claim which could not be submitted to it and that it has only been able to assert its jurisdiction by examining into and pre-judging the merits of the case.

I do not know whether the expression *usurpation of jurisdiction* can be considered here as having a legal meaning different from that of the expression *want of jurisdiction* when it is a question of a usurpation of jurisdiction committed by a jurisdiction. A Tribunal which declares itself to have jurisdiction when it ought not legally to do so commits a usurpation of jurisdiction. However, in France, the Court of Error exercises its control both over jurisdiction and usurpation of jurisdiction, and, as this distinction exists in substantive law, it has led to a distinction being made between the two ideas. Usurpation of jurisdiction then is characterised by interference of the judicial power in the attributes of the legislative and executive powers. The judge who wrongly declares himself to have jurisdiction behaves as a judge; *he who commits an usurpation of jurisdiction no longer behaves as a judge* and entirely oversteps his prerogatives (Garsonnet and Cézard-Bru, *Procédure civile*, No. 925).

It is certain that a Mixed Arbitral Tribunal would commit a usurpation of jurisdiction if, under colour of deciding upon a claim presented by the application of a provision of the Treaty, e.g., Article 250, it declared itself to have jurisdiction to grant compensations not provided for in the Peace Treaty; it would thus checkmate the sovereignty of the States and arrogate to itself powers that it did not possess. The only question to be examined would then be whether any appeal whatever is provided against such usurpation of jurisdiction.

But this would only be the case if the Mixed Arbitral Tribunal declared itself prepared to consider claims which were not based upon the clauses of the Peace Treaty. The duty of the Tribunal, seized of a claim based upon Article 250 of the Treaty, is solely to verify whether the applicants are not seeking to obtain from it compensation not in reality based upon that Article—that is to say, to induce it to create, itself, the rule from which their right would derive, for evidently it would not suffice to quote Article 250 in an application for the Tribunal to be validly seized of the matter.

The examination of the Mixed Arbitral Tribunal should, therefore, consist in considering successively the conditions required by Article 250, to see whether these conditions existed, i.e., whether the application was really based on Article 250. If it recognises that this Article was not cited wrongfully and solely as a covering for the application, it could give a decision without committing any usurpation of jurisdiction.

Now it is sufficient to read the Judgment of 10th January, 1927, in order to see with what care this examination was conducted. The Mixed Arbitral Tribunal states that it is seized of the case by Hungarian nationals, who invoke Article 250 of the Treaty of Trianon. It confirms the fact that measures of liquidation have been taken against the property

of these nationals; it declares to be admitted the facts of the expropriation suffered and the non-payment of the trifling compensation promised. It further declares "that the other facts cited by the Applicants suffice to show that the present case concerns a measure which affects the ownership of ex-enemy property by transferring it in its entirety from the owner and without his consent"; and it concludes therefrom that this measure infringes vested rights and has all the characteristics of a measure of liquidation within the meaning of Article 250.

Roumania does not deny the expropriation. She simply maintains that this expropriation does not constitute a measure of liquidation in the sense in which the Treaty has understood this expression. This defence can only be examined on the merits and the Mixed Arbitral Tribunal alone has jurisdiction to examine it. The conditions of admissibility are present; the conditions as to the merits will be discussed later on.

Can it be objected that the Mixed Arbitral Tribunal has only been able to pronounce upon jurisdiction by prejudicating on the merits? The objection would be a strange one coming from Roumania, since it was precisely this State, who desired to raise the plea as to the question of jurisdiction without putting forward a defence on the merits, i.e. it alleged that the Mixed Arbitral Tribunal was able to decide separately upon the question of jurisdiction.

The objection cannot be accepted for another reason. The Mixed Arbitral Tribunal does not state in any way that the claim brought before it is justified on the merits; very much to the contrary, it reserves to itself to take cognizance later on of the objections raised by Roumania. It has reserved, in particular, the question of whether or no the measures taken are differential measures, or whether the Roumanian State had a right authorising it to cause a derogation from general international law. It had only to set aside on the merits the objections put forward by the Roumanian State when they tended to cause the application to be declared inadmissible, on account of the want of jurisdiction of the Tribunal to which it was referred.

In order to be able to allege that there is usurpation of jurisdiction in the Judgment of 10th January, 1927, it would be necessary to succeed in proving that in no case could the national of a contracting State submit to the Mixed Arbitral Tribunal a claim made by reason of a measure taken by that State, by virtue of a law, against his movable or immovable property. The usurpation of jurisdiction would then result from the fact that the Mixed Arbitral Tribunal, in declaring itself to have jurisdiction, would be trampling upon the sovereignty of the contracting States and would be attempting to lay down the law instead of applying it.

But such an objection is obviously inadmissible, since the Mixed Arbitral Tribunal has received precisely the right to give judgment on appeal by Hungarian nationals against measures of liquidation (Article 250, par. 3).

It is all very well to discuss the meaning of this expression "measures of liquidation," but it cannot be made out that an expropriation of movable or immovable property is not a measure of liquidation or be denied that an expropriation decreed by law is, nevertheless, an expropriation. With that the question is settled. It is not a question of whether this expropriation is a general measure or a differential measure, whether it is pronounced without compensation or carries with it a sufficient compensation, or whether it is justified by national interest or constitutes a fraud upon the Treaty. These are questions of the merits

which will be submitted to the Mixed Arbitral Tribunal and judged by it when it gives a decision on the merits. Once it is acknowledged that expropriation has taken place, it is indispensable that it should be decided whether this expropriation was a measure of liquidation contrary to Article 250, or not.

Furthermore, the Committee of Three, nominated by the Council of the League of Nations, to the function of which we shall revert later, has indeed been compelled to recognise indirectly the jurisdiction of the Mixed Arbitral Tribunal. This Committee of Three, after having consulted juriconsults of all nationalities, has given its opinion as to the characteristic features of a measure of liquidation. In the report of Sir Austen Chamberlain, the rules which, according to the Committee of Three, express the principles to be followed, are condensed into three propositions.

These propositions do not by any means state that an Agrarian Law can never be considered as a measure of liquidation. On the contrary, they state that, on the other hand, no inequality should exist between Hungarians and Roumanians, either in the terms of the Agrarian Law or in the manner in which it is applied, and further, that the measures of liquidation cover measures taken against the property of a Hungarian in the territories ceded by Hungary and in so far as such property owner is a Hungarian national.

This is the opinion of the Committee of Three, which opinion, we may say, cannot be binding on the Mixed Arbitral Tribunal. But what it is needful to bear in mind for the moment is that this Committee of Three recognises that, if this opinion is acted upon, the parties must take the necessary measures for the functioning of the Mixed Arbitral Tribunal.

In what then is the usurpation of jurisdiction on the part of the Mixed Arbitral Tribunal supposed to consist? It is declared to have full jurisdiction, if the parties accept the interpretation of the Committee of Three, and Roumania declares herself to be in agreement therewith. It has therefore committed no usurpation of jurisdiction in accepting the claim of the Hungarian nationals. It was bound to accept it and was bound to declare itself to have jurisdiction. Roumania acknowledges it implicitly, since she accepts the resolutions of the Committee of Three.

This jurisdiction cannot be conditional and, above all, it cannot be made to depend upon the interpretation of Article 250 by the Mixed Arbitral Tribunal. If it is qualified to give judgment as to the application of Article 250—if the request of the Hungarian nationals is really based on Article 250—it has the sovereign right to give a decision on the merits. It cannot be declared or recognised to have jurisdiction to give judgment on condition that it will examine one single question only.

In reality, the moment that Roumania fails to cause the jurisdiction of the Mixed Arbitral Tribunal to be set aside, with respect to the application presented, whatever may be the nature and the cause of the expropriation suffered, the question is already judged. Roumania would be taking up a logical attitude if, confining herself to the exercise of her national sovereignty, she denied to the Mixed Arbitral Tribunal any right to supervise the application of her laws to Hungarian nationals. In accusing the Mixed Arbitral Tribunal of usurpation of jurisdiction, she might perhaps be mistaken, but could justify her attitude. But the moment Roumania agreed to discuss the conditions under which the expropriation of the Hungarian nationals took place, and, above all, the moment she accepted the resolutions of the Committee of Three

when pronouncing upon the methods of the Agrarian Law, she could no longer maintain that the Mixed Arbitral Tribunal had committed a usurpation of jurisdiction in declaring itself to have jurisdiction.

V.

The judgment as to jurisdiction being thus justified, the procedure provided for in the Peace Treaty must follow its normal course. The Mixed Arbitral Tribunal, declaring itself to have jurisdiction, has accorded to the Respondent a period of two months in which to submit his defence on the merits.

In the face of this decision, with which the Roumanian Arbitrator was not in agreement—in which he was perfectly within his rights—the Roumanian Government decided to withdraw its Arbitrator, in order to prevent the Tribunal from giving judgment on the merits.

We shall carefully refrain from any expression of opinion in so delicate a matter, upon the attitude of the parties to the dispute and confine ourselves to submitting only a purely juridical discussion. We may, however, be permitted to point out, that it is not logical, after having reached a conclusion on the question of jurisdiction, not to accept the decision concerning jurisdiction. The withdrawal of the Arbitrator, before any discussion took place, would be a political act upon which it is not for us to express an opinion. But, such withdrawal, coming after the judgment of the Mixed Arbitral Tribunal with regard to jurisdiction, constitutes a refusal to recognise the authority of the final judgment when, by a defence to the legal action, one has co-operated in it.

However that may be, this withdrawal of the Roumanian Arbitrator cannot cause a stoppage of the proceedings, for the Peace Treaty, foreseeing such resistance, has provided the means of overcoming it. The Contracting States wanted to guard themselves, to a certain extent, against the dangers of their future attitude towards the jurisdiction which they had created and they wished to protect this international jurisdiction, initiated in a period of mutual agreement, against political actions of a later date. Article 239 of the Treaty of Trianon lays down that, if for any reason whatsoever, an Arbitrator is not able to carry out his functions, the Council of the League of Nations shall choose the Arbitrator intended to replace the one who is not able to sit on the Tribunal.

Hungary, acting as a Contracting Power for the establishment of the Mixed Arbitral Tribunal, has presented to the Council of the League of Nations a request for the nomination of an Arbitrator.

This appeal to the Council of the League of Nations was made with a specific purpose. Hungary did not submit to the Council the question of the liquidation of the property of Hungarian nationals; she simply requested the appointment of an Arbitrator, as entrusted to the Council by the Peace Treaty and which was indispensable for the functioning of the Tribunal created by that Treaty.

It was for the Council, seized of this request, to ascertain that the vacancy existed and, in default of its being filled by the Roumanian Government, to appoint the Arbitrator itself. It was bound by the text of Article 239; it could not refuse to comply with a request, which did not concern a particular dispute, but the very functioning of the Tribunal.

Unfortunately, the Council of the League of Nations had already, in 1922, had occasion to take cognizance of the claims of the Hungarian Government with regard to the application of the Treaty to Hungarian nationals and, moreover, at the very moment that it received the

application of the Hungarian Government, it likewise received from the Roumanian Government a request for intervention based upon Article 11, par. 2 of the Covenant of the League of Nations.

It is not our intention in any way to discuss here the rôle of the Council of the League of Nations and the decision given by it in this Roumanian-Hungarian dispute. We simply record that the Council, desirous of finding a solution for this dispute, united the applications of Roumania and Hungary for a common enquiry, seeing that these two applications have a different object and a different cause. Roumania makes the Council a judge of a dispute with Hungary regarding the interpretation of the Treaty; Hungary requests the Council to secure the functioning of the Mixed Arbitral Tribunal, in order that that Tribunal may be able to give judgment concerning the claims put forward by Hungarian nationals and for which the Mixed Arbitral Tribunal has declared itself to have jurisdiction.

The confusion becomes more accentuated still in the report made in the name of the Committee of Three by Sir Austen Chamberlain. The Committee, after having set out three propositions which, according to it, should serve as a guide in the interpretation of the Peace Treaty, proposes that, if Hungary does not accept these propositions, the Council should not appoint the substitute Arbitrator but, on the contrary, should take the necessary measures for securing the functioning of the Mixed Arbitral Tribunal, if Roumania refuses to accept them. It further proposes to state that, in the event of the refusal of both parties, the Council will have exhausted the rôle which, is incumbent upon it by virtue of Article 11 of the Covenant.

This is forgetting that, besides the rôle which is imposed upon it by Article 11 of the Covenant, there is another one which is conferred upon it by Article 239 of the Treaty of Trianon, and if it has exhausted the former, the second depends neither upon the will of the Contracting Parties nor upon the sovereign decision of the Council.

If, in any given State, the executive power to which belongs the right to appoint judges, refused to proceed to such appointment, in order to prevent a Tribunal from functioning and consequently from giving judgment upon claims which are submitted to it, would it not be said that this constituted a real attack upon justice?

The Council of the League of Nations, where the Mixed Arbitral Tribunals are concerned, plays the part of the power charged with the appointment of the judges. A State applies to it to proceed with such appointment. It is not disputed that the case is one in which the appointment of a substitute Arbitrator has to be resorted to. Is it admissible that the Council should refuse to proceed with this appointment or, what would be perhaps more serious still, should subordinate the appointment to conditions limiting the powers conferred by the Treaty on the Mixed Arbitral Tribunal?

An attempt has also been made to justify this right of the Council by maintaining that the Mixed Arbitral Tribunals are not true jurisdictions or, at least, that the Council of the League of Nations has a right of control over the constitution, the organisation and the working of the Mixed Arbitral Tribunal.

This is the argument upheld by M. André Prudhomme in his article, previously quoted, in the *Journal de droit international*. There ought not to be, he says, "a purely passive intervention restricting itself

to the automatic appointment of the missing judge." The Council retains the right and the power of exercising its judgment with respect to the appointment which is requested of it.

We reply that there is nothing *passive* nor *automatic* in the appointment of a judge. The Council has the right to choose. It may, if it wishes, in the exercise of its choice, examine into the conditions under which the vacancy arose. But this right, which is conferred on it by Article 239, is the right of nomination and not the right of evocation, and still less the right of conditional nomination.

If the Treaty has given the Council the right to choose substitute Arbitrators, it is in order that the functioning of the Mixed Arbitral Tribunal should not depend in the future on the good-will of the Contracting States. But none of the Contracting States understood that this functioning should depend upon the good-will of the Council. In appointing or not appointing Arbitrators at its option, the Council would be allowing the jurisdiction to function or would suspend the course of justice in accordance with its own sweet will!

It is in truth somewhat puerile to try to find such a right for the Council in the terms of Article 239, and from the fact that this text states that the Arbitrators shall be *chosen* by the Council, to deduce the consequence that the Council is at liberty *not to choose*. (Vide A. Prudhomme, op. cit. p. 861). The Council has the right to appoint the Arbitrator it desires, but what it cannot do is to refuse to appoint one.

It is useless to say that the Council of the League of Nations, being seized of a dispute between Roumania and Hungary may take any measure likely to be of use in the settlement of this dispute. This would be the confusion already pointed out. The matter brought before the Mixed Arbitral Tribunal was introduced by Hungarian nationals and these nationals are entitled to justice. It matters little to them whether their Government supports their claim diplomatically or remains indifferent to it. They have, according to the Peace Treaty, which has become their law, a personal right to indemnification and to a Tribunal before which they can obtain compensation. They have approached this Tribunal, which has declared itself to have jurisdiction. They desire to carry on the action and, through their Government, request that the Council of the League of Nations should ensure the functioning of the Tribunal which they have seized of their case. All this is expressly provided for by the Treaty. They cannot be refused judges without a violation of their rights.

VI.

In order to defend the intervention of the Council of the League of Nations, it was necessary to go further and to maintain, that the Mixed Arbitral Tribunal is a jurisdiction *subordinated* to the Council of the League, and that this Council has *a right of supervision and control over the Tribunal*. (Vide article of M. Prudhomme *loc. cit.*, p. 865).

The fact that such an opinion should have been put forward proves that, for certain minds, the idea of international jurisdiction does not yet exist, and this, unfortunately, also proves that the clauses of the Peace Treaty are sometimes only regarded as rules subject to perpetual revision. But it is necessary that jurists should protest against the want of recognition of the authority of a jurisdiction organised by the Treaty and of the compulsory character of the clauses imposed.

The Covenant of the League of Nations has created a Permanent Court of Justice, the States considering that, if the law had to be laid down,

it was not fit that the Council should pronounce upon such a thing itself. It has determined that this Permanent Court may take cognizance of all disputes of an international description (Art. 14), and, moreover, has reserved to the parties the responsibility of submitting these disputes to it. It is, therefore, always possible for a State, desirous of an interpretation of a Peace Treaty and of obtaining a legal pronouncement, to apply to the Permanent Court of Justice.

But this optional procedure before the Permanent Court has no connection with the procedure followed before the Mixed Arbitral Tribunals. The Permanent Court is neither an appeal jurisdiction nor a reviewing jurisdiction with regard to the jurisdiction of the Mixed Arbitral Tribunals; nor *a fortiori* is the Council one.

In order to admit a right of control on the part of the Council over the Mixed Arbitral Tribunals, a special text of the Treaty would be necessary and such text does not exist. This special text, moreover, ought to be peculiarly precise, because this right of control would be truly extraordinary. An Executive Council would become the judge of appeal and of revision of a real tribunal!

It was thought possible to make a better defence of the right of the Council by writing, "Should it be said that, by applying the law, by confirming it, by evolving it by means of sovereign interpretation with the mere support of technical opinion, by thus, to a certain extent, creating it, the Council of the League of Nations carries out the work of jurisdiction? Certainly not." (A. Prudhomme, *loc. cit.* p. 872).

This is a peculiar form of defence! If the Council really did carry out the work of jurisdiction, it might, strictly speaking, be admitted that its jurisdiction were substituted, in certain given cases, for that of the Mixed Tribunals. But it is recognised that the Council does not carry out jurisdictional work, but lays down the law in settling the dispute and creates the rule!

It could not be acknowledged more clearly that the Council proposes, in this way, to obstruct the course of justice, in order to substitute for a solution which the competent judges ought to have given in accordance with the appropriate law, a solution which it had itself conceived, either by inspiration from the general principles of law or by virtue of its right to take measures necessary for the preservation of peace.

If this is so, the question is no longer one merely of respect for the jurisdiction of the Mixed Arbitral Tribunal, but, in a more general way, of respect for the clauses of the Peace Treaty. These clauses cease to be the law for the parties and the Council applies or modifies them at its own will and pleasure.

No mention is made of the source from which the Council could derive such powers. In order that it may be able to modify at will the clauses of the Treaties, a superior investiture would be necessary for it, or else that the Treaties had conferred such a sovereign power on it. In reality, the Council of the League of Nations, being itself the product of peace treaties, finds its rights and attributes regulated by the Treaties. It has no right superior to that of the Mixed Arbitral Tribunals, for the right it possesses has the same origin as that of those Tribunals.

The Committee of Three proposed to the Council of the League of Nations to adopt three propositions explanatory of the Peace Treaty. The Council is at liberty to accept these propositions. It might be considered that, in so doing, it would somewhat exceed its rôle, for it would be pronouncing upon the interpretation of a clause of the Treaty, which

the Permanent Court of Justice alone appears qualified to do, if the parties should desire it. At all events, if it did so, it would simply be an imprudence on its part with regard to the decision taken, and, in any case, it could not be accused of preventing the competent Tribunal from giving a decision.

Such is not the proposal of the Committee of Three. It desires that the interested States should accept the three propositions and it is only in the event of such acceptance that the Council, proceeding to the appointment of arbitrators, would permit the Mixed Arbitral Tribunal to give its decision.

Therein would lie the inadmissible intrusion of the Council into the administration of justice. The Mixed Arbitral Tribunal is seized of the action upon which it has given a decision as to jurisdiction. The Council cannot subordinate the course of the action to the acceptance of a compromise by the parties.

It must here be noted that the Committee of Three appears, itself, to have perfectly understood the peculiar character of this intervention. It did not venture to say that the resolutions it proposed would be obligatory for the Mixed Arbitral Tribunal. It only wished to make them so for the parties to the dispute. If it recognised itself that it could not force them upon the Tribunal to which the matter had been referred, by what right could the Council refuse to afford the Mixed Arbitral Tribunal the possibility of delivering judgment?

VII.

If no recourse to the Council existed against the decision of the Mixed Arbitral Tribunal, that Tribunal would be a sovereign jurisdiction. Such is the final argument which has been put forward to justify the intervention of the Council.

"Any solution to the contrary," it has been written, "would make the Mixed Arbitral Tribunal a sovereign jurisdiction, enjoying absolute independence and autonomy and which could thus arrogate to itself an unlimited jurisdiction and powers of decision, subject to no sort of control. How could such a thing possibly be?" (A. Prudhomme, *op. cit.*, p. 861).

We reply: "How could it be otherwise?" When a jurisdiction has been created with specific competence to settle certain disputes, that jurisdiction is evidently a sovereign jurisdiction. The most modest of jurisdictions, when it has the power to give conclusive judgment in a dispute, has sovereign power.

The Peace Treaties which created the Mixed Arbitral Tribunals might have established the principle of a dual degree of jurisdiction, or else might have created a recourse to a court of error or appeal before a superior jurisdiction. They did not do so, or, to be more exact, they contented themselves with creating a procedure for review before the Tribunal itself. The States wished to confer on the Mixed Arbitral Tribunal sovereign powers to give judgment.

These sovereign powers explain themselves on the one hand, because the jurisdiction of these Tribunals is limited to a definite class of matter; on the other hand, because it is not obvious what jurisdiction superior to the Mixed Arbitral Tribunal could have been instituted; perhaps also by a desire not to cause disputes to be long drawn out. The reasons which can justify the system adopted are, however, of small importance. What is incontestable is that there are no legal modes of appeal against the decision.

This creation of a sovereign Tribunal is not, moreover, an extraordinary novelty. There are, in all countries, jurisdictions which are sovereign, because the law has not organised any appeal against their decisions. These are not even always the most important jurisdictions, and it sometimes happens that a lower jurisdiction gives a conclusive judgment, because, in his desire for expeditious justice, the legislator did not permit of its decision being impugned.

When a Tribunal has thus received the right to give conclusive judgment, that Tribunal itself verifies its own jurisdiction, and the decision which it gives on this point is a conclusive decision, seeing that it cannot be impugned. The Mixed Arbitral Tribunal determines, in sovereign fashion, the cases which fall within its jurisdiction. When it has given a decision affirming its jurisdiction, that decision has the authority of a final judgment. No one has the right to declare that there has been a usurpation of jurisdiction.

Further, the discussion which arose after the Judgment of 10th January, 1927, respecting the validity of the decision given by the Roumanian-Hungarian Mixed Arbitral Tribunal, appears to a jurist to be merely a doctrinal discussion and it is difficult to understand how this discussion could have been brought before the Council of the League of Nations. The decree of 10th January, 1927, has the authority of a final judgment. It has this authority both for Roumania and for Hungary and the dissenting opinion of the Roumanian Arbitrator does not in any way impair the legal authority of the Judgment.

Now, if the Executive Council were to impose upon the Contracting States the adoption of the resolutions laid down by the Committee of Three before proceeding to the appointment of the defaulting Arbitrator, it would be attempting to destroy the jurisdiction of the Mixed Arbitral Tribunal in certain directions. This Tribunal has, in effect, declared itself to have jurisdiction to decide the claim of the Hungarian nationals. It has now to give judgment on the merits and there is no power on earth that can say that it has jurisdiction to give judgment, or that it may only do so under certain conditions.

Those who view with alarm this sovereign power thus attributed to a Tribunal which might arrogate to itself an extraordinary jurisdiction, have not grasped the scope of jurisdictional power. When a Tribunal is entrusted with the task of verifying its own jurisdiction, without organising any appeal against decisions as to jurisdiction, it must be expected that sometimes this Tribunal might commit errors with regard to this determination and might arrogate to itself a jurisdiction which it does not possess. It is for those who appoint the judges to exact sufficient guarantees of their impartiality and learning. It would be vain to expect that their decisions would never be disputed.

Thus, even if the Roumanian-Hungarian Mixed Arbitral Tribunal had given a decision as to jurisdiction, which was unanimously criticised, the Council could only deplore the failure of the judges, without having any right to modify the decision. But such is not the case. The decision as to jurisdiction was, we have already shown, indisputable. How, then, is it possible to justify an intervention which would be an attack on the independence of the judicial power and on the authority of a final judgment?

VIII.

Those who used their ingenuity to defend the intervention of the Council have, been reduced, in the final analysis, to declaring that this Council has sovereign power. "If, in exercising its mission," writes Mr. Albert Wahl (*Revue politique et parlementaire*, 1927, No. 396, p. 214), "the Council of the League of Nations should go so far as to refuse to recognise a decision given without appeal by any jurisdiction whatsoever, more especially by a Mixed Arbitral Tribunal, there should be no hesitation in considering that it would be acting in the plenitude of its rights, because, as we have shown above, the Covenant has placed before all things, the preservation of peace confided to the organs of the League of Nations . . . The Council cannot be accused of having failed to recognise the authority of international justice by substituting its own decision for that of the Arbitral Tribunal. It would even have the right to consider the latter decision negligible, if the duty imposed upon it by the Covenant appeared to point in that direction."

The right to disregard a decision of sovereign justice! What a strange formula to guide the deliberations of a Council! A sovereign power is attributed to it such as no sovereign ever exercised. There is even no longer the necessity for it to observe the fundamental rules, among which was included the traditional one of respect for justice. It has no other duty but to preserve peace by all the means in its power. The laws of countries, the clauses of Treaties, the decisions of competent jurisdictions, the rights of individuals, all these are nothing; the necessity of preserving peace is the supreme law to which everything must be sacrificed.

But who is to say whether the decision made is inspired by the sole desire to preserve peace? Who, above all, is to say whether this decision contributes to the preservation of peace, or whether, on the contrary, by tearing up established rules, it becomes a cause of conflict. When the power of passing judgment is conferred upon the Council by declaring it *legibus solutus*, it is certainly a sovereign power that is accorded only that power is no longer based upon right, but upon force.

It is certain that, if the Council refuses to complete the Arbitral Tribunal as it ought to do, there is no means of compelling it to make this appointment. In this sense it is sovereign, as there is no appeal possible against a supreme authority. But when a request, based on the application of an express clause of the Peace Treaty, is referred to the Council, it must remember that its mission, according to the Covenant of the League of Nations, is "the maintenance of justice and a *scrupulous respect for all Treaty obligations* in the dealings of organised peoples with one another."

Power was not given to it to modify the Treaties, to lay down the law or to enforce rules. Its mission is determined by the Act of Institution. It must scrupulously respect the Treaties. If its mission is to intervene when a dispute arises or is liable to arise, its rôle is to bring the Contracting States back to observing the Treaties which bind them. Its task is to preserve peace by the law and not against the law.

IX.

In conclusion, let us revert to the precise object of this investigation.

M. Emeric Kulin, senior, applied, on 29th December, 1923, to the Roumanian-Hungarian Mixed Arbitral Tribunal. He obtained on

10th January, 1927, a judgment as to jurisdiction. He now requests that the Tribunal recognised as having jurisdiction should decide his claim. Other Hungarian nationals have filed similar claims; they are entitled to judges. These judges are refused to them and, what is more serious, they are refused to them because the judges appointed have decided that they had the right to judge.

Behind these litigants and over their heads, the Hungarian Government and the Roumanian Government discuss before the Council of the Council of the League of Nations the application of a clause of the Treaty which, being interpreted in a different manner by the two States, brings them into opposition. The Council obtains opinions, makes proposals, suggests an agreement on certain points. What does all that matter to M. Emeric Kulin, senior, and other Hungarian nationals? It is their personal cause which they are upholding, it is their own rights which they are defending.

It matters very little that the Hungarian State is behind its nationals in order to defend their interests. The rights concerning which the Mixed Arbitral Tribunal should give judgment are not the rights of the Hungarian State, they are the rights of a Hungarian national; the legal action of which it may take cognizance according to the terms of Article 250 of the Treaty of Trianon, is not the action brought by Hungary against Roumania, it is the action brought by Hungarian nationals against the Roumanian State.

“The Mixed Arbitral Tribunals,” writes M. Scelle (*Revue générale de droit international public*, 1927, p. 474), “have been instituted as a jurisdiction accessible to private individuals and in order to validate individual rights. The constitutive law (Treaty of Trianon) which provides private individuals with this jurisdiction is not at the mercy of their respective Governments and the Hungarian Government could, at the outside, only promise the Roumanian Government to endeavour to induce its nationals to accept a compromise which it was not within its power to force upon them. From a general point of view, let us here record a valuable precedent in the evolution of international law tending to the recognition of the individual as a subject in law, who is entitled to make use himself of his juridical powers before international jurisdictions.”

The Mixed Arbitral Tribunal, in its Judgment of 10th January, 1927, when examining an alleged recognition by the Hungarian Government of the thesis of the Roumanian Government, itself pointed out that such recognition would not be valid for the settlement of the dispute, because it could not be binding on Hungarian nationals and cause them to lose the right guaranteed to them absolutely by Article 250.

If the Treaty of Trianon thus gives Hungarian nationals the right to apply to the Mixed Arbitral Tribunal, it is not for Roumania or Hungary or the Council of the League of Nations to take this right away from them. They must be granted the justice which is their due and judgment must be given in their action.

The judgment given in the case brought by M. Emeric Kulin and other cases would be a danger to world peace! Who is going to believe that? When the Mixed Arbitral Tribunal giving judgment in sovereign fashion on the merits, decides that M. Emeric Kulin, or any other

garian national, is entitled to compensation, in what way will peace be more endangered than on the day when those Hungarians filed their claim for compensation ?

Let us put things at their worst : if, the judgment having been given, Roumania refused to execute it, if she alleged such execution to be impossible for vital national reasons, if the Council indeed considered, in fact, that the integral execution of the judgment might lead to disorders calculated to disturb world peace, we might admit that the Council would then have the right to intervene.

But, so long as the case is in progress, so long as the Mixed Arbitral Tribunal has not pronounced on the justifiability of the Hungarian nationals' claim, the action initiated by the Applicants must follow its course and no one has a right to stop it. If the request is rejected, the difficulty disappears ; if it is accepted, this difficulty does not become any more serious than it is to-day, and the intervention of the Council—which would then solely relate to the method of carrying out the judgment—could be requested by Roumania.

At the moment, this intervention applied for in order to stop proceedings regularly brought before a Tribunal has no sense unless it has for its object the prevention of a discussion on the merits before this Tribunal. Now, as the merits have already been very largely dealt with in connection with the question of jurisdiction, a fresh discussion on this point could not entail a risk to world peace, which must at all costs be avoided.

The question was a simple one ! It has only been complicated by the desire to avoid the solution enjoined by the rules of the law. Roumania and Hungary have accepted the institution of a Mixed Arbitral Tribunal. They have decided that claims made by Hungarian nationals and based upon the violation of Article 250 of the Treaty, should be brought before that Tribunal. The Tribunal has been seized of the matter. It has declared itself to have jurisdiction. It must give judgment on the merits. It cannot do otherwise than decide the case after its declaration of jurisdiction. The Council cannot prevent it from giving judgment without committing a denial of justice towards the Hungarian nationals.

These are obvious solutions for the jurist who does not wish to have anything to do with diplomatic interventions and political reasons. If some maintain that it ought to be otherwise with regard to an international jurisdiction, it is because they consider that such international jurisdiction is not a true jurisdiction.

It has been rightly said, therefore, that the case of the Hungarian optants marked a real crisis in international life and in the League of Nations.

"It is to be presumed," writes Mr. A. Wahl (*op. cit.*, p. 216), "that the decision of the Council will often be invoked in the future as a fortunate precedent." It is indeed a question of creating a precedent and it appears somewhat audacious to describe it as *fortunate*, even if the decision were considered necessary.

If it should happen that the case introduced by the Hungarian nationals never received any solution, it would be a lamentable check

to the international jurisdiction created by the Peace Treaties. The States who might in the future accept this creation, would have as an example this compulsory arresting of the course of justice and would too readily imagine that it would depend upon their own will to prevent actions inconvenient to themselves.

My conclusion is a simple one: the claim of the Hungarian nationals has been brought before a Tribunal created by a Treaty which is law for the States which signed it; this Tribunal has declared itself to have jurisdiction; any act which would prevent it from giving judgment on the merits, or which would force a decision upon it, would constitute a denial of justice or an attack upon the independence of the jurisdiction.

(Signed) GEORGES RIPERT.

Professor of the Faculty of Law at Paris University and
at the Ecole Libre des Sciences Politiques.

Translated from the German.

CONCERNING THE LEGAL OPINION OF THE
CHAMBERLAIN COMMITTEE UPON THE
ROUMANIAN-HUNGARIAN DISPUTE AND ITS
BEARING ON INTERNATIONAL LAW.

AN ARTICLE BY

Dr. JAMES VALLOTTON (OF LAUSANNE),

Member of the "Institut de Droit International," former President
of the American-Norwegian Mixed Arbitral Tribunal, Advokat at
Lausanne.

Extract from "Zeitschrift Für Ostrecht," November 9, 1927.

The facts are fresh in everyone's memory. The Mixed Arbitral Tribunal, constituted between Roumania and Hungary under the Treaty of Trianon, having delivered a preliminary judgment in which it rejects the objection to the jurisdiction raised by Roumania in opposition to the claims of Hungarian nationals dispossessed of their property in Transylvania (annexed by Roumania), the defeated Respondent State orders its national judge to withdraw from that Tribunal and thereby prevents its functioning. In addition, it addressed a complaint to the Council of the League of Nations, directed ostensibly against Hungary—guilty of having helped her nationals to win their case—but having in reality the object of securing, by the roundabout means of Article 11 of the Covenant, a revision of the Peace Treaty or a revision of the arbitral judgment.

Hungary, for her part, requested the Council to replace the defaulting Roumanian judge by neutral substitutes, in conformity with the Treaty and with the practice followed in a certain well-known previous case.

It is not for us to guess at or discuss here the political motives which led the honourable Rapporteur of the "Committee of Three" to publish, on the 15th September, 1927, a Report in which that Committee does not say a single word in defence of the International Tribunal and does not appear for one moment to enquire whether it is in accordance with the law of nations, the express wording of the Treaties, and the spirit of the Covenant—whether, in short, it is in accordance with international good faith—and to give, in the name of the Council of the League of Nations, an example of a kind of voluntary ignorance with regard to the *executory* judgment of a *Mixed Arbitral Tribunal*. Has the Council the right to interfere in a case still pending before a Mixed Arbitral Tribunal, to introduce into it juridical confusion and disorganisation, mainly with the desire—so he says himself—to play a "political rôle of mediation and reconciliation in a dispute, the bearing of which greatly exceeds the actual limits within which it has been presented by the two parties?"

When a judge wishes to bring the parties, by amicable means, to a respect for their engagements, he weakens his authority and fails in his endeavours towards a settlement, if he does not show an example by limiting his intervention to the rôle which has been entrusted to him by a formal text, such as that of Article 239 of the Treaty of Trianon.

Wisdom counsels, it would appear, the playing of the less glorious but more effective "mechanical" rôle, such as is laid upon the Council of the League of Nations by that Article. It seems superfluous to recall that, at the time of a disagreement of the greatest importance between Germany and France, Article 304 of the Treaty of Versailles (identical with Article 239 of the Treaty of Trianon) was applied—very wisely—in a purely "mechanical" manner by the Council of the League of Nations. When Germany, in consequence of the occupation of the Ruhr territories, had withdrawn her judges from the Mixed Arbitral Tribunal, the Council carefully abstained from any examination into the causes of their absence and without any prior stipulations appointed the neutral judges. The sequel of events shewed it to have acted rightly.

The same will occur in the Roumanian-Hungarian case, on the day when the Council of the League of Nations sends the parties back to the Tribunal and when Roumania recognises the uselessness of her obstinacy. The Council in 1923, as it admits itself (see Report of the Committee of Three, p. 7), advised "Roumania to furnish a proof of her good-will with regard to the interests of the Hungarian optants." To-day, nevertheless, it accepts, under the head of a complaint founded upon Article 11 of the Covenant, a claim from Roumania which is, in reality, equivalent to a proof, not merely of ill-will, but of absolute denial of the "interests of the Hungarian optants." Would not the Council be putting itself in the wrong, not only with regard to Hungary, but also with regard to the League of Nations, if it did not reply to Roumania: "So long as you do not conform to our recommendation of 1923, and, further, so long as you refuse to submit to an executory arbitration judgment or to a judgment of the Permanent Court of International Justice, it is, in our opinion, to be presumed that you are in the wrong?"

By a strange inversion of responsibilities, Sir Austen Chamberlain's Report of the 15th September, 1927, goes to the length of proposing that the Council should prevent the functioning of the Mixed Arbitral Tribunal, by refusing to Hungary the nomination of the judges (which she demands by virtue of an undeniable right) in the event of her not conforming to the juridical interpretation of Article 250 of the Treaty put forward *proprio motu* by the Committee of Three and of her insisting, on the contrary, on adhering to the interpretation pronounced by the competent Tribunal.

We learn that the Members of the Council, almost without exception, did not particularly appreciate this method of international conciliation.

In spite of this the Council has, up to the present, remained deaf to Hungary's request and, with the object of conforming to Article 11 of the Covenant, has not proceeded with the election of the judges which, with "mechanical" but wise management, should have taken place at the first session following upon the request. Thus an international Tribunal is prevented from functioning—to the detriment of the parties under its jurisdiction—and this, moreover, not by the act of an individual State, but by the act of the Council of the League of Nations.

At the most would this position be understandable if the Council had voted unanimously (it will be recalled that the unanimous vote of the Council is necessary for a binding decision, such as the decision not to appoint judges in execution of Article 239 of the Treaty of Trianon would be) against the request of Hungary founded upon that Article 239; or even if the Committee of Three had stated and proved that the Mixed Arbitral Tribunal, accused by Roumania, had committed a manifest denial of justice, or a scandalous abuse of power, etc. Now, far from

coming, in reality, to conclusions of this kind, the Report of the Committee of Three supports both the jurisprudence of the Mixed Arbitral Tribunals and of the Hungarian claimants with regard to the decisive points.

Does Roumania complain with good reason of the fact that the Mixed Arbitral Tribunal—instituted by Article 250 of the Treaty of Trianon, to protect the intangibility of the properties, rights and interests of nationals of the former Austro-Hungarian monarchy (in territories, transferred to Roumania)—has declared itself to have jurisdiction for all measures of transfer of property subsequent to the armistice of the 3rd, November, 1918, and to the coming into force of the Peace Treaty, even when one of those measures had been decreed or applied under the name of “agrarian reform?”

On the contrary, the honourable Rapporteur, after having, as he says, consulted the highest legal authorities, has decided that Roumania is in the wrong and has recognised the jurisdiction of the Tribunal.

Roumania was non-suited in her claim to transform into a “reserved domain,” exclusively within the jurisdiction of her own laws and authority, the future régime for the property, rights and interests of ex-enemies in the transferred territories.

The Hungarian thesis has triumphed, on the only point of importance for her.

In deferring, therefore, for no reason, the nomination of the neutral substitutes on the Mixed Arbitral Tribunal, the Council unnecessarily aggravates the confusion provoked in the minds of others by its—to say the least—premature attempts to interfere in pending proceedings.

The object of this treatise is not, however, to interfere, in our turn, in the discussion brought about by this unfortunate attempt to apply Article 11 of the Covenant, but simply to reply to the following questions from the purely juridical point of view :

(1) In its definition of the principles which the acceptance of the Treaty of Trianon rendered obligatory for Roumania and Hungary, is the Committee of Three in agreement with the wording of the Treaties, with the doctrine and jurisprudence, in short, with the law of nations applicable in this matter? To this first question I believe that I must reply in the negative, in so far as I have been able to grasp the guiding thoughts and the general tendency of the Report.

(2) On the other hand, if I have to answer the further question whether, at the most, the Hungarian claimants, under the pressure of the Council based upon the principles of the Committee of Three would be able to plead their case before the Mixed Arbitral Tribunals, with sufficient chance of success. I would not hesitate to reply in the affirmative.

(3) Supposing that Hungary, in her capacity as a State, should accept the recommendation of the Council to agree to the interpretation laid down by it, would this fact result in prejudice to the rights acquired as individuals by the Hungarian nationals with regard to their liberty to obtain from the Mixed Arbitral Tribunals a judgment based upon some other interpretation? On this point, I can only confirm the negative opinion already expressed by me in the “*Zeitschrift für Ostrecht*,” June, 1927, page 345, with regard to what Roumania calls “the Brussels Agreement.”

The result of this assumption would be, on the other hand, that the position in law of the States concerned would be prejudiced if Roumania should subsequently refuse to execute judgments of the Mixed Arbitral Tribunal with regard to the restitution of properties, compensation, etc.

Furthermore—and this is chiefly what has led me to take up the pen—the greatest damage caused by this interference of the Council would be to the League of Nations itself.

From the day, indeed, when the fact of a State belonging to the League renders it liable to being deprived, by a mere intervention of the Council, of the legitimate rights and advantages to which a judicial award entitles them, what inducement would the small States have to remain in that League?

* * * * *

I will now justify these conclusions, in detail, in the light of the principal theses of the Chamberlain Report.

* * * * *

The Committee of Three, first of all, defines the jurisdiction of the Mixed Arbitral Tribunal as follows:—

(a) The jurisdiction of the Mixed Arbitral Tribunal is fixed and limited by the Treaty which created it.

(b) The Mixed Arbitral Tribunal has jurisdiction in any plea for the restoration of the property of a Hungarian national, after proof that it has been the subject of seizure or liquidation or any other measure of transfer, administration or sequestration, between the armistice of 3rd November, 1918, and the coming into force of the Treaty of Trianon. In these cases, the jurisdiction of the Mixed Arbitral Tribunal would not be precluded by the fact that the application of an agrarian law was in question.

The Mixed Arbitral Tribunal says nothing else.

All this is not disputed by Hungary.

Roumania, up to the present, has maintained the opposite thesis, claiming, moreover, that the measure referred to in Article 250 under the term "liquidation" must be a *war measure taken for a war purpose*, etc., whilst, according to the Mixed Arbitral Tribunal (Kulin père case), liquidation within the meaning of Article 250 may be either a war liquidation or a *post-war* liquidation differing only in the object. The Committee of Three next pretend to define the principles which the acceptance of the Treaty of Trianon have rendered obligatory for Roumania and Hungary. What is its first thesis?

(1) The Peace Treaty of Trianon does not in any way exclude the application of the general principles of agrarian reform to Hungarian nationals (including the Hungarian optants). Roumania, on the other hand, has the right to promulgate any agrarian law which she may deem suitable for the requirements of her people.

In this vague form, there will be no doubt as to this affirmation. Has not Hungary herself proceeded, within the last few years, to carry out very important expropriations under this title? But it is necessary first to understand the scope of these words.

A State may designate as an agrarian reform a total confiscation of private property, consisting in a clever combination of various measures, each one of which may appear inoffensive ; this, for example, is the case with the very skilful measures of the Czechoslovak State ; another, such as Roumania, may limit itself to measures equivalent to a confiscation of 99.02 per cent. of the property ; another, again, may designate as " agrarian reform " simple changes in distribution, or a general obligation for landlords to hand over a portion of their properties to tenants, the latter having the right to purchase little by little, at low prices, all or part of the leased lands, etc. ; still another may confine itself to promoting the progressive disappearance of large landed properties by legislative measures, such as the suppression of entails, the suppression of the liberty to bequeath, etc., combined with fiscal measures (heavy progressive increases in the annual tax or death duties, capital levies, etc.).

To sum up, this alleged general juridical principle " which the acceptance of the Treaty of Trianon has rendered *obligatory* for Roumania and Hungary " has no precise significance, and if it can be said that this Treaty has not expressly withdrawn the faculty, either in Article 232 or in Article 250, of the adoption by Roumania (or Czechoslovakia, let us add) of agrarian measures in conformity with the law of nations, it is possible to maintain with much greater reason that no article of a Peace Treaty, and especially of that of Trianon, expressly authorises Roumania (or Czechoslovakia, let us add), to pass measures of " agrarian reform " against the landed property of certain definite private individuals. If there are two opposing theses in this question, both of them are founded upon divergent interpretations of the Treaties.

In the last resort, who is responsible for the authentic interpretation of the Treaty of Trianon ?

It is known by the documents relative to the preliminaries of the Treaty, which have been referred to by the Mixed Arbitral Tribunal and by Hungary (*vide* for example Opinion of Mons. A. de Lapradelle, especially as to proposition 3 p. 1270 *et seq.*), to which Hungary—as well as Austria—drew the attention of the Allies, in a Note No. XXXVII, Annex. 6, to the agrarian reform measures of Roumania (law of September 10th, 1919) and Czechoslovakia (law of 16th June, 1919), which in the Note were designated as confiscation measures, which were in practice only applied in respect of Austro-Hungarian nationals, etc. Hungary requested in consequence the insertion in Article 250 of the Treaty of a text giving to the Mixed Arbitral Tribunal the jurisdiction which is to-day contested by Roumania. The Allied Powers had no objection to recourse to the Mixed Tribunal, as proposed by the Hungarian Delegation, for the settlement of disputes relating to the restoration to nationals of the former Kingdom of Hungary of their property, *rights or interests*, situated in the transferred territory, as provided for in Article 250 of the Treaty. They declared themselves to be in agreement with the completing of this Article (250) in this sense. But they declared further, in the clearest possible manner, that the Mixed Arbitral Tribunal alone, specifically and specially charged with the interpretation of Article 250 of the Peace Treaty, was qualified, by means of the interpretation of the Treaty, to settle this disputed question between Hungarian private individuals and the future sovereigns of the transferred territories.

This is what is stated in the " Reply of the Allied and Associated Powers to the Observations of the Hungarian Delegation upon the Peace
 0
 onditions . . . Article 250: *The various observations presented*

by the Hungarian Delegation with regard to the treatment applied by Roumania and Czechoslovakia to immovable property constitute a question of interpretation of the Peace Treaty, which cannot be settled at the present time."

Special but, at the same time, exclusive, by the will of the Allies themselves and of Hungary, is the jurisdiction of the Mixed Arbitral Tribunals with regard to Article 250 of the Treaty of Trianon.

To this Tribunal alone belongs, so long as the Treaty of Trianon is in force, the faculty to settle between the claimants and the Respondent States, *those questions arising out of the transference of sovereignty of Hungarian territories.*

If this Treaty had intended to give to the Council of the League of Nations a power of revision or even to interpret Article 250 in its own way, it would have mentioned it expressly, as was done, for example, in Articles 292, 293 and 311 to 313, of the Treaty of Trianon and in other similar Articles.

Why did those who drew up the Treaty leave it to the Judge to settle this question ?

Why, at Trianon, did the Allies not threaten Hungary, as is being done to-day, when it is even proposed to the Council that "in the event of refusal by Hungary" it should declare itself not justified in proceeding to the nomination of the two substitute members of the Mixed Arbitral Tribunal ?

Why was no objection raised against the Hungarian thesis, nor a single word said, nor a single effort made to induce Hungary to recognise the "obligatory principles" proposed to-day for the acceptance of Roumania and Hungary ?

Various hypotheses are possible. I will keep to the one which appears to me to conform best with international good faith and with the conscientious sense of responsibility which was certainly present in the intentions of the High Contracting Parties. Did the drafters of the Treaty not say to themselves that no rule of international law exists which exempts the owners of immovable property from a general scheme of agrarian reform in a territory transferred by a peace treaty to a new sovereign. For they knew their law of nations. They knew exactly that the jurisprudence, the jurisdiction and the peace treaties drawn up by themselves—and in particular Article 232—proclaim and intend that the principle of *the inviolability of private ownership*, even with regard to ex-enemies, should be respected, most particularly in favour of the owners of property and vested rights in annexed territory, who, having been driven out of their former native land, must at least be protected against spoliation, whatever the form or the "disguise" (*déguisement*—the word is that used by the President of the Peace Conference) made use of by the law of the new sovereign. The drafters of the Peace Treaty did not desire to abrogate Article 232 which, with the Annex to Section IV, governs the question of private property, rights and interests in an enemy country, in particular, they have upheld paragraphs (a) and (i) of that Article. Now, how far would extend, in view of what has been said above, and if Article 250 did not exist, the jurisdiction of the Mixed Arbitral Tribunal according to the principles of the Treaty ?

In order to justify this jurisdiction of the Mixed Arbitral Tribunal, would it be sufficient for the Hungarian injured party to prove to the Judge the existence of sufficient indications of the imminence of legislative administrative or judicial measures.

(a) which would have the object or effect of liquidating one of his rights or properties in transferred territory—that is to say to hinder the free enjoyment or ownership of that right or property or to transfer it to another without his voluntary consent—

(b) to prove that these measures have been taken outside the limits of the general legislation—that is to say in a manner that does not conform with the law of nations, or even with the common law of the Respondent State—

(c) to prove that the said measures have been taken or notified in a manner that threatened to prejudice the free or equitable determination of the price or indemnity for dispossession, and

(d) that they are *unjustified*—that is to say, contrary to the general principles of law ?

Such, however, is the spirit in which the impugned judgment of the Roumanian-Hungarian Mixed Arbitral Tribunal, in the case *E. Kulin père v. Roumanian State No. R-H 139*, was delivered. We cannot quote it here in full (1).

When the presence, in the facts of a case, of these elements of its jurisdiction, would appear proved, the Mixed Arbitral Tribunal, according to Article 232, would have full liberty to lay down the equitable indemnity, due to the Hungarians at the cost of the debtor State, according to that same Article.

The jurisdiction of the Mixed Arbitral Tribunal goes even further when it is a question of guaranteeing the Hungarian nationals against the errors that might be committed by a Tribunal having jurisdiction, whether Czechoslovak or Roumanian.

Indeed, in order to justify the jurisdiction of the Mixed Arbitral Tribunal from the standpoint of Article 240 of the Treaty of Trianon, and the "*right*" of the Hungarian to a reparation which will be determined by the Mixed Arbitral Tribunal, it is sufficient to show that there is need for "*redress*" in the English meaning of the word, that is to say that the Mixed Arbitral Tribunal finds in the facts of the case before it the characteristics of a wrong to be righted, a wrong consisting in a judicial decision of the Respondent State which prejudices the rights guaranteed by the treaty, "contrary to the law of nations relative to the protection of vested rights in transferred territory, or to one of the matters of Sections III, IV, V or VII of Part X of the Treaty of Trianon."

Article 240 goes still further than Article 232, in the sense that it is not necessary to demonstrate here that the error of the Roumanian Court must concern a "*liquidation*" or some other special provision of the said Article ; it applies rather if the error concerns the *spirit*, i.e., the sense and object of the questions dealt with in Sections III, IV, V and VII. Why was this Article 240 not mentioned in Article 250 ? The reason is because the Article confines itself to imposing a legal penalty to prevent a violation of the law of nations consisting in the fact of a national Tribunal

(1) NOTE :— *Vide* "Ostrecht" III. No. 2. p. 227 s.v.

delivering, in a manner not in conformity with the principles, either expressed or understood, of the Treaty a judgment prejudicial to one party. This Article 240, as opposed to Article 232, did not authorise any derogation from the general principle of respect for vested rights in annexed territory. On the contrary (as Article 305 of the Treaty of Versailles) it gave to the Mixed Arbitral Tribunal a power of control and redress which Article 250 of the Treaty of Trianon has extended by quietly adding to the power of redress or reparation the power of granting compensation and restitution in favour of Hungarian nationals.

In the words of the Committee of Three itself, "as regards Article 250 of the Treaty of Trianon, the latter forbids the application of Article 232 to the property of Hungarian nationals in the transferred territories." This is evidently not in the interests of Roumania, but rather to give to the Hungarian nationals in Transylvania, Jugoslavia, or Czechoslovakia a more extended guarantee than that of "the adequate indemnity" of Article 232 (or of the "reparation" of Article 240 of the Treaty of Trianon). How can one, therefore, seriously maintain, in view of the preliminaries to the Treaty cited above, that "according to the object of that article, the prohibition to retain and to liquidate cannot restrict the liberty of action of Roumania beyond what such liberty of action would have been had Articles 232 and 250 never existed?"

No commentator of the Treaty of Trianon has the right to ignore the history of the preliminaries to Articles 267 of the Treaty of St. Germain and 250 of the Treaty of Trianon, nor the suppression by the Peace Conference, at the request of Austria, of Article 49 of the Treaty of St. Germain. It was just this article which would have given to Roumania, Jugoslavia, Czechoslovakia, etc., the right to retain and liquidate all property possessed by Austrians within the territories of the former Danube-Monarchy. Nor have the commentators of the Treaty of Trianon the right to ignore that the text (of Article 267 of the Treaty of St. Germain and of Article 250 of the Treaty of Trianon) was in reality agreed to at first in the form which is, at present, that of the first paragraph of Article 250 of the Treaty of Trianon, with the object, says the Allied Conference "of substituting (for Article 49) a prescription that shall give full satisfaction to the desire of the Austrian Delegation." He must further not ignore, that after the Austrian Delegation had explained its fears with regard to agrarian reform measures, the desire of the Allies was to renounce all measures by which "the provisions of Article 267, which forbids the retention or liquidation of the property of Austrian nationals in the transferred territories *may in fact be rendered illusory.*" This desire is proved not only in a Note of sufficient clearness, but above all in the text which to-day forms the end of paragraph 1 of Article 267 of the Treaty of St. Germain and paragraph 2 of our Article 250 of the Treaty of Trianon. "The Allied Powers have desired to place the property under the dominion of general international law," says the Mixed Arbitral Tribunal, "and this is clearly evident from the preliminaries relative to Article 267 of the Treaty of St. Germain and Article 250 of the Treaty of Trianon, as also from the text of this latter article.

"It is, therefore, by principles of general international law that the Tribunal should be inspired whenever it is called upon to give judgment on a claim made by virtue of Article 250."

These principles have been admitted and observed during the whole of the nineteenth century, and many jurists, in all countries, are to-day striving to establish the protection of International Law. (*Vide*, in this connection, the many notes devoted to American jurisprudence and the Collection of Löwenfeld, p. 1347 s.v.).

All this is known to everyone ; the documents produced by Hungary at Brussels, Geneva, etc., the Opinions and pleadings before the Mixed Arbitral Tribunal, and the judgments of those Mixed Arbitral Tribunals, have been repeated *ad nauseam*.

In short, it is to-day public knowledge that the object of Article 267 of the Treaty of St. Germain and of Article 250 of the Treaty of Trianon is to give " full satisfaction " to Austria-Hungary (insufficiently protected by the texts, valid to-day, of Article 249 of the Treaty of St. Germain, 232 of the Treaty of Trianon and 297 of the Treaty of Versailles) and to give the necessary protection against sequestration or confiscation, total or partial, of property situated in territory transferred to Roumania. (See, for instance, Avis consultatif, No. 6, Judgment No. 7, Series A, pp. 22, 31-33, 41, 46 ; Judgments Nos. 8 and 9 Chorzow, Jurisdiction p. 27, which emphasises that according to judgment No. 7 the expropriation therein provided for constitutes a derogation from the general rules of International Law concerning the treatment of foreigners and the protection of vested rights).

The Report of the Committee appears to assert that, if Article 232 of the Treaty of Trianon *had not existed*, neither Roumania (nor Czechoslovakia we would add) would have the right, in accordance with general international law, " to apply a general scheme of agrarian reform," even if this were equivalent to a spoliation or to a confiscation—though if only partial, *A fortiori*, it could not be said that this " scheme " would be in accordance with the law of nations, on the sole condition of being applied, in fact, without discrimination to the Roumanians in Transylvania, as well as to the Hungarians. For the law of nations, in cases of annexation, transfer, or succession from State to State, necessarily implies respect for private vested rights in the territory, such as they exist at the moment of the effective transfer of sovereignty (e.g. in this sense Judgment No. 7 of the Permanent Court of International Justice pp. 29 and 41, which confines itself, however, to confirming here the rule steadfastly proclaimed, both by jurisprudence and by doctrine).

In Article 250 of the Treaty of Trianon, the High Contracting Parties confined themselves to recognizing and confirming this rule of the law of nations. It has become unquestionable and is based upon :

(a) unanimous *doctrine*, from Grotius and Vattel, Alexander Hamilton, etc., and to cite only recent authors : H. Bellot, Gabba, Gidel, Dupuis, de Lapradelle, de Visscher, Fachiri, Fauchille, Halleck, Sir A. Hopkinson, J. B. Moore, Oppenheim, Philippson, Pillet, Pollock, Struycken, Verdross, Westlake, Vaughan-Williams, etc. etc., to say nothing of learned Societies ;

(b) *upon jurisprudence* ; See Judgment No. 7 aforesaid, p. 29, the jurisprudence of the French Cour de Cassation cited by G. Gidel in his work, " On the effects of the annexation upon the concessions," Paris, Larose, 1904, pp. 86 to 88 ; the regular American jurisprudence from 1816 down to the present day, cited for instance by J. B. Scott, " Cases on International Law," the various judgments cited by J. B. Moore (Digest. 1906, Vol. 1, p. 414) ; the jurisprudence cited in the Norwegian memoranda in the course of the arbitral procedure of 1922 between the United States and Norway, etc. Let us be permitted to mention here a Judgment of a

hundred years ago of the Supreme Court of the United States, the mere reading of which leads one to ask oneself : Has the idea of the duty of an annexing power progressed during the last hundred years ? (1)

(c) upon the peace treaties and the most recent conventions, additions and directions concerning execution of those treaties ; the German-Polish Convention of Geneva, Articles 4, 6 *et seq.* ; the Treaty of Warsaw of 24th October, 1921, between Danzig and Poland, Article 253 ; the German-Czechoslovak Liquidation Treaty of June, 1920, Article II ; and the Treaty between the same High Contracting Parties (Collection T.S., No. 56 of 1926, Articles 43 to 52), etc.

At the most, one might understand the affirmations in the Report of the Committee of Three, although its terms are not very clear, if it meant the following :—

“ Article 250 cannot restrict the liberty of action of Roumania beyond what such liberty of action would have been if Articles 232 and 250 had never existed—*because*, in accordance with the law of nations, sanctioned by the Peace Treaties, by jurisprudence, especially by Judgment No. 7 of the Permanent Court (pp. 31, 41, etc.) the Treaty of Versailles (and more expressly still the Treaty of Trianon, let us add) *manifestly admit the principle that private rights, even those of the former sovereign, must be respected in the event of change of sovereignty ; even if this principle has not been expressly and positively enunciated in it* ” . . .

Therefore Article 250 of the Treaty of Trianon has confined itself to maintaining and confirming the principle of the law of nations in accordance with which the liberty of action of Roumania is limited by Articles 63 and 250 of the Treaty of Trianon to the right “ of expropriation for purposes of public utility,” *such as was provided by the Hungarian law in force in the transferred territories at the time of the coming into force of the Treaty of Trianon.*

But when this reasoning has as its object the justification of the astonishing conclusion that there exists no rule of international law guaranteeing the nationals of the transferred territory against the execution of a general scheme of confiscation of 99 per cent. of each Hungarian property, if this measure—*illegal according to the law of nations*, we repeat with the Permanent Court—really affects only the nationals of the annexing State, it is permissible to approve the courageous attitude of Hungary, and to say with her : “ No, this is not the ‘ definition of the principles which the acceptance of the Treaty of Trianon has rendered obligatory for Roumania and Hungary ! ’ When a measure is illegal according to the law of nations, it does not become legal through the fact that it is applied equally to the nationals of the annexing State.”

In this affair, however, it is facts alone which matter and not the name given to the illegal measure.

That is why only an international judge is in a position to appreciate whether a case is one of a simple “ scheme of reform,” or, on the contrary,

(1) See : The United States v. Percheman, Supreme Court of the United States, 1833, in J. B. Scott, Cases on International Law, Sect. 5. Change of Sovereignty.
b) Effects on private rights pp. 96, 97).

of "special measures" (1) (Judgments Nos. 8 and 9, p. 27) of a scheme directed against a certain class of nationals of the State annexed or in the territory transferred, and intended to effect reprisals, or to eliminate the economic, political or cultural influence of those aimed at, on the occasion of a transfer of sovereignty.

Owing to the decisive element—i.e. *the change of sovereignty*—not having been taken sufficiently into account, the only delicate question in this affair, that of the duration of the functions of the Mixed Arbitral Tribunal, has not been dealt with by the Committee of Three.

What, in this respect, will be the limits of the jurisdiction of the Mixed Arbitral Tribunal?

The duration of the functions of the Mixed Arbitral Tribunal is not limited by the Treaty. In theory, it will be the same as that of the Articles of the Treaty of Trianon, which invested this Tribunal with its jurisdiction.

In practice, especially with regard to the jurisdiction arising out of Article 250, their maintenance will depend only upon the attitude of Roumania and Czechoslovakia. On the day when, in these two States, the laws and, above all, the authorities entrusted with their application return to a just comprehension of the duties of a new sovereign, terminate their confiscatory legislation and again respect individual liberty, private ownership and the vested rights of ex-enemies in accordance with the law of nations, the special protection of Article 250 of the Treaty of Trianon will no longer be indispensable and may be replaced by ordinary Treaties of Establishment guaranteeing the same rights to Hungarians in transferred territories as to Roumanians.

Manifestly, the compilers of the Peace Treaties did not take into sufficient account the fact that the new rulers of the States, founded on or enlarged through the collapse of the former Dual Monarchy, would allow themselves to be influenced by a kind of return to the former agrarian communism, always so dear to peasants of Slavonic upbringing, to the extent of decreeing confiscation, "without compensation of the property of nationals of ex-enemy States," as, for example, the Czech National Assembly did in 1919 (Paragraph 9 of Law of 16th April, 1919, concerning expropriation of the large landed proprietors, S.g.d.G. No. 215) (1). Even if the appearance given to the measures, in the three succession States is not identical, the effects *are* so; they not only result in general insecurity of rights, but even in the ruin of the landowner.

It would be illogical therefore to complain, on the one hand, of Sovietic confiscation and to affirm, on the other, that measures identical in nature and taken by Roumania or Czechoslovakia against Hungarians are not contrary to a principle of international law, *when it is true* (2) that

(1) In its recent Judgment upon the Chorzow case (Judgments Nos. 8 and 9, p. 27), the Permanent Court of International Justice insists upon the fact that the measures taken by the Polish State (seizure of the property of Chorzow) are invested with the character of special measures involving a derogation from general international law and prohibited although they do not, properly speaking, come within the expropriations or liquidations regulated by the Convention for the execution of the Article of the Treaty of Versailles.

(2) See Resolutions of the Supreme Court of Brünn of April 8th, 1927, R.J. 120-27 translated and published in the Communications of the Association of the German Landowners of Bohemia, Prague 1927, p. 212, *et seq.*

the principle of respect for the private property of foreigners is expressly recognised by the law of nations, particularly by the most recent Peace Treaties, and (2) that, according to this very law of nations, the change of sovereignty would never make the private rights properly acquired prior to the transfer of sovereignty, subject to the whim of the new sovereign.

And yet the Representatives on the Council of the two Powers, who, not only with regard to Russia, but also with regard to Roumania, have claimed restoration of the property and reparation for the losses of their nationals, appear in this case to consider the two above principles to be untrue when Hungary is in question.

The report of the Committee of Three makes no allusion to these two fundamental principles of the Treaties, upon which the whole of international jurisprudence—especially the Judgments of the Court and the decisions of the Mixed Arbitral Tribunals, objected to by Roumania—is founded. Its silence has every appearance of *voluntary* ignorance.

This grave deficiency vitiates its conclusions.

Apart from the brutalities and crimes against individuals which accompanied the confiscation of all private property in Russia, it must, however, be recorded in defence of Russia :

(a) that the latter, unlike Roumania and Czechoslovakia, was more severe against her own nationals than against foreigners ;

(b) that she did not claim to remain within the community of civilized European States after she had confiscated the properties of foreigners ;

(c) that she reverted to the principle of respect for foreign private property in the Treaty of Brest-Litovsk, and finally, which is the most important and decisive fact from the point of view of Article 250 of the Treaty of Trianon :

(d) that the confiscations were not carried out in annexed territory, so that foreigners, in acquiring property in Russian territory, have to reckon in advance upon the risks arising out of a Communist revolution and the agrarian communism previously existing in Russia.

On the other hand, the Hungarians, who had lived in the new Roumania for centuries, are fully entitled to demand respect for their properly acquired private rights, and this by virtue of the law of nations, even if it had not been expressly guaranteed to them by Articles 63, 232, 250, etc., of the Treaty of Trianon. This is not merely a question of the confirmation of the general principle of respect for the private property of foreigners, but of the observance of the special principle according to which, the acquirer of the sovereignty does not acquire the private property and private rights which did not belong to the former sovereign as such.

Common sense demands the recognition of this truth. Thesis (1) of the Committee of Three does not appear to differentiate between the territories of former Roumania and those of Transylvania, although the legal position of the latter has become entirely altered in consequence of Articles 232, 250, etc., of the Treaty of Trianon.

Owing to this capital difference in the legal situations not having been taken into account, the Report of the Committee of Three appears, in reality, to have renounced without any valid reason, all protest against the confiscation by the Soviets on the one hand and, on the other, places itself in contradiction with the entire jurisprudence of the international tribunals, including that of the Permanent Court of International Justice—to say nothing of the manifest contradiction between its thesis No. 1 and the actual wording of the preliminary documents of the Treaties of St. Germain and Trianon.

* * * * *

It appears superfluous to examine further into theses (2) and (3) of the Committee of Three. They appear to be as much in contradiction with the law of nations, especially with the jurisprudence of the Permanent Court as is thesis 1).

(The Roumanian-Hungarian Mixed Arbitral Tribunal has judged that “the question of whether the expropriations in question in the present case are differential measures or not, is essentially concerned with the merits of the case, and that, therefore, there is no occasion to examine it at present,” in a simple pronouncement upon the plea to the jurisdiction).

In its second thesis, to which we have already alluded, the Committee of Three appears to allege that Hungarian landed property in transferred territory might be confiscated, on condition that it were taken in the same manner and in the same measure as Roumanian property.

Is it necessary to point out that the fact of ill-treating their own nationals has never—for more than a hundred years—been considered as a sufficient excuse in the law of nations?

* * * * *

“Equality of treatment is not a conclusive answer.” Such has, in particular, been the constant doctrine of the United States and of Great Britain, affirmed by them with vigour and success in their relations with various civilized States (e.g. *Fachiri*: Expropriation and International Law, in the British Year Book of International Law, 1925, p.162).

Is it necessary to cite once more Judgment No. 7 of the Permanent Court of International Justice which has, on several occasions, insisted (e.g. p. 33) upon the fact that a measure contrary to the law of nations (either general or special to the case) “could not become lawful by reason of the fact that the State also applies it to its own nationals?”

In view of the fact that Article 250 guarantees the Hungarians only against “retention” or “retention or liquidation,” or against “any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration,” the Report of the Committee of Three alleges that the characteristic element of the “liquidation” thus prohibited is its differential character. The Permanent Court did not admit this. (*Vide* on this subject the remarkable analysis of Judgment No. 7, of our eminent colleague, Gilbert Gidel in the General Review of Public International Law, January-February, 1927—which also appeared in pamphlet form published by Pedone, Paris).

For instance, Gidel says on p. 45: “It is one thing to say: liquidation touches German property as such and another thing to say:

a liquidation exists only when the measure affects German property exclusively. The defect in the Polish reasoning lay in its endeavour to establish an identity between these two propositions."

This is also the defect in the arguments of the Report of the Committee of Three, a defect which includes both thesis 2 and thesis 3 of the Committee of Three.

As M. de Lapradelle wittily says :—" If ten just men are sufficient to save a whole nation, it is not sufficient to strike at a few nationals in order to make the mass of foreigners suffer."

The Hungarians who request the return of their property in Transylvania or in Czechoslovakia are not claiming a privilege, but what is their due, that is to say, treatment in accordance with general international law.

It might, indeed, suffice that they should be satisfied with requesting the Mixed Tribunals to apply the so-called " obligatory principles" laid down by the Committee of Three. The facts set forth in the documents submitted to these tribunals are sufficient to prove :

(1) that this is a case of a scheme, representing not merely an agrarian reform, but a confiscation ;

(2) that the manner in which the agrarian law is applied leads, *in fact*, to differential treatment to the detriment of the Hungarians and ;

(3) that the said measures would not have been decreed or applied as they have been, if the owners of the properties " liquidated " had not been Hungarians.

But that is not the question with which we are dealing. *What troubles us in this matter is the violation of the sense of right and of justice* of which it is an indication.

What is of prime importance is that—in order to win his case, before an international arbitral tribunal—a litigant must not be forced to yield his right to existing judicial principles for fear of the political influence which his opponent makes use of through an all-powerful political corporation.

What is particularly distressing is this attempt to compel a weak State to renounce, not only an authentic interpretation of a treaty, but the execution of a judgment delivered by a competent tribunal.

Again, it is necessary to be certain that the intervention of the Committee of Three is founded on a jurisdiction which is uncontested and superior to that of the Mixed Arbitral Tribunal.

The governing idea of the Covenant was to make arbitration the principal, indeed the sole method of settling international disputes. The whole text of the Covenant is impregnated with it.

Where the Covenant provides for intervention by the Council of the Assembly with a view to preventing or settling a dispute between States, it is always on the hypothesis that the latter are not already bound by agreement to submit to arbitration proceedings. Such intervention is never provided as a means of paralysing such settlement of a dispute by arbitration, much less as a means of making impossible, *a priori*, the execution of an international judicial sentence.

It appears superfluous to demonstrate this principle by examples. The mere perusal of Articles 11 to 15 of the Covenant is sufficient. Article 11, in particular, is manifestly dominated by the principles laid down in the subsequent articles in greater detail. Article 12, far from anticipating the absurd thesis of two parallel and possibly contradictory solutions (the one by an arbitral judgment and the other by a recommendation or decision of the Council), *expressly* excluded this possibility, by prescribing that the dispute shall be submitted "*either* to arbitration procedure *or* to the examination of the Council," and farther on: ". . . judgment of the Arbitrators *or* Report of the Council." Sound common sense and practical experience suffice, moreover, to show that the Council, before entering into the subject of the merits of the demand of a State, based on Article 11 of the Covenant, must first establish its own jurisdiction.

In this case, was it not the duty of the Council, in view of Article 250 of the Treaty of Trianon, to have confined itself to saying: "The arbitral tribunal of which the judgment as to jurisdiction is attacked, is undoubtedly the one which was formally provided for in Article 239" of the Treaty of Trianon? It is, *a priori*, the sole competent international tribunal in the present case. If this tribunal has declared itself to have jurisdiction, we have no right to see in its regular activity a "circumstance affecting international relations which threatens to disturb international peace," etc., in the sense of Article 11 of the Covenant.

To enter upon the subject respecting Roumania's request for review is, in reality, to accept a request for review, not of the judgment complained of, but of the Treaty of Trianon itself. This Roumanian request aims at the condemnation of "the interference of the Tribunal in the settlement of certain disputes"?

Is it not obvious that this request of Roumania is, in reality, an attempt to secure revision of the Covenant and in particular of Article 13, in which it is stated:

"Amongst those disputes between Members of the League of Nations . . . "which are generally suitable for submission to arbitration" . . . declares to be "*disputes as to the interpretation of a Treaty*"? . . . "The Court of Arbitration to which the case is referred shall be the Court agreed on by the Parties to the dispute *or stipulated in any convention existing between them.*"

Such is the categorical language of the Covenant.

In view of the latter, the Council found that the Mixed Arbitral Tribunal has jurisdiction in all cases of requests presented with a view to obtaining restitution of the property of a Hungarian subject, always on condition that the property of the latter was the subject of one of the measures forbidden in Article 250. Would it not have been better, under the circumstances, if the Council (after having itself established such undoubted facts) had refrained from a statement of principles which, in reality, are not only liable to sow confusion, but which, in our humble opinion—whatever may be the intrinsic value of those principles and the high competence of the authors of the Report—appears to be at the same time in clear contradiction to the spirit of the Covenant and even dangerous for the future of the League of Nations itself.

OSZK

Országos Széchényi Könyvtár

Translated from the German.

THE HUNGARIAN-ROUMANIAN DISPUTE

CONCERNING THE

ROUMANIAN AGRARIAN REFORM

BEFORE THE

Council of the League of Nations.

ARTICLE BY

PROFESSOR ERICH KAUFMANN,

Honorary Professor in Berlin.

Published in "Zeitschrift fuer Ostrecht," December, 1927.

The dispute between Hungary and Roumania concerning the Roumanian Agrarian Reform, with which the Council of the League of Nations and international public opinion has been occupied since 1923, has, since the last session of the Council, entered into a new phase which raises it far beyond the level of a common inter-State dispute. The fundamental principles of international law, the moral and political prestige of the League of Nations and the whole problem of international jurisdiction are under discussion. It is understandable that the minds of people in Geneva and outside Geneva should have become excited. So strong has been this agitation that what happened at Geneva and what was decided there is being considerably over-estimated and often something has been considered as having actually happened when it was only something that might have happened. Some talk very glibly of a complete victory of their cause; others are afraid that they have suffered complete defeat. A dispassionate examination of the facts and a dispassionate appreciation of those facts appears, therefore, to be not only desirable, but necessary.

In its Judgment of January 10th, 1927, the Hungarian-Roumanian Mixed Arbitral Tribunal declared itself to have jurisdiction to take cognisance of a series of complaints made by Hungarian nationals against Roumania and based on Article 250 of the Treaty of Trianon, which were brought before it since 1923 and which dealt with the application of the Roumanian Agrarian Reform Laws to Hungarian nationals. Thereupon the Roumanian Government declared that it would not submit any further documents relating to the merits, in agrarian cases—as it had been ordered to do by the Tribunal—and that it would withdraw its Arbitrator when such cases were in question. At the same time it informed the Council of the League of Nations of its decision, with a statement of its reasons, and referred to Article 11, paragraph 2, of the Covenant of the League of Nations.

The provisions of Article 11, paragraph 2, concede to every Member of the League the right to call the Council's attention, in a friendly fashion, to any circumstance which might influence international relations and, consequently, endanger peace or the good understanding between nations on which peace depends. Article 11 does not state what the Council must or may do in this case. For this there are good reasons. It is the most far-reaching clause of the whole Covenant of the League of Nations; it does not presuppose a breach of the peace, but deals only with the case of circumstances arising which *threaten* to disturb it; it is even sufficient for the good understanding between nations to be disturbed. Therefore each Member of the League of Nations has merely the right to call the attention of the Council, in a

friendly fashion, to such circumstances. Paragraph 1 of Article 11, which deals with war and threat of war, expressly authorises the Council to take appropriate measures for the efficacious safeguarding of international peace in the event of a threat of war. Articles 12-15, which deal with the actual adjustment of differences between Members of the League, likewise delimit, in the same way, the rights and duties of the Courts appealed to, as well as those of the parties to the dispute. Article 11, paragraph 2, certainly does not provide—at any rate primarily—that it should be cited by the disputant parties themselves (in their case Articles 12-15 would apply), but it provides that a third party should draw the attention of the Council, in a friendly fashion, to the circumstances. A menace to peace and good understanding may arise through a State which is not a Member of the League and, according to the system and standpoint of Article 11, paragraph 2, in this connection, it will be seen that, for non-Members also, it is essential that the circumstances should affect international relations in general and peace and good understanding as such, *i.e.* a matter which concerns the League as a whole and is not, so to speak, a local quarrel between two States, which could entail no danger to the peace of nations. Ordinary disputes between Members of the League are dealt with in Articles 12-15. In practice it has, therefore, been usual to cite, in addition to Article 11, paragraph 2, further clauses of the Articles which follow.

It could, therefore, be understood that the Council of the League of Nations should have brought the affair back to the procedure laid down for such party disputes and referred the parties to Articles 12-15, merely confining itself to deliberating as to how any danger to the peace between nations, which might possibly arise out of the affair, could be prevented. Roumania had made no definite proposal and certainly no proposal based on Article 11 had been made by Hungary, who confined herself to requesting the appointment of a substitute Judge in virtue of Article 239 of the Treaty of Trianon. The most that the Council could do under Article 11 was, therefore, to attempt to bring about a direct agreement between the parties and eventually to facilitate that agreement by mediatory proposals.

It is strange that the Rapporteur, Sir Austen Chamberlain, and the Committee of Three, appointed by the Council do not appear to have raised these questions. It was only in the course of the proceedings that they were dealt with, implicitly by Herr Stresemann and explicitly by M. Paul Boncour and, more especially, by Signor Scialoja. M. Paul Boncour proposed that the Council should act not only under Article 11, but also under Article 12 (which was certainly not correct), while Signor Scialoja drew a definite distinction between the possibility of a friendly intervention, which is all that Article 11 provides for, and the settlement of the dispute, accompanied by possible sanctions. Herr Stresemann had already, in a particularly effective manner, drawn a distinction between that part of the Report which contained merely recommendations for an equitable and voluntary solution of the question and that which held out a prospect of sanctions; recommending the adoption of the first part only.

The Committee of Three at first understood its task quite correctly as “a political task of mediation and conciliation,” not “strictly and exclusively juridical” or merely “mechanical.” Having failed in this task, the Committee of Three then exceeded its rôle. The statement that “the Committee found itself, therefore, under the necessity of seeking a solution by other means” aroused misgivings, but led to the further steps taken by it, as well as to its proposals, which are certainly no glorious episode in the history of the League of Nations.

After the Report had just stated that the task before the Committee was not exclusively and strictly a *legal* one, the Committee reports that it had caused certain questions to be examined by eminent *legal* authorities and had arrived at certain definite conclusions as a result!

And what questions! The question of whether the Mixed Arbitral Tribunal really had jurisdiction in the case of claims which they had declared, in a conclusive judgment, to be within their jurisdiction; and, on that question being answered in the affirmative, to what extent and under what conditions it had jurisdiction.

The Committee then, with regard to these questions, went even further than the suggestion made to the Council by the Roumanian Government itself, in virtue of Article 11, paragraph 2. That Government had only asked to be allowed to submit to the Council its reasons for the withdrawal of its Arbitrator. It had put forward no submissions in connection with this, but had merely alleged a usurpation of jurisdiction on the part of the Mixed Arbitral Tribunal. Even if it were admitted that the Council of the League of Nations could not, without an examination of the circumstances, comply with Hungary's request to appoint a substitute Arbitrator, the only question for juridical examination, in this case too, was: has *usurpation of jurisdiction* taken place? That, however, is something totally different from the *question of jurisdiction* which was submitted to the eminent legal authorities.

There are sound reasons for maintaining that this question of jurisdiction is not an absolutely necessary preliminary to the establishment of usurpation of jurisdiction. For it is a fundamental and universally recognised principle, without which international justice could not exist, that every international tribunal should itself decide whether it has jurisdiction, in accordance with the arbitration agreement. To attack that principle would be to shake international justice to its foundations. The question of usurpation of jurisdiction is something quite different, that is to say, the question of *whether an international tribunal has given an obvious and flagrant decision on a matter which could not in any way be considered as being covered by the arbitration agreement*. M. Politis rightly requires that usurpation of jurisdiction "should be certain and incontestable" (*Justice Internationale*, p. 92). It is clearer than daylight that there can be no question whatever of usurpation of jurisdiction in the case of the *extremely careful judgment, given under the presidency of the cool and experienced M. Cedercrantz, which judgment, moreover, renders no decision on the merits of the case, reserves questions of principle for the decision on the merits, and bases its findings on the high authority of the Permanent Court of International Justice at The Hague*. There has, therefore, been no examination of the nature or the motives of the contested judgment of the Mixed Arbitral Tribunal. There can be no question of "*certainty*" and "*incontestability*" of usurpation of jurisdiction, having regard to the Judgment of the Permanent Court of International Justice at The Hague. At the utmost it might be said that the principles on which that Judgment is based are *contestable in spite of the authority of the Court*. The present case is, therefore, precisely one in which an examination could and should have been dispensed with, even if in other cases an examination of the preliminary question of jurisdiction were considered necessary. For nobody would allow that the Judgment of the Court could likewise be regarded as indisputably false. The anonymous

eminent jurists, who were, without doubt, aware of the connection, but were exclusively confronted with certain other questions, can scarcely have been in an enviable position when they undertook their narrowly and strictly limited task.

Further, if the Committee of Three did actually raise the question of jurisdiction solely in relation to the main question of usurpation of jurisdiction (of this the Report gives no indication), it did not, at all events, make use, in this sense, of the reply it received from the Committee of Jurists it had consulted. On the contrary, it apparently avoided, as if on purpose, drawing from that Opinion any conclusions regarding the existence or non-existence of usurpation of jurisdiction. Rather has it simply made the chief principles of the Jurists the basis of its material proposals to the parties and has even suggested sanctions in the event of their non-acceptance.

Finally, if the Committee of Three desired to settle the question on the basis of Article 11, paragraph 2, it ought not to forget the actual subject of the dispute between Hungary and Roumania. The question was not one of the jurisdiction of the Mixed Arbitral Tribunal, but of whether the action taken against Hungarian nationals under the Roumanian Agrarian Law was in conformity with the *acknowledged principles of international law and international equity*. This being so, their task was, first and foremost, not a strictly and narrowly juridical one; it was a task of conciliation from the point of view of peace and good understanding, rather than a matter of how this question should be judged exclusively on the basis of the Treaty of Trianon. It might be argued whether, and to what extent, certain special rules of this Treaty may be said to have general international law as their basis and their so obvious premises, so as to be considered as included, implied and incorporated in the stipulations of the Treaty of Trianon. The fact might even be disregarded that The Hague Court of Justice has given a celebrated Judgment (No. 7) on this question and that the Mixed Arbitral Tribunal has merely conformed to that Judgment. It cannot and must not be forgotten that recourse to the Mixed Arbitral Tribunal is only a detail in the great dispute as to whether Roumania has committed an injustice towards the Hungarians. Even if the Mixed Arbitral Tribunal had declared itself to have no jurisdiction, as had been proposed by the Roumanian Government, this would not have settled the dispute between Hungary and Roumania, for the main question of right and wrong would still have been left open and would have continued, undiminished and with full acuteness, to poison international relations and the good understanding between the two nations.

While the Committee of Three chose to make the question of usurpation of jurisdiction an unnecessarily far-reaching one, it, on the other hand, narrowed its task too much by restricting it to the Treaty of Trianon. This in spite of the fact that it would have been in a position to pass over the juridical interpretation of the Treaty of Trianon—by formulating the question in such a way that it covered only the essential element of the case—to undertake nothing against the authority of the findings of international courts of justice and thereby really to serve the cause of peace. *Either* the question of usurpation of jurisdiction should have been clearly put and plainly answered—in which case, in the event of a negative answer, the Hungarian request for the appointment of a substitute Arbitrator would have to be complied with; in the event of an affirmative answer, it would have to be refused. *Or* an attempt might have been made to evade the painful question altogether—in that case, however, the question of the essential element

in the dispute, that of whether the Roumanian action against the Hungarian owners was right or wrong, would have to be raised and settled. All the complications and misunderstandings that have obscured, rather than cleared up the question, are due to the fact that the Committee of Three, faced with this alternative, did not choose a clear and unambiguous way out.

If Article 11 were relied upon as the essential basis of the matter, it would have been found that this clause would have afforded the greatest possibilities for a friendly and boldly-conceived settlement of the dispute. In spite of this, the Committee of Three carried the matter to legal extremes by calling in jurists and submitting to them highly specialised and technical questions, without, however, drawing from their reply the conclusions which alone would have rendered such questions legitimate. It dealt with the matter as if it were a case of settling disputes according to Article 15. It will be shown later that, even were the dispute to be considered as a party dispute, Article 15 could not apply.

If, on the other hand, the entirely concrete question of the withdrawal of the Arbitrator, is taken, the question of usurpation of jurisdiction ought to have been clearly put and answered, and it ought not to have been forgotten that, in any case, it was, on the part of, Roumania, an attack on a Judgment of an international tribunal.

Passing on to the question of sanctions, the Council fortunately dropped that part of the Report and proposals of the Committee of Three, thanks chiefly to the intervention of Herr Stresemann and Signor Scialoja. This is fortunate, not only from the point of view of the interpretation of Article 11, but also because the proposal of sanctions cannot be regarded as just and impartial. Only if usurpation of jurisdiction were established would it have been possible to refuse to appoint substitute Judges. If the Committee of Three were nevertheless to refuse to appoint substitute Judges in the event of Hungary not submitting to its proposals, it would be a gross injustice towards Hungary. Herr Stresemann quite rightly emphasised the fact that it was not permissible to make the appointment of substitute Judges dependent on the acceptance by Hungary of the proposals of the Council; that would only be possible if the proposals submitted to the parties emanated, not from the Council alone, but from a purely legal tribunal to which the Council could have appealed.

From the formal standpoint, there was no party dispute between Hungary and Roumania, for the Council had been seized of the matter only under Article 11, paragraph 2, of the Covenant of the League of Nations and Article 239 of the Treaty of Trianon. As, however, the affair had actually and materially developed into a party dispute, as a result of the Roumanian allegations and the Hungarian Application, as well as of the confusion of the two questions by the Council itself, it would undoubtedly have been advisable for the Council to have invited the parties to adopt formally the procedure appropriate to the nature of their dispute. Even if the Council did not do this, it would seem somewhat risky for it, to say the least, when dealing with the matter, to ignore completely the principles which should have been applied in a formal party dispute. If, in party disputes, a procedure in accordance with Article 11—which is certainly not appropriate to their peculiar circumstances—were frequently to be adopted, instead of their being settled according to Article 12 *et seq.*, and if the Council were, in such a case, completely to ignore the principles contained in Articles 12-15,

there would be a danger of precisely these rules, perhaps the most important in the Covenant of the League of Nations, becoming illusory and of Article 11, paragraph 2, being abused in order to circumvent Articles 12-15.

Even if Roumania (perhaps not without intention) has evaded the procedure proper to party disputes and Hungary has only invoked Article 239, there is nothing to prevent her from still choosing, later on, the way which offers and is probably for her the more correct. For this reason alone, it would seem appropriate to examine the matter also from the point of view of a party dispute.

Article 12, to be sure, leaves it to the parties—as Mons. Paul Boncour rightly pointed out—to choose whether a dispute which may arise between them shall be submitted either to legal or arbitral procedure, or to examination by the Council. It is also undoubtedly correct that Article 13 does not make legal or arbitral procedure compulsory, even for questions mentioned in paragraph 2, but makes such procedure dependent on the fact that, “in their opinion,” the dispute lends itself to such settlement. Article 13, however, in no way excluded—in fact it intended at least to suggest to the States—the possibility of their previously undertaking to adopt a compulsory arbitral procedure for the settlement of disputes, whether generally, or with regard to particular questions or groups of questions, especially those mentioned in Article 13. In an agreement of this kind the parties would resign the freedom of choice granted to them in principle by Article 12. For this reason, Article 13 states that only those disputes *which are not subject to settlement by arbitration under Article 13* shall be submitted to the Council. If, therefore, a matter has been submitted for judicial decision, then Article 13 *alone* is applicable. Moreover, paragraph 4 of this Article lays down expressly that the Members of the League of Nations shall bind themselves to carry out the award in full good faith. With regard to the jurisdiction of the Council in this case, Article 13, paragraph 4, further states that, in the event of the arbitral award not being carried out, the Council shall prescribe the steps to give effect thereto.

It is incontestable that Hungary would therefore have been—and still is—in a position to invoke Article 13, paragraph 4, in addition to Article 239. In that case, the Council would not be able to evade the duty imposed on it in the last paragraph of that Article.

In fact, I would have no hesitation in saying that Article 13, paragraph 4, is formulated so clearly and is so free from ambiguity, is based so much on the essence of the institution of the League of Nations and on the nature of the case, that the Council of the League ought not to have ignored it. Article 13 does not make the League's duty to ensure the effective carrying out of arbitral awards dependent on the application of one of the parties, but lays it down as its *ex-officio* duty, at least in the sense that, when an arbitral award—even if not concerned with any formal party dispute—is the chief subject of a dispute submitted to the League for decision, that body is bound to take the measures incumbent upon it. In no case would it be permissible for the Council, when applying Article 11, paragraph 2, to proceed as if Article 13, paragraph 4, did not exist, for, in so doing, it would be departing from its duties and functions within the organisation of the League of Nations. Article 11, paragraph 2, which also provides for the intervention of the Council in the event of a mere threat of a disturbance of the peace, cannot be considered to mean that it can be used to set aside Article 13, which is specially intended to serve the cause of peace by developing the institution of Arbitration.

Without explicitly quoting Article 13, Count Apponyi, in his denunciation of the action of the Committee on the fundamental idea of that Article, found some very apposite words to express the eternal truths of right and justice, which were given the Council's closest attention and for which he will be thanked by all to whom the cause of justice is sacred. In so doing, he also rendered a great service to the cause of the League of Nations. Thanks to the deep impression made by his first speech, the League of Nations was spared an irreparable loss of moral and political prestige. If the Council had in fact taken a decision in accordance with the proposals of the Committee of Three, the effect on the cause of international justice would have been catastrophic and it would have been understandable if all the presidents of the Mixed Arbitral Tribunals had resigned their offices in consequence.

What, however, did actually occur, after Count Apponyi's speech had succeeded, by its loud shout of alarm, in preventing the Council of the League of Nations from taking the last fatal plunge into the abyss? It seems to me that the understandable excitement of Count Apponyi and the far-reaching effect of the events of September 17th and 19th, have given rise to considerable over-estimation of the significance of what really happened. This should be borne in mind when criticising and condemning the Council's action and what took place, as is done in this treatise.

In the first place, it should be established that not only has no usurpation of jurisdiction been proved, but that it is even entirely obvious, from what has been said, that, in the opinion, not only of the Council, but also of the Committee of Jurists and of the Rapporteur, it is absolutely certain that usurpation of jurisdiction *has not taken place*.

As has already been stated, the question of usurpation of jurisdiction has never been raised. The only question that was raised was the entirely different one of whether the Jurists of the Rapporteur and the Committee of Three respectively (not those of the Council!) would affirm the jurisdiction of the Mixed Arbitral Tribunal. Even to that question they have not given a plain "Yes" or a plain "No."

The Jurists said :

(1) The jurisdiction of the Roumanian-Hungarian Mixed Arbitral Tribunal is limited to that conferred on it by virtue of Articles 239 and 250 of the Treaty of Trianon.

(2) Article 250 prohibits certain measures against Hungarian property in the ceded territories and also provides for the restitution of property and allows claims to be brought before the Mixed Arbitral Tribunal.

(3) If, in a particular case, the property of a Hungarian has, in consequence of an application of the Roumanian Agrarian Law, been subjected to a measure mentioned in Articles 232 and 250 and the injured party claims restitution, the Mixed Arbitral Tribunal has jurisdiction to award him satisfaction.

(4) The Mixed Arbitral Tribunal has no jurisdiction for claims which arise out of the Agrarian Law as such, unless the conditions set out in (3) above are fulfilled. In that case, the lack of jurisdiction of the Mixed Arbitral Tribunal is not due to the fact that an Agrarian Law is in question.

(5) Since, therefore, the claim of a Hungarian for restitution may come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim arises out of an application of the Agrarian Law, the principles which the Treaty of Trianon imposes on Roumania and Hungary must be determined.

Nobody can object to *these* five items which form the basis of the Jurists' Opinion moreover, their correctness has never been contested.

From them it follows, above all, that there can be no question of accepting completely, or even on principle, the justness of the Roumanian thesis, according to which the Mixed Arbitral Tribunal has no jurisdiction whatever for claims based on the Agrarian Law, since such belong to the exclusive jurisdiction of Roumanian sovereignty. Sir Austen Chamberlain himself pointed this out very distinctly in his speech on the afternoon of September 17th. He said that expropriation by virtue of an Agrarian Law might, under certain circumstances, constitute an act for which the Mixed Arbitral Tribunal might have to award reparations; consequently, the Council cannot admit that the Mixed Arbitral Tribunal has no jurisdiction to take cognisance of disputes of this kind. Therefore, even from the standpoint of Article 13—which, as has been shown, is not applicable—the Roumanian thesis, which endeavoured to emphasise the “*domaine réservé*” of paragraph 8 of that Article, has not been considered relevant. The only thing that must be rejected, according to Sir Austen Chamberlain, is the point of view of the *Hungarian Government* which, as he understood it, struck at the foundations of the Roumanian Agrarian Reform, seriously prejudiced Roumanian sovereignty and excluded Hungarians from the scheme of Agrarian Reform.

But that is stated nowhere in the *verdict of January 10th, 1927*, which, on the contrary, as already pointed out, is very carefully edited and leaves open all questions of differentiation and amount of compensation until the main matter is being discussed. The more striking, therefore, is all the effort which the Committee of Three expends against this verdict. Why did they not wait till the judgment on the facts which was about to deal with the delicate points, had been given, or recommend Roumania to do this? The extreme standpoints in relation to the Agrarian Laws are by no means those of the verdict of 10th January, 1927.

But quite apart from the position which may be taken up towards the three principles regarded by the Jurists as principles of the Treaty of Trianon, and even if it is thought that they do not agree with those of the Mixed Arbitral Tribunal, it is not possible to deduce from them that such disagreement means an *excès de pouvoir*. Nor does the speech of Chamberlain, referred to above, say that such is the case. He certainly says that, in his opinion, the whole question turns on the point whether *excès de pouvoir* has been committed, but he never answers this question in the affirmative. Nor could he have done so according to the opinion of the expert Jurists. But even if a larger discrepancy between the Jurists' points and the verdict were admitted, and even if the Council had accepted the standpoint of the legal experts as correct and its own, there would only follow from this, that the Tribunal had committed an *error of judgment in the opinion of the Council*. *Erreur judiciaire* even in questions of jurisdiction is something *toto cælo* different from *excès de pouvoir*. On this point neither the Council nor the legal experts consulted by the Rapporteur can have any doubt.

Since the proposals for sanctions made by the Committee of Three was not accepted, and it was made quite plain that the points of the legal experts were only intended to be taken as a friendly proposal for an amicable agreement between the parties and since all the steps to be taken in case of disagreement should be reserved for future considerations, it has been made particularly clear that, at all events, the *Council as such* had not confirmed the existence of an *excès de pouvoir*. The Council accepted the points of the Jurists as a basis for agreement only and as a proposal only. Several members pointed this out with all possible distinctness: Scialoja would otherwise have demanded a searching discussion of every sentence owing to his doubt about certain points of the Jurists. Loudon emphasised his view that acceptance did not mean taking up a position regarding the correctness of the statements; they were only intended to form a basis for discussion between the parties. Urrutria pointed out that the points of the legal experts were only intended to serve as suggestions for the parties, the interpretation of Treaties being a matter of law. Stresemann and Scialoja expressly reserved their right to revert, eventually on a later occasion, to the submission of the dispute to the Court at The Hague.

Plainly there can be no question of establishing an *excès de pouvoir*. Indeed this would be a question of such importance, that the Council could never answer it in the affirmative without an Opinion of the Permanent Court of International Justice. If Article 14 of the Covenant of the League of Nations, which provides for the obtaining of such a legal Opinion, has any meaning at all, the Council can never dispense with such procedure, even if it should happen that in a similar position it were inclined unanimously to assume the existence of an *excès de pouvoir*. In the case under discussion, however, there is so little unanimity that, with the exception of Roumania, *excès de pouvoir* was asserted by nobody, nor could it be asserted after the Opinion of the legal experts. In the absence of an *excès de pouvoir* the Council cannot omit to ensure that the verdict of 10th January, 1927, becomes effective according to Article 13, para. 4 last sentence, should Roumania continue to refuse to appoint a substitute Arbitrator.

In comparison with the above and in accordance with what has been stated above, the question of what the famous statements of the famous Jurists really say and whether they are correct, entirely loses its importance. This should be emphasized to those who, excited by the whole procedure of the Council, see in the three statements of the Jurists a complete abandonment of the old tried doctrine and practice, as well as to those who, considerably more clever in their tactics, maintain that they have gained a complete victory by them. As already mentioned, Chamberlain himself pointed out with considerable emphasis, that the Jurists did not side with the views of either of the extremists. The more carefully they are studied, the more one inclines to the belief that they are the result of a compromise to find a formula. Confronted with definite questions on the application of their three principles, the unanimity of the Jurists would probably disappear quickly. In fact the three principles were only intended to serve, so as to say, as three pegs for staking out a space within the limits of which the parties were to come to an agreement.

Considering the three principles themselves—at first place without the short explanations and reasons attached to them—one cannot but agree with them completely.

(1) The rules regulating peace after the War 1914-1918, do not exclude the application of a general agrarian reform scheme to Hungarian subjects (including the Optants).

(2) No inequality must exist between Hungary and Roumania, either in the wording of the law, nor in the way of its application.

(3) The words "saisie" and "liquidation" used in Article 250 which refers solely to the territories ceded by Hungary, only refer to measures taken in the territories in question against the property of a Hungarian subject and because the owner is a Hungarian subject.

More especially since in principle 1 a strong accent has been put on to the expression "general" agrarian reform scheme nobody will dream of criticizing it.

The same holds good for principle 2.

Regarding the 3rd principle one need not entertain any scruples concerning it as it stands, even if it is compared with Judgment No. 7 of the Court. In this Judgment, too, The Hague Court of Justice says, that by no means does it deny, that the liquidation regulations made by the Treaty of Versailles and the expropriation measures themselves allowed by the Convention of Geneva have in view German property as such (p. 32). And in Judgment No. 8, especially on its page 27, the same idea is expressed again: the measures based on the Polish Annulment Law did really not come within the province of the expropriations and liquidations regulated in that part of the Convention of Geneva. Probably the Jurists had these Hague statements in mind.

But in its Judgment No. 7 the Court had added to the words just quoted, that it could not attach to the thesis such importance and such consequence as did the Polish Government. And the quotation from Verdict No. 8 too has the mental connection that "although" the Court acknowledges these theses, nevertheless the Polish measures are opposed to the liquidation rules. It appears that the Jurists do not accept this final conclusion although they do not reject it expressly, which would have been to be expected if they had desired to depart, after a certain point, from the Judgment of the Court and that of the Mixed Arbitration Tribunal based on it.

When explaining principle 1 the Jurists say, still in complete agreement with the Court: The interdiction of detention and liquidation laid down in Article 250 cannot limit Roumania's freedom of action beyond what its freedom of action would have been, if the two Articles 232 and 250 had not existed. Quite so: without Articles 232 and 250 Roumanian liberty of action in an agrarian reform would only be limited by the rules of common international law. The same thing is said by the Court. And quite correctly the Jurists proceed: assuming that neither Article 232 nor Article 250 were contained in the Treaty, Roumania would have the right to make an agrarian law such as she considers fit for the requirements of her people, always *with the reserve of the obligations arising out of the statutes of international law*; but no rule exists in international law which excludes Hungary from a *general* agrarian reform scheme. All this agrees completely with what The Hague Court of Justice and, following it, the Mixed Arbitration Tribunal has said. Supposing we assume the non-existence of the right of liquidation granted in Article 232 and also of the interdiction contained in Article 250, to make use of such right in the territories ceded, we stand again on the ground of common international law. By cancel-

ling an *extraordinary* faculty a reversion takes place to the *normal* legal position which would have existed without the grant of such extraordinary rights. In this simple sequence of ideas the explanations to the first principle agree completely with The Hague Tribunal.

The short explanations to the third principle cannot be understood so easily, neither in themselves, nor in their relation to the explanations to the first principle. The first sentence of the explanations to principle three, dealing with the meaning of the "words" *saisie* and liquidation, says that the right of liquidation reserved in Article 232 refers to the property of a Hungarian as a subject of an ex-enemy country. The Court had said that too. The second sentence says that it is not sufficient that such measures entail the confiscation of Hungarian property and that the owner be a Hungarian subject. Here again no objection can be raised, neither when one considers the right of liquidation as such, nor when one considers special measures which as the Court says in Judgment No. 8, although going beyond the normal scope of the liquidation rights, may yet be in contradiction with them. Nor do The Hague Judgments consider it sufficient, that measures are applied to ex-enemy property in general, to establish a violation of the liquidation rules, but the measures must in addition be in contradiction to the principles of common international law in regard to the treatment of foreigners and the protection of acquired rights. Sentence 3 adds that it (*i.e.* the right granted under Article 232) must be, further, a measure, which would not have been decreed, or which would not have been applied in the way it actually was, if the owner of the property had not been a Hungarian. It is really only this last sentence which causes difficulties of interpretation.

Does it refer only to the "jeu normal" of the right to liquidate? Does it exclude every *argumentum a fortiori*, every argument of the kind used by the Court, viz., that this *normal* application of the extraordinary right is the *only* extraordinary right allowed to Roumania, which runs contrary to common international law on the position of foreigners and the respect for rights acquired. Does it refer mainly to Article 232, with which alone it deals explicitly, or also to Article 250, which it does not mention and which forbids again the exercise of this extraordinary right? Or does what is contained in the explanations to the first principle apply rather to Article 250, viz., that its sense is, to re-establish common international law with regard to foreigners and respect for acquired rights.

In addition to such doubts about the meaning and the range of this statement, which are difficult to answer, there must be added more especially some further ones. Do the three principles refer to the question of *restitution* only or also to that of *reparation*?

It appears that they refer to the question of restitution only. In the five statements already enumerated above, which form the *foundation* for the three principles of the Treaty of Trianon and the questions under discussion, *restitution only* is mentioned, viz., in statements 2, 3 and 5, *i.e.* everywhere where a claim for compensation should have been mentioned as such, if it had been desired to include this question. Furthermore, when explaining the first principle, which is really the preamble and the basis of the other two principles, it is explicitly stated in a separate paragraph, that the question of reparation does not enter here, whatever its importance may be from other points of view.

It is important to point out that this question was reserved just with reference to the first principle, which deals with the application of the *general Agrarian Reform* scheme. If the supposition is correct that the question is altogether only one of restitution, it would follow that principles two and three also refer to the question of restitution only, *i.e. to restitute only in case of differentiation, but to leave the question of reparation open*. This supposition is confirmed by paragraph 2 of the explanations to the second principle. In it is said: the interdiction that Hungarian subjects may own land in the territories ceded, would, even if it were extended to all foreigners, run counter to the obligation of Roumania, to allow the Optants to keep their lands; but this question has nothing to do with Article 250. As the accent rests on the word "keep," it appears that here too the starting point was that the question of compensation was to be left open.

In the course of the discussion on the three principles within the Council the question of compensation was touched upon and its treatment by the legal experts was called unclear. In the morning Session of 19th September Count Apponyi pointed out: the compensation question and its solution, decided in a way the whole question; the Hungarians had never denied that expropriation in the public interest was permissible; but precisely for them the compensation question was of decisive importance; the Opinion of the Jurists contained a reservation which excluded complete clearness; this lack of clearness might constitute the only reason for him to reconcile himself with the text. And in a later speech Count Apponyi said expressly that Hungary was entirely desirous to consider all the social problems contained in the problem; nobody would think of taking away the allotments of the small land owners. Expressions, indeed, well worth attention, but which, strange to say, nobody seems to have noticed.

Even if there do exist doubts, how the question of compensation is to be judged according to the rules for liquidation laid down by the *Treaty of Trianon*—the interpretation of *these* rules only was submitted to the Jurists, and they worked on them alone—there exist no doubts, and none have been expressed by the Jurists in any way, that *common international law* on the position of foreigners and the respect for acquired rights, does under certain circumstances impose the duty of compensation upon a State taking these measures, even if there is no differentiation of legal or other measures. We can be sure that no such doubts existed in their minds. This principle has been so strongly attested by the theory of international law since Vattel, by the oldest and the latest practice (especially with regard to the Roumanian Agrarian Reform) by international jurisdiction, and only quite lately by the International Law Association and the Institute de Droit International, that nobody can deny it legitimately.

It must be pointed out again and again, that at the bottom the whole dispute before the Mixed Arbitration Tribunal and before the Council was exclusively a question of interpretation, *viz., whether and to what extent these universally admitted and unquestioned principles of international law, can be regarded as an integral and consequently not expressly referred to constituent part of the rules covering liquidation in the peace treaties*. The Court answered this question in the affirmative, not only for such cases in which the allied state in question is permitted to liquidate, but also for those in which this extraordinary right was again withdrawn. Apparently the Jurists of the Committee of Three affirm them too in case where *liquidation is forbidden* as in principle 1—and *that case alone is being discussed here*—whilst they appear to negative it in principles 2 and 3 for cases where *liquidation is permitted*.

One may be as firmly convinced, as I am, that the standpoint of The Hague Tribunal is the correct one, and yet not able to understand, how any answer to this question of interpretation, which may be called a delicate one, may permit entertaining any possible thought even of *exces de pouvoir*. And one cannot understand why it has not struck the Committee of Three to leave this question of interpretation in abeyance and advise the parties to set it aside in the friendly settlement of their dispute and to take their stand on the basis of common international law, whether this is to be considered as implied in the liquidation rules or as being outside or parallel with it. Had this manner been adopted, the fateful attack on international jurisdiction could have been avoided; it would not have been necessary to consider as a threat to Hungary, which was loyal to the Judgment, the sanction of stopping the Court, and to grant to Roumania, which was hostile to the Judgment a prize for its behaviour. For even if the dispute about the correctness of the Judgment of 10th January, 1927, had been settled in favour of Roumania, the dispute between Hungary and Roumania on the basis of common international law would yet have to begin anew and to occupy the attention of the Council, which would hardly be able to settle it without an Opinion from the Permanent International Court of Justice.

Yet even if both parties accept the basis of the three principles, the dispute between the States is by no means settled. Extraordinarily much depends on how the "*Differentiality*," as formulated in the second principle is interpreted. Is the Roumanian Agrarian Law a differential one in the sense of the second principle?

In explanation of this principle, the Jurists say: Any rule contained in a *general agrarian reform scheme*, which would create expressly a separate position for Hungarians, unfavourable to them and to the advantage of Roumanians or subjects of other States, in general, or which would necessarily lead to such a *result*, would justify the assumption of veiled liquidation or confiscation in contradiction to Article 250, and would empower the Court of Arbitration to take the matter up.

I myself have no doubt that a case of differentiality does exist in connection with the Roumanian Agrarian Law, now under consideration. It is by no means a question of the *general Agrarian reform law*, but of a *special law* for the territories ceded by Hungary, consequently in no case of a *general agrarian reform scheme*, of which alone the Jurists are talking. Why such a separate law for just those territories, where as far as Hungarian property is concerned, the Roumanian State which acquires them is distinctly forbidden to apply that extraordinary right of liquidation otherwise granted to it. There is only one explanation, viz., that in these districts there is, naturally, much Hungarian property, and Roumania wanted to circumvent the interdiction of liquidation.

But this special Transylvanian Agrarian Law is no agrarian law pure and simple, it is no agrarian reform scheme specially designed for this territory. It allows expropriation for all sorts of other purposes, for which expropriation would be inadmissible according to the common law of expropriation. And such purposes have been extended considerably beyond the limits in the general Roumanian Agrarian Law. In addition they have been made even severer for this territory in particular by addenda and by-laws regarding their application. Why?

The size up to which the estates may be expropriated has been fixed differently for the formerly Hungarian territories than in the

general Roumanian Agrarian Law. In the territories ceded by Hungary even small holdings may be expropriated. Why just here? Everybody knows that it was precisely old Roumania that suffered from unrest among the peasants and that in its large landed estates were much more plentiful, than in the formerly Hungarian territory, which had already passed through an agrarian reform. Why this increased severity just here?

The law dealing with complete expropriation of all those who were absent, even if only temporarily, during the Roumanian occupation, which is practically almost solely aimed against Hungary, is still further expanded in the special law for the territories ceded by Hungary and its application is severer than in Old-Roumania. Why?

Let other matters be passed over in silence.

The argument that the agrarian legislation was intended to check Bolshevism, in order to protect Middle and Western Europe from it, is anything but convincing. Apart from the fact that it has always been regarded as a doubtful measure to drive out the devil by Beelzebub, it cannot be understood why Roumania should consider the severest Bolshevistic measures necessary just in her most Western territories, which are farthest removed from Bolshevism. Again the question suggests itself, why?

If the Roumanian Agrarian Law for the territories ceded by Hungary is considered in the light of such questions, the only answer possible appears to be that the Roumanian law must be regarded as differential. It creates a separate position for Hungarians to their disadvantage and to the advantage of Roumania. With reference to the making use of the method of argumentation applied by the commission of Jurists, it is only necessary to put the question, *whether Roumania would have passed this special law for the territories formerly Hungarian if Article 250 had left to her the right of liquidation which she possesses in principle for the ceded territories also*, to be quite certain that the answer would be: Roumania would not have made this law. Under no circumstances can it be regarded as a *general* scheme for an *agrarian reform*.

Differentiality, of which the Jurist's Opinion speaks, need not necessarily mean that in each single measure of expropriation it must be proved, that just it has been taken because the affected party is a Hungarian subject. Laws as such may be differential and they are so, if their rules affect Roumania's own subjects as well as the subjects of other States. It is sufficient if the law puts Hungarian subjects in an unmistakable manner at a disadvantage compared with Roumanians and other foreigners. That is certainly the opinion of the Commission of Jurists too; for in their explanations both to the second and the third principle they emphasized the point, that under such measures not only individual applications of a law are to be understood, but also that the laws themselves may be differential.

In the explanation to the second principle it is pointed out that differentiality may also consist in treating Hungarian subjects differently from other foreign subjects. That too is the case here. For of course it can make no difference whether payment in excess of the normal amount fixed in the law for expropriation is provided for in the law itself or whether it is made in accordance with separate arrangements outside the law. Count Apponyi remarked that up to 40 per cent. of

the value of the lands expropriated has been paid by way of compensation to English and French subjects, whilst the law allows compensation of about 1 per cent. of the value only. This fact also should suffice to answer in the affirmative the question as to whether the Roumanian Government has treated the Hungarians differentially.

If a settlement on principle of the whole dispute on the basis of the Opinion of the Jurists is to be effected, it is necessary before all else to clear up the question of differentiability; for this is just the point upon which the views of the Roumanian appear to differ completely from those of the Hungarian Government.

As the question has been handled up to now, one cannot rid one's self of the impression that the importance of the question about the importance of differentiability for the liquidation rules has been greatly over-estimated. The rules of common international law too, which deal with the treatment of foreigners, are based in principle on the axiom that a foreigner can only demand treatment equal to that of the State's own subject. In such rare cases only in which the treatment of the State's own subject does not conform to a certain international standard, is it a rule that the foreigner is not to be treated according to national law, but in accordance with such international standard. Therefore, even if one presumes for the liquidation rules of the peace treaties that in principle only measures of a differential nature were to be meant, it is at the least not very far-fetched, to apply the said axiom of common international law regarding foreigners to them too *per analogiam* or on the basis of an *argumentum a fortiori*. Viewed from this angle only such extraordinary and special measures of a State, by which he fails to comply with the internationally presumed and internationally demanded standards, would have to be regarded as equivalent to differential, whilst in common law, as well as in the law dealing with foreigners, differential measures only are considered.

Regarded from this point of view too, it becomes evident once more that the dispute to which alone has occupied so far the Council of the League of Nations and the Jurists' commission of the Committee of Three, constitutes at bottom the question as to whether it is necessary to interpret the liquidation rules in a very narrow sense, or whether it is permissible to make a deduction *ad analogiam* from the doctrines of law dealing with foreigners, which too is based on differentiability; *whether the idea of an international standard is not so fundamentally important and a matter of course, that it should apply to the liquidation rules too.* And even this question would retire completely into the background as soon as the dispute is considered altogether from the points of view of common international law, which—about this there can be no doubt—must be the only authoritative one for a genuine settlement of the dispute.

If, finally, the question is asked whether the principles of interpretation on which The Hague Permanent Court of International Justice has based its Judgments No. 7 and 8, have suffered in any way in their authority by what has happened at Geneva, it must, undoubtedly, be denied. The discrepancy between the Opinion of the commission of Jurists and The Hague Judgment is by no means as great as has been made out. But so far as discrepancies do exist, it is evident that the authority of The Hague Tribunal cannot be shaken by a casual piece of work, even if it was done by ever so important legal advisers of the Council of the League of Nations.

Nobody will dream of under-estimating the importance of form and procedure in jurisprudence: any verdict obtained through regular procedure where both parties have the right of contradiction and which has been invested with all imaginable guarantees will have a higher authority, even if its findings should be open to dispute, than what is said by a casual commission of anonymous members sitting *in camera*, without regular procedure, without a most accurate examination of the documents and without hearing the pleadings of the parties. According to the legal principles of all civilized States, only a Judgment, *i.e.* an act of authority can be recognized as possessing binding power when it has been delivered by a legal authority invested with all guarantees of independence and procedure under the co-operation of the parties. Even the unanimity of the commission of Jurists, on which Chamberlain thought it necessary to lay special stress, will be no support for the authority of its findings. On the contrary it is precisely this unanimity which indicates that compromises were necessary when laying down the three principles, certainly when formulating them, probably also on the matter itself. The doubts and the confusion pointed out above and which appear when reading the principles impartially indicate with special clearness the existence of such compromises. It must, therefore, come as a great surprise, when certain parties maintain that the Judgment of the Permanent Court of International Justice may be considered as definitely set aside by the work done at Geneva.

From whatever aspect these matters may be regarded, the difference between what has been said by the Jurists and what is said in the Judgment of The Hague Tribunal, is not so great as to make a solution of the *whole* group of questions appear impossible, when the Hungarian-Roumanian dispute is carried back to its essential origin. For this purpose, however, it would be necessary to approach the whole dispute in a manner different to that of the Committee of Three—up to now. Since there remain in this case especially a sufficient number of important and fundamentally controversial questions of law, the Council of the League of Nations will hardly be able to reach a peaceful solution considering the difference in principle between the Roumanian and Hungarian views, without having recourse to the expert Opinion of a great and authoritative judicial body. Article 17 of the Covenant of the League of Nations states which body is the proper one in such cases. To many it will appear that only such a treatment of the question can remove the extremely painful impressions which the procedure of the Committee of Three has left upon public opinion.

Translated from the German.

From the "Neue Freie Presse" of 2 December, 1927.

THE AGRARIAN DISPUTE BETWEEN HUNGARY AND ROUMANIA

By

Dr. JOSEF. L. KUNZ,

Lecturer on International Law at the University of Vienna.

A comparatively new item on the agenda of the December Session of the Council of the League of Nations is the dispute between Hungary and Roumania. This conflict has its origin in the confiscation without compensation of lands owned by Hungarian optants in Transylvania in consequence of the agrarian reform laws which Roumania passed for Transylvania. This is the Garoslidh Agrarian Reform Law for Transylvania, Banat and Marmaros published in the "Monitorul Oficial," No. 93, of 30th July, 1921, that is four days after the Peace Treaty of Trianon became effective. This law is considerably less favourable than the Agrarian Reform Law for Old Roumania in its object, as it extends the idea of absenteeism, it reduces the area to which appropriation cannot be applied and also owing to the manner in which it fixes compensation for the Transylvanian landowners, the larger number of whom are Hungarians, amongst them a considerable number of Hungarian optants.

The dispute between Hungary and Roumania had begun already whilst the Peace Conference was still sitting and had led to an *appeal to the Council of the League of Nations* by Hungary in 1923. Later Hungarian subjects made use of the rights granted to them by Article 250, para. 3, of the Treaty of Trianon, and appealed to the Hungarian-Roumanian Mixed Arbitral Tribunal, established by Article 239 of the Treaty of Trianon, and sitting at Paris. From this Mixed Arbitral Tribunal they demanded full compensation for their lands, confiscated by Roumania in consequence of the Roumanian Agrarian Reform Law. For this law provides for a compensation of about 1 per cent. whereas the seizure of 99 per cent. means confiscation without compensation. Roumania entered the plea of no jurisdiction, mainly on the ground that the application of the Agrarian Reform Law to Hungarian optants did not constitute a *saisié ou liquidation* in the sense of Article 250, para. 1, of the Treaty of Trianon. The Mixed Arbitral Tribunal, whose neutral President is a Swede, V. Cedercrantz, formerly minister plenipotentiary, in its verdict of 20th January, 1927, dismissed the *plea of no jurisdiction* in 22 cases, giving detailed reasons for its finding, declared that it had jurisdiction and gave to Roumania a time limit for submitting her answer to the suit served against her regarding the *Meritum causæ*. Roumania's reply to this defeat on the plea of jurisdiction was that she recalled her Arbitrator from all further agrarian reform suits at the Mixed Arbitral Tribunal and by doing this rendered any further procedure of the Tribunal in such cases impossible. Soon afterwards Roumania referred the whole matter to the Council of the League of Nations under Article 11 of the Covenant of the League of Nations, which says (para. 2) that "every Member of the League of

Nations has the right to draw the attention of the Council in a friendly way to any circumstance which may influence international relations and therefore threatens to disturb the peace or the friendly relations between the nations." After this Hungary asked the Council of the League of Nations to appoint two substitutes for the Hungarian-Roumanian Mixed Arbitral Tribunal, as per Article 239 of the Treaty of Trianon.

The first discussion of the matter took place at the March Session, 1927, of the Council of the League of Nations. Adopting the proposal of the German Minister for Foreign Affairs, Dr. Stresemann, who was at that time President, Sir Austen Chamberlain, British Secretary of State for Foreign Affairs, representing Great Britain at the Council of the League of Nations, was appointed referee, and at his request the Chilean Ambassador, M. Villegas, and the representative of Japan were appointed to assist him. These three gentlemen formed the "Comité des trois" of the Council for the question under consideration. However, the question was adjourned in March and also at the June Session of 1927.

At the 47th Session of the Council of the League of Nations Sir Austen Chamberlain submitted his report as spokesman of the "Comité des trois." The report consists of a fairly long introduction dealing with the history of the dispute, and part 2 contains the actual proposal made. Sir Austen mentions that he consulted prominent Jurists and that he had laid down three principles, based on their opinion, which principles "the acceptance of the Treaty of Trianon has rendered compulsory for Roumania and Hungary," viz. : (1) The Peace Treaties do not exclude the application of a general Agrarian Reform to Hungarian optants, *provided the rules of international law are not violated*. There does not exist any international rule by which Hungarian subjects are excluded from a general Agrarian Reform. The question of compensation, whatever its importance may be from other points of view, does not enter into consideration at present. (La question d'indemnité, quelle que puisse être sans importance à d'autres point de vue, n'entre pas ici en ligne de compte); (2) Neither the text nor the application of the Agrarian Reform Law is allowed to make any difference whatever between Hungary and Roumania; (3) The words of Article 250 of the Treaty of Trianon, "saisie ou liquidation," apply only to the property of a Hungarian subject in the territories ceded, in so far as they apply to him just because he is a Hungarian subject.

Sir Austen's proposal to the Council in his report is to invite both parties to accept his three principles and to ask Roumania to re-appoint her Arbitrator on the Mixed Arbitral Tribunal.

The *third* part of Sir Austen's report proposes *sanctions in case of non-acceptance*. These are: In case Hungary should refuse, the Council will not appoint the substitute Arbitrators, referred to in Article 239 of the Treaty of Trianon; in case Roumania should refuse the Council will in any case ensure that the Mixed Arbitral Tribunal continues to operate; in case both parties refuse, the Council will have exhausted the duty laid upon it by Article 11 of the Covenant of the League of Nations.

Count Albert Apponyi (Hungary) and the Roumanian Minister for Foreign Affairs, M. Titulescu, delivered several lengthy speeches explaining the views of their respective Governments. In the discussions which followed valuable contributions were made by the delegates of

France (Paul Boncour), Germany (Dr. Stresemann), Italy (M. Scialoja), Holland (M. Loudon), by Sir Austen Chamberlain as referee, and M. Villegas (Chili), member of the "Comité des trois" and President of the Council. The result was that the proposal of M. Villegas was accepted by the members of the Council, excepting Hungary and Roumania, but *without* the sanctions. Both parties, Hungary and Roumania, were asked to inform the Council of their definite decision during the approaching December Session.

My object in writing the following is to analyse the attempted procedure of the Council of the League of Nations, and especially the action of the referee, Sir Austen Chamberlain, in relation to international law.

Let us first discuss the three points, which Sir Austen Chamberlain recommends for acceptance to the parties, on the strength of the opinion of the Jurists, ostensibly because they arise out of the Peace Treaty of Trianon. Points 2 and 3 demand, as a premise, a "saisie ou liquidation" effected by the Agrarian Reform Law, a proof of *differentiation* in the text of the law or application of the law. To this is to be said: the whole Transylvanian Agrarian Reform Law is much severer and much more radical than the Old Roumanian one. Of course, differential treatment is a sure criterion for measures prohibited by Article 250 of the Treaty of Trianon. Yet really non-differential treatment is no proof that the case is one of "saisie ou liquidation." The judgment practise of the numerous Tribunaux Arbitraux Mixtes shows that differentiation is no premise for "saisie ou liquidation." This is proved, for instance, by the famous Judgment No. 7 of the Permanent Court of International Justice. "L'expropriation sans une indemnité est certainement contraire au titre III de la Convention, or une mesure défendue ne saurait devenir légitime au regard de cet instrument du fait que l'Etat l'applique aussi à ses propres ressortissants." (Proof that differentiation is not an essential fact for the conception of liquidation can be found in the excellent work by Richard Fuchs: "Die Grundsätze des Versailler Vertrages über die Liquidation," Berlin, C. Heymann, 1927, pages 33 and 34).

Point 1 states that, in general, Roumania is not prevented by the Peace Treaty to carry out a general Agrarian Reform, even where Hungarian subjects are concerned, provided she does not violate her obligations under common international law. That is undoubtedly correct, but nobody denies it. The real question is whether the obligations of common and special international law (*i.e.* Article 250 of the Treaty of Trianon) have been met. It is a positive rule of common international law that no State, in whatever manner it may deal with its own subjects, is allowed to confiscate the property of alien subjects, but can only expropriate. The conception of expropriation, however, includes "full and adequate compensation." It is a point for very serious consideration that Roumania refuses to give full and adequate compensation to the Hungarian optants, who are specially protected by the Treaty of Trianon, and yet provides considerable amounts in her Budget for the compensation of aliens expropriated in consequence of her Agrarian Reform Laws, but who are subjects of the "Entente" States.

Translated from the German.

A THEORY ENDANGERING THE INDEPENDENCE OF INTERNATIONAL JURISDICTION

by

Baron JULIUS WLASSICS

*(President of the Court of Administration and of the
Upper Chamber).*

("PESTER-LLOYD," 19th February, 1928.)

None of us have forgotten the highly important speech made by Count Albert Apponyi before the Council of the League of Nations in which he took up his position against the opinion of the jurists so surprisingly consulted, an opinion through which it was intended to induce the Council of the League of Nations to issue instructions, infringing its judicial independence, to the Mixed Arbitral Tribunal dealing with the case of the Hungarian-Roumanian optants. The truth contained in this speech and its powerful arguments have aroused a mighty echo throughout the whole civilized world. The most important representatives of international law have raised their voices to condemn, decisively, the mistaken position taken up by the jurists of the League of Nations. They all saw that in this case the fate of the conception of Arbitration Courts, as such, was at stake. The fundamental principles of international jurisdiction must give way if such an attempt could meet with success, and in this case it would have been an end of the ideal which would represent the realization of compulsory arbitration in the field of human progress and real civilization. This view appeared in all the pronouncements of the most prominent exponents of international law, and it might have been expected that such a backsliding would have been followed by better insight, the insight for retracing the rash step and cancelling the absurd view that the Council of the League of Nations might, in the sphere of judicature, give judicial instructions to the International Courts. A reversal might have been expected of the conception which would make politics the master in the realm of international jurisprudence.

What happened was precisely the opposite. Now some of the international jurists are worrying their brains how to create a new theory and support it with apparently scientific arguments, according to which international jurisdiction, procedure and even the verdict would be placed under the control of the League of Nations. That otherwise so excellent international jurist, Mr. Politis, appears in the field to expound with much unctiousness in French and German technical periodicals that the Council of the League of Nations is at all times entitled to engage in questions which threaten the peace or the good relations between the peoples, on which peace is based. With such a foundation the League of Nations would be able to arrest the procedure or the verdict itself at any time, even when an International Court has

taken up a case. This theory Mr. Politis would like to graft on to Article 11 of the Covenant of the League of Nations. Also he has, already, won over adherents to his theory, which I was forced to brand as dangerous to the independence of international jurisdiction in the heading of these lines. Indeed, this theory is dangerous to such an extent that we must oppose it in the strongest possible manner, not only in the world of letters but also in the great international organisations. I am so convinced of the impossibility of this theory that for me it is nothing less than a humiliation to oppose it with arguments. The fundamental idea of the theory undermines judicial independence. It aims at subjecting jurisdiction to the control of a political body, and that means such a shattering of all ideas of jurisdiction that any commentary must appear superfluous. This attack on the independence of jurisdiction represents one of the most crass errors of the human mind. For if such a theory were valid hardly a dispute of any importance between the peoples could be imagined which could not be fitted into the framework of Article 11, and it would always be possible to ferret out some point, even in judicial questions affecting the most important interests, concerning which it could be contended that it disturbs the peace or endangers the good relations between the nations. In this fashion the whole system of international law would become illusory and every State would have to consider the question whether it is really worth while to enter into Arbitration Agreements, if it is possible to drag questions of law over into the political field.

Mr. Politis and his colleagues announce that the Council of the League of Nations may interfere not only in the procedure of the Mixed Arbitral Tribunals, but even in the execution of a verdict already pronounced. Nobody will object, on principle, that the Council of the League of Nations may intervene after the verdict has been given, in respect of its execution, at the desire of the parties; that depends entirely on the nature of the case. The State which has won the case may make concessions even after the verdict, and examples show that such cases have occurred. At the stage, however, when a State is seeking justice, and its case is before the Court, nobody, except the independent Court, is entitled to interfere. The party which believes itself to have suffered derogation from its rights appeals with confidence to the judge appointed for it by the international Treaty. Such confidence would, however, be shaken to its very foundations if the Court were obliged to obey bodies of a political character. And when such confidence has once been shaken, nothing in the world will be able to check the collapse of international order. Compulsory international jurisdiction would constitute the most surely effective and the safest institution in the sphere of international relations. And anybody who desires to maintain international solidarity of the nations in the interests of permanent peace must range himself in favour of the inviolability of compulsory international jurisdiction and the political independence of International Courts of Justice. He must reject the theory of Mr. Politis with all possible energy. I have no doubt that the League of Nations Union and the Inter-Parliamentary Union will not fail in this respect to fulfil the duties, which, in my opinion, cannot be evaded, at their Meetings this year.

The experts, however, at present engaged under commission of the League of Nations, on the codification of the new international law will, it is to be hoped, take no notice of the theory of Mr. Politis

and his colleagues. And when the science of international law comes to deal with the question of Mixed Arbitral Tribunals, all the real, unembarrassed, scientific influences cannot fail to do their utmost to ensure that the system of Mixed Arbitral Tribunals, even more than is at present the case, shall be provided with all guarantees of judiciary independence, and that material pledges are created which will prevent the Council of the League of Nations from withdrawing, under any circumstances, cases which have been submitted to an international judge from the province of international jurisdiction. Even now several of the experts in the science of international law are considering the question whether it would not be advisable to establish the jurisdiction of the Permanent Court of International Justice at the Hague in the procedure of Mixed Tribunals and of the Courts in general, in the case of the so-called "usurpation of jurisdiction." I am certain that our great international organization will not overlook this question. It is, however, not my desire to enter into polemics with Mr. Politis, who, with his pseudo-scientific theory, desires to serve the Roumanian interests in the Hungarian-Roumanian optants dispute. If he would refer back to his own valuable studies on international law, he will find in them the most convincing refutation of those theses which he has expounded as his new theory, in a new scientific periodical which has recently made its appearance.

OSZK

Országos Széchényi Könyvtár

Translated from the German.

DISPUTES AS TO JURISDICTION IN INTERNATIONAL ARBITRATION.

A Contribution to the Discussion on the Agrarian Case
between Hungary and Roumania.

BY

Professor Dr. GEZA v. MAGYARY,
Member of the Institute of International Law, Budapest.

Although international arbitration can point to notable progress of recent times, it still suffers from serious imperfections, the removal of which is one of the most important tasks to be performed. A striking proof of this is furnished by the controversy between Hungary and Roumania with regard to the jurisdiction of the International Mixed Arbitral Tribunal in the proceedings instituted by the Hungarian optants against the Roumanian state.

By the terms of Article 250 of the Peace Treaty of Trianon, Roumania has assumed the obligation to maintain the immunity from sequestration and expropriation for any property whatsoever belonging to Hungarian nationals or to such persons as have opted for Hungarian nationality, which is situated in the territory ceded to her by Hungary. The Article adds that disputes which may arise out of it shall be decided by the Roumano-Hungarian Mixed Arbitral Tribunal. In the meantime Roumania has carried out an agrarian reform, in consequence of which Hungarian nationals were dispossessed of their estates in a very peculiar manner. The persons affected by this reform received by way of compensation hardly as much as one per cent. of the value of the confiscated property! It goes without saying that these persons could not rest satisfied with an indemnity of this kind; consequently, after long drawn-out fruitless negotiations, some three hundred of them, most of whom were owners of medium-sized and small properties, instituted legal proceedings against Roumania before the Mixed Arbitral Tribunal. It is, therefore, quite incorrect to have stated that the dispute only centres round the latifundia of a few Hungarian magnates. The Roumanian Government raised an objection to the Court on the ground of jurisdiction, but, nevertheless, after lengthy discussions, the Court, in a judgment rendered at the beginning of 1927, declared itself competent. As Roumania was firmly determined to frustrate a decision on the merits of the case in these legal actions, she recalled her arbitrator without appointing anyone to replace him, and, moreover, made this case the occasion for an appeal to the League of Nations under paragraph 2 of Article 11 of the League Covenant. Hungary, on her part, insisted that the judicial procedure should take its course and accordingly made a request to the League Council that the latter body, in accordance with Article 239 of the Peace Treaty, should make the necessary selection to fill the vacant arbitrator's place. As a result of this, the dispute between the two states entered a new phase. After further lengthy negotiations the Council, during its September meeting,

laid down those three principles, according to which the parties were to leave the decision on the merits of the case to the Arbitral Tribunal. These three principles, which the Council adopted on the advice of an improvised committee of jurists, have attracted a certain degree of attention in the world and, as they are sufficiently well known, need no further description. Only the most important of them, the second, may perhaps be mentioned here.

According to this principle, Hungary was required to make an admission that the Hungarian optants should not be entitled to claim any greater compensation for their expropriated property than Roumanian nationals, and, since the latter were deprived of their property ostensibly without any compensation whatever, the Hungarian optants, also, would go away empty-handed. The December session of the Council brought no new element into the dispute. A decision was to be reached at the March meeting, unless by then the two parties had come to some agreement, a course which was urged very strongly upon them both. It may be seen from this recapitulation of the affair that the fundamental issue of the whole dispute is the question whether the Mixed Arbitral Tribunal had authority to pronounce judgment with regard to its own jurisdiction and whether or not its decision has acquired the force of law. This question shall now be examined here from a general point of view.

It is accepted as a common principle in legal procedure that, when the jurisdiction of a court is questioned, it is the court itself which has to decide on its own jurisdiction. This practice of the court deciding on its own jurisdiction is an essential constituent element of all legal procedure, without which no judicial action can be properly performed. This principle must, therefore, necessarily also hold good in international arbitration. It is expressly recognised in Article 36 of the Statute of the Permanent Court of International Justice. This particular court has been compelled to give decisions as to its own jurisdiction in some important cases, for instance, in the *Mawromatis* case and in the dispute concerning German interests in Upper Silesia. But this principle must also hold good in the case of other international courts of arbitration. It is recognised as a rule of law of general validity in the legal procedure of the mixed arbitral tribunals, as is evident from copious examples in the course of their judicature. Accordingly, the Roumano-Hungarian Mixed Arbitral Tribunal proceeded with perfect correctness when it gave a decision on its own jurisdiction and declared this to be established. As a matter of fact, this right of the Arbitral Tribunal was also recognised on the Roumanian side, by the fact that Roumania entered into the discussion on jurisdiction before this Tribunal, whose decision Roumania refuses to recognise for the reason that its decision proved to be unfavourable for her interests.

Having established this point, we must turn to the question of the legal recourse which can be claimed against the decision by a court as to its own jurisdiction. The laws of the various states admit, in most cases, a legal remedy against decisions as to jurisdiction. If, by way of exception, no such legal remedy is admitted, or if all the admitted legal

remedies have already been tried, then the decision as to jurisdiction at once takes on the force of law. It represents, therefore, an immovable basis for the discussion of the merits of the case and, further, it cannot be examined into any more by any other administrative authority. As is common knowledge, in international arbitration, courts for examination of legal remedies in matters of jurisdiction have not yet been provided for; there is, accordingly, no means available by which a decision as to jurisdiction by an international court of arbitration can be called in question on the basis of a legal remedy. It follows that its decision as to jurisdiction acquires immediately the force of law; which means that it must be accepted as an incontestable basis for the further procedure. In respect of the Permanent Court of International Justice, scarcely anyone is likely to dispute the accuracy of this thesis. If this court of justice declares itself to have, or not to have, jurisdiction, everyone must accept this as *res judicata*; there is no organ which could be qualified to test the legality of this decision. This principle, however, must also be recognised as applying to all other international courts of arbitration. I must once more emphasize the fact that decisions as to jurisdiction of any and every international court of arbitration acquire forthwith the force of law. The same is true also of the Mixed Arbitral Tribunals. If we examine the legal judgments of these courts we find, until this Roumano-Hungarian case, the fact that legality of their decisions as to jurisdiction was always unreservedly acknowledged. Therefore, when Roumania refused to bow to the decision as to jurisdiction of the Mixed Arbitral Tribunal, she was transgressing a recognised rule of international law.

If this principle is not recognised, the greatest disturbances in the whole system of international arbitration will be palpably evident, as is shown by this dispute between Hungary and Roumania. Roumania was determined to evade, under all circumstances, a decision as to jurisdiction which might be inconvenient to her; in order to resist it she chose the path of self-help; she took it upon herself to oppose an arrangement which had been come to with her approval and to which she had subjected herself. In order to give her action the semblance of legality, she brought the case before the League Council under Article 11 of the League Covenant. The Council, in the sense of the clear provisions of Article 239 of the Peace Treaty, had the single duty of carrying out the prescribed selection of arbitrators; instead of which the Council formulated the three principles, in the light of which a decision on the merits of the case should be reached. The most peculiar feature in this confusion of ideas is the fact that Article 11 of the League Covenant should be dragged into the affair. Paragraph 2 of that article entitles Members of the League to bring, in friendly fashion, to the attention of the League any circumstance whatever "which threatens to disturb" the peace. The question is, who has disturbed the peace in this case? Certainly not the Tribunal which simply established its jurisdiction. Nor Hungary either, for she only wishes for a regular continuation of the judicial procedure. It would be nonsense to represent a state as a peace-breaker, which demands nothing else but that the legally prescribed judicial proceedings should be continued.

Hence it can only be Roumania, the party which illegally opposes the judicial decision, which can be regarded as the one whose conduct is disturbing the peace of the world. And she, Roumania, invokes Article 11, which manifestly was not embodied in the League Covenant for the benefit of disturbers of the peace. The Council was feeble enough to pass over Roumania's offence; and not only that, it also accepted, as a principle, that its task did not conclude with the automatic selection of arbitrators, but that, further, in virtue of the article quoted, it should also determine the fundamentals on which a decision on the merits of the case should be based. This view can find no trace of justification in the Covenant. It is perfectly clear that Article 11 gives no authority to any organ of the League of Nations to formulate any definite principles, according to which an international court of arbitration must settle any given dispute. Indeed, the organs of the League of Nations must exercise no influence whatever on the course of any international arbitration procedure based upon that article. It is absolutely inadmissible that political organs should in any way influence the course of justice. In the case under discussion, this is all the more inadmissible since it is definitely clear that, thereby, one of the parties would be prejudiced to the highest degree. The second of the principles formulated by the Council would certainly bring about the defeat of the Hungarian optants. With the assistance of this principle, Roumania would achieve that which has been her aim all along, namely, to obtain possession of the landed property belonging to Hungarians without making any payment in return. On this point, moreover, it should not be forgotten, that, in the case under discussion, the Council has usurped much more power than would be within the rights of a court of appeal dealing with the question of jurisdiction. Such a court would have had simply to decide whether or not the Court of Arbitration had jurisdiction. The Council, however, went much further and, in addition, laid down definite practical criteria to be applied in the formulation of the judgment. This is absolutely inadmissible.

The only right solution of the difficult situation would be for the Council to carry out its selection of arbitrators quite simply in accordance with the original Hungarian request. Hungary wished, however, to make the decision easier for the Council by putting forward the alternative proposal that the Council should first submit the case, for an opinion, to the Permanent Court of Justice. If this proposal should not be adopted, or should the parties not reach an agreement meanwhile, it is inconceivable how the tangle is to be unravelled.

All who are earnestly convinced that international arbitration is the most honourable and effective means of preserving peace must learn wisdom for the future from the present case. Every effort must be made to prevent anything similar from ever happening again. The more frequently international arbitration is called upon the more numerous are likely to be the controversies arising on the question of jurisdiction. It would be a bad omen for the future of international arbitration if the parties should be allowed to oppose, unhindered, such decisions as to jurisdiction as did not happen to suit them, and if it were admitted that non-judicial

bodies, however important they might otherwise be, could influence, in any way, the decisions of the international courts of arbitration. The efficacy of the decisions of international courts of arbitration and the independence of these organs must be safeguarded under all circumstances. The only way to attain this object under the present conditions of international arbitration is through a deeper ethical conception of it. More confidence in international arbitration and a greater respect for the decisions of the courts of arbitration, that is what is necessary, above all, in order to give greater vitality to international arbitration.

At any rate, consideration might certainly be given to the question of elaborating a system of legal recourse in regard to problems of jurisdiction. As a court of appeal in questions of jurisdiction, the Permanent Court of International Justice would seem to be the most appropriate. This Court, which by reason of its profound juridical knowledge, its absolute impartiality and its lofty spirit of humanity, enjoys an unsuspected measure of confidence, would, undoubtedly, serve excellently as a court of appeal in questions of jurisdiction. But, however desirable such a consummation may be, I scarcely believe that it could be realized under present conditions. For the present we must direct all our efforts towards the development of the ethical foundation of international arbitration, in order to make it more serviceable for the welfare of mankind.

OSZK

Országos Széchényi Könyvtár

OSZK

Orange Székely-Könyvtár

Translated from the German.

OPINION ON THE ROUMANO-HUNGARIAN DISPUTE

BY

HERR EUGEN SCHIFFER,
formerly Minister of State.

In December, 1923, some 350 Hungarian nationals, among them a number of optants from Translyvania, filed petitions with the Roumano-Hungarian Mixed Arbitral Tribunal against the Roumanian State, in which, on the grounds that the rights guaranteed to them by Article 250 of the Treaty of Trianon had been violated by the application of the Roumanian Agrarian Law of 23rd March, 1921, they claimed restitution, or if for any reason that should be impossible, indemnification. Roumania filed a protest pleading that the case was outside the jurisdiction of that Tribunal. Twenty-two of these actions were dealt with in joint oral proceedings in December, 1926.

By Judgments delivered on January 10th, 1927, which came to the same conclusion in every case, the objection that the Tribunal had no jurisdiction was over-ruled and at the same time Roumania was ordered to submit her case in writing within two months. Roumania repudiated this Judgment, withdrew her Arbitrator from the Court with a declaration that he would not sit in these or any other agrarian cases. She communicated a statement of her action to the Council of the League of Nations, at the same time making an appeal under Article 11, para. 2, of the Covenant, and requested the Council to give her an opportunity of submitting an oral explanation of her reasons. The explanation was given on March 7th, 1927. On the same day Hungary made a request that the League Council should, in accordance with Article 239 of the Treaty of Trianon, appoint another Arbitrator in the room of that member of the Tribunal who had retired. The League Council appointed a Committee of Three, with the British Foreign Minister, Sir Austen Chamberlain, as Chairman. This Committee, after vain attempts to bring about an agreement and after taking the opinion of Jurists of repute, drafted a report which was submitted to the Council on September 17th, 1927. It came to the conclusion that petitions by Hungarian nationals for restitution of property were quite in accordance with Article 250 of the Treaty of Trianon, even though such a petition might have its origin in the application of the Roumanian Agrarian Law and that they could be said to come within the scope of the jurisdiction of the Mixed Arbitral Tribunal. It thereupon proceeded to give an interpretation of the principles that had become binding on Roumania and Hungary by the acceptance of the Treaty of Trianon. Formulating its conclusions in the form of three propositions, which are diametrically opposed to the standpoint indicated in the Judgment, it suggested that the Council should:—

- (a) Urge both parties to record their agreement with these principles.
- (b) Request Roumania to restore her Arbitrator to the service of the Mixed Arbitral Tribunal.

In the event of a refusal on the part of Hungary, the Council was not to be considered justified in proceeding to appoint a new Arbitrator

in accordance with Article 239. In the event of a refusal on the part of Roumania, despite acceptance by Hungary, the Council would be justified in taking the necessary steps to ensure in any case that the Mixed Arbitral Tribunal should be able to operate. In the event of a refusal by both sides, the Council would have exhausted the resources open to it under Article 11.

In the subsequent discussion it was moved that only the propositions (a) and (b) should be recognised, that is to say, without the attendant sanctions. On the proposal of the Chairman, nevertheless, (b) was also omitted, while the remainder of the proposal, it is true with sundry reservations, was accepted unanimously, Hungary and Roumania abstaining from voting. Further resolutions were deferred so as to give the two States an opportunity to reach agreement on this basis. Roumania declared her acceptance at once; Hungary gave expression to her refusal in a memorandum presented on November 29th.

* * * *

Judging by this course of events one might think that there had really been no essential change in the situation since September, 1927; that the League Council had made use of its good right to offer the parties in dispute a basis of understanding; that Hungary had made use of her equally good right to reject this view; and that, therefore, a case of *res integra* remained. But this conception would be too formalistic to be correct. It would simply turn upon the externals of the affair. First of all, such a view would not give a fair idea of the psychological reactions consisting in the fact that Hungary's stubborn refusal to comply with the urgent requests and the unanimous desire of the League had weakened her position and prejudiced feeling against her at the League and in a considerable section of public opinion. It is only necessary to read the irritated speech which Chamberlain made against Hungary before the League Council as early as on September 19th, 1927, to appreciate the nearness and the extent of this danger. It arose spontaneously, without and indeed against the intentions of the person concerned. Even in the ordinary courts, day by day, one can observe this involuntary revulsion of feeling against anyone who rejects a compromise proposal. The same reaction arises far more easily and forcibly in the case of a political body such as the League Council, which directs its passionate endeavours, not so much towards finding out what the law is as towards the preservation of peace, and so must feel it not only deeply but can also take account, in its further decisions, the fact that its endeavours were frustrated by the supposed obstinacy of one of the parties. For this reason and in consideration of the attitude of the Council of the League in all Minority problems, as appears from the statement made by Chamberlain, Mello-Franco and Benes, in December, 1925, Hungary did quite right to embody in detail, in her statement of rejection, all the reasons for which she deemed such an answer inevitable, so as to disarm the suspicion of mere selfishness and to remind the Council and also public opinion in general of the fine phrase used in the Treaty between Poland and Czecho-Slovakia of 23rd April, 1925: "The defence of minority rights shall not be considered as an act of disloyalty to the State." In the case with which we are dealing the assertions in the Memorandum amount to what Hungary's representative, Count Apponyi, had already contended on 19th September, 1927, namely, that in accepting the proposed Principles, Hungary's case would be as good as lost before any Judgment was rendered, since her claims

rested on a precisely opposite view. As Lord Newton remarked in the English House of Lords on 17th November, 1927, they were giving Hungary her Arbitrator on the condition that the award should go against her.

However, this immediate emotional consequence of the procedure approved by the League Council relates only to the fortunes of the two parties to the dispute, and it can, after all, be remedied by the good will of the Council, which is not open to doubt. Another reaction, however, goes much further and its effects are far more difficult to counteract. It consists in the official recommendation of principles, which are opposed to those expressed in the Judgment given by the Mixed Arbitral Tribunal. That would not be any obstacle, if the only purpose were to establish a basis for an agreement out of Court. The prestige of a Court is not necessarily impaired by the fact that the parties by way of compromise, accept as criteria for an agreement between themselves, standpoints different from those of the judicial award. That, however, is not the case here. The new principles are supposed rather to determine the criterion for the further procedure of the Mixed Arbitral Tribunal, provided that any such procedure is not rendered superfluous by a previous full agreement of the parties on the course to be followed. This is clearly shown by the whole context of the proposals made by the Committee of Three, which assuredly has not been abandoned by the League Council, even though, formally, the propositions themselves were only partially adopted. It can indeed be questioned whether and in what manner, even with the consent of the two States, any such arrangement would be executable in the further procedure. It is not the Hungarian State which is a party in the suit as the plaintiffs are private individuals who cannot be retrospectively bound as a matter of course by an action of their Government in the name of international law. They derive the rights which they are vindicating as independent prerogatives conferred by the Treaty of Trianon but also, in addition to this, from the domestic legislation of Hungary into which that Treaty has been incorporated. The possibility of binding the Arbitrators of the Tribunal in any way seems even more questionable, for as such they have to pronounce judgment simply according to the standards set by the Peace Treaty and their own free conscience, and they must resist any influence from outside. In order to commit them to the new legal basis which is suggested for the present series of disputes and for litigation of a similar character still to be expected, it would be necessary to effect alterations in the Treaty of Trianon, in which all the Powers that were parties to the Treaty would have to take part. But, anyhow, apart from these considerations of principle and practical difficulties, the opposition to the substance of the Judgment rendered by the Mixed Arbitral Tribunal opens up a vista of possibilities the significance of which is not confined to the causes that have been or may be in the future the subject of action. Behind the arguments on which the Judgment was given there is, in fact, the legal view of the Permanent Court of International Justice, as laid down in its Judgments Nos. 7 and 8. The League Council is accordingly taking up a position which is in contradiction with the Court. This contradiction does not consist only in the different interpretation of the Treaty of Trianon, as it extends also to the substance of other Peace Treaties. Nor will it be easy to set aside, unless it is decided to alter all the Peace Treaties. Finally, the whole question of the relation between the League Council and the Tribunals would be raised. Out of the controversy with regard to the jurisdiction of the Mixed Arbitral Tribunal arises the controversy on the far more important problem of the jurisdiction of the League

Council, of the relation between the duty incumbent on the Council and the duties to be performed by the Courts, similarly established by or contemplated by the Covenant, and ultimately of the limits between right and might.

* * * *

The Committee's Report did not neglect this problem. It distinguishes most explicitly "the political rôle of mediator and conciliator" from the "solely and narrowly juridical conception of the rôle of the Council," and decides for the first of these rôles. If it relies in support of this decision on the argument that in point of time Roumania's reference to the Council under Article 11 came before the reference by Hungary under Article 239, it must seem indeed somewhat specious and not very convincing. The Committee, therefore, puts forward other reasons why the Council should not simply confine itself to "a mechanical function," that is to say "purely and simply the selection" of the substitute Arbitrator. It finds them in the fact that all the attempts it has made to bring about an agreement have come to nothing, so that it is compelled to seek a solution by other means. In the quest for such other means it reaches the conclusion that "a primordial interest" attaches to a careful examination of the question of jurisdiction. But according to what has gone before—and after the subsequent result of that examination—this manifestly does not mean that it still wants, so to speak, to go back to the genesis of the judicial proceedings. It took this course rather as a means of bringing about an agreement between the two sides, even though the voluntary aspect of the matter were somewhat modified by the "sanctions." It did, however, abide by the decision not to appoint any Arbitrator in accordance with Article 239, and it rejected the view that such were an independent measure, irrespective of the attitude of the parties.

To be sure, the position is not that there is between that measure and action under Article 11 an absolute contradiction, so that the Council may do only one thing or the other, and nothing else. It would be quite possible for it to carry out the designation of the substitute Arbitrators, and yet at the same time take measures in conformity with Article 11. On the other hand, it would be a dubious proceeding for the Council to try and defer, even only provisionally, for some time the action under Article 239 in order to gain space and time for action under Article 11. In so doing it would interfere with the rightful interests of Hungary and at the same time would, from the point of view of principle, place its own attitude in a very strange light. On March 7th, 1927, Hungary's representative affirmed quite rightly: "The course of justice may not be hindered." The idea that the League should be free to withhold the application of Article 239 on account of Article 11 must be completely and absolutely rejected. But, evidently, that is just the point of view of the Committee.

The following considerations probably determine its conduct: The most essential task of the League is the preservation of peace. Any steps taken by it must serve that purpose and must be subordinate to that aim. They should not be taken unless they are calculated to achieve that purpose, and certainly not when they threaten to frustrate it. This is true also with regard to arbitration. For the latter is only introduced into the League of Nations system as a means for the preservation of peace. Arbitration, therefore, must be judged by that same guiding principle. The Tribunals are there not for their own

sakès nor for the sake of justice as such, but simply to be used when and to what extent their operation will serve the purpose of preventing or settling controversies liable to disturb the peace. If this hypothesis is not the correct one, there is no justification for their existence, and it is not the duty of the League, nor in fact has it the right to go bail for them or their efficacy.

It might be possible to support this thesis by pointing out that in actual fact the Preamble to the Covenant of the League of Nations postulates the promotion of justice not as an aim in itself but only because it serves to "foster co-operation among the nations and to guarantee international peace and international security." But all the more caution is required in the materially decisive conclusions derived from this view of the position, the more their implications are realised. In order to do so it is advisable to divest the practical case which inspires such considerations of all accidental accompanying phenomena. Only then will the ultimate consequences of the one or the other view be clearly apparent.

In the present case it must be reckoned as a fortuitous circumstance that the League Council should be faced with the question as to whether it ought, in accordance with Article 239, to appoint a substitute Arbitrator to replace the absent Roumanian Arbitrator. Looked at from this aspect its line of conduct appears easier, since it would permit it to remain simply passive and in this way bring about a pause in the legal sequence of events, without actively intervening in them. Fundamentally, the problem would be the same, however, if Roumania had not withdrawn her Arbitrator. As soon as the League Council came to the opinion that a continuation of the proceedings would be a menace to peace, it would, according to the point of view which is apparently taken or which is at least that represented by the Committee, be compelled to put a stop to them. The same situation might logically arise in relation to the Permanent Court. What is fit and proper for the Mixed Arbitral Tribunal must be also right for the Court. Its quality as Supreme Court of Justice cannot be weighed against the danger to peace, if the latter represents the standpoint that determines the attitude and the actions of the League Council.

These logical deductions from the view championed by the Committee are as undeniable as they are intolerable. In the first place they actually place a premium on frustrating the conclusion of any proceedings in a court of arbitration. Even now it has become customary for the defendant to begin by raising, first and foremost, an objection to the Court's jurisdiction. If then the opportunity is given of entirely crippling the court of arbitration by such an objection, the temptation is great to put it forward and back it up with sabre-rattling so as to provoke the intervention of the Council of the League with the object of interrupting and defeating the legal proceedings. In this way the institution of arbitration would very soon be robbed of all authority. A right with no certainty of being transformed into reality, in other words a right without might, has no value in the world of facts and has

NOTE.—Politis ("Zeitschrift für Ostrecht," 1927, p. 1237) says in fact: "If the Council had a hope of bringing the dispute to an end by appointing the Arbitrators, it should abide by Article 239 of the Treaty of Trianon, without heeding the wish expressed in Article 11 of the Covenant. . . . In respect of these two obligations the Council must be guided in its decision by the political one, since this is the most urgent, the most important and the most significant. To allow itself to be guided by the other obligation would mean not only sacrificing external forms to facts but also, it would mean still more that the Council was not being true to its essential mission, which consists in guaranteeing peace."

no place in it. For this kind of law men of standing will not in future be ready to come forward as arbitrators. Personages of importance, men of reputation, who value themselves, will not be inclined to accept and take up appointments in which they would be little more than puppets on the wires of a non-judicial tribunal of appeal. This would bring about the collapse of the whole arrangement, the technical side as well as the personal. But it would also entail the break-up of one of the most essential foundations of the League of Nations. For in its most important part its structure is built up especially on the idea that, in principle, all disputes which are suitable in any way to the application of legal standards are to be taken out of the sphere of politics and transferred to the sphere of law. This has been affirmed on countless occasions, as for instance by M. Briand on February 8th, when he demanded in connection with some organisation of the ' *poilus d'Orient* ' that " as far as possible juridical settlement of strife among the nations should be substituted for the arbitrament of arms." In this matter law is synonymous with courts and justice. For up to now any state would have rejected with indignation any suggestion that it was acting on any basis other than that of law. The submission whenever possible of differences to the courts and to judicial treatment is modern practice—progress. Hence—and this is the conclusive point—the organisation of the courts of arbitration as such, as absolute powers, is pressed into the service of the idea of peace, and not merely relatively and conditionally, according as to whether it appears to be of service in any individual case. Just this absence of any relative consideration, of any examination as to its fitness for this or that case, endows it with the required qualities of security and strength. That this is the guiding principle of the Covenant is clearly shewn by its dispositions, which moreover, are completed by the provisions of the Peace Treaties and other conventions dealing with the settlement of disputes by arbitration. Even where the obligation to initiate certain proceedings is not prescribed in so many words, as it is with the Mixed Arbitral Tribunals, the striving is plainly revealed towards assigning affairs, if it be in any way possible, to legal procedure. The unconditional recognition of such procedure, without regard to the way in which it may develop and end in individual case, is stated unequivocally in Article 13, para. 4: " The Members of the League undertake to carry out truly and honourably any arbitration award that is rendered; it shall be unlawful to proceed to War against any Member of the League which complies with the award; and in the event of the decree not being carried out the Council proposes the steps that may be taken to give effect to it. These commands and prohibitions are made unconditional and unrestricted and are frankly incompatible with any such reservation as that of previous examination in the individual case as to whether they shall be complied with or not. Above all the idea would surely be downright absurd that it should depend on any such examination whether war should be waged against a State that complies with the award of the Court. The position is rather that, when once the judicial path is entered upon it must take precedence over any other, as the most desirable one because it rests on justice and morality. In so far as a contradiction arises, then, between Article 11 and Article 239 in the application of their provisions, it is to be resolved in favour of the prescription of the latter. This, and nothing else, corresponds to the sense and the spirit of the League Covenant, particularly that of Articles 12-15, of which the substance must also be authoritative for the interpretation of Article 11.

It cannot be denied that, owing to this, serious conflicts may arise between the ruling conception of the securing of peace and respect

for the Courts. But anyone who wishes to enjoy the advantages which ensue from the institution and the functioning of the Courts, must make allowances for this possible drawback. Nor are such conflicts by any means isolated. They arise also in the same acute form in the internal political life of the State and have troubled the nations for centuries. The independence of the State Courts, too, is on the one hand a palladium of justice, but on the other hand it is a danger to justice, if, under cover of it, and thanks to its protection, a wrong judgment results and is enforced. The rôle played by the Prussian King, Frederick the Great, in the Müller-Arnold action should be remembered. He thought he had discovered that the defendant had been wrongfully sentenced, and, in the endeavour to come to his assistance against his titled opponents and to contribute to the triumph of justice, regardless of class differences—forgetful of the principle and purpose that he had more than once affirmed, namely, that he would reject all imposed judgments and allow justice to have her way unhampered in the hands of the Courts—he intervened as an absolute ruler, quashed the judgment and sent the judges who had rendered it to the fortress. No doubt he believed he was serving the cause of justice in this particular case. But to justice in general, as a mission of the State, he wrought immeasurable harm. Long before him, in Germany as in other parts of the world, the principle had won its way through that Princes and Authorities must allow justice “to take her resolute course,” and this had developed into a fundamental idea of the State and created the essential condition for birth of the legal polity. Indeed, in quite recent times in Germany the recognition of this principle is again being struggled for. Once again the autonomy of the courts has been felt frequently to be a bar to justice. But again it has been recognised that it cannot be taken away without undermining what is indeed the strongest bulwark of justice, that we must put up with its drawbacks and be satisfied to provide as well as possible against the special dangers by means of specific arrangements and measures of a personal and technical nature. The day of arbitrary “Cabinet justice” in the modern legal polity is over once and for all. Yet what the Committee is proposing to the League Council is nothing else than “Cabinet justice” in the name of international law. If this notion should prevail, it would throw back international law, which should transmit the idea of the legal polity to the community of States, to a stage of growth far behind that which has been reached by the domestic legal systems of the States.

At the same time the hands of the League Council are not tied completely in regard to the work of the Arbitral Tribunals. In the matter of the designation of substitute Arbitrators, for instance, its function is not, as the Committee describes it, “purely mechanical.” That would be the case, at the most, if there were no resistance to the demand of the one Government on the part of the other which has withdrawn its Arbitrator. Nor will the League Council need to have any qualms about the substitute Arbitrator being selected from the two persons who are supposed to be deputies for the President, when very often such deputies may not exist at all. For a conventional practice with prescriptive force has arisen to supplement the law, namely, the custom of appointing deputies in such cases at a later date. If, however, objection is raised to the re-occupation of the vacant seat in the Court, the Council must proceed to an investigation of the matters of fact. First of all it must establish whether the Arbitrator to be replaced has really withdrawn. In the present instance Roumania’s contention is that this preliminary condition does not exist; that the Roumanian Arbitrator still continues to belong to the Court, only that he does not

participate in the discussion of certain particular matters. But even then it will be necessary to go beyond the actual wording of Article 239 and to assume that whatever applies of the complete withdrawal and the total removal of the Arbitrator, applies also to his failure to act owing to illness, actual refusal or voluntary abstention. The main duty of the Council, however, is to establish whether in actual fact the Court is an Arbitral Tribunal of the kind to which the stipulations of the Treaty apply. That would not be the case, if the Court in question were to differ either in its composition or in its method of procedure from the pattern designed by the Treaty. A court of arbitration which does not dovetail in with the prescriptions as to organisation or jurisdiction laid down by the Treaty would naturally not be a Tribunal according to the Treaty and, therefore, could not ask for any support from the League of Nations. On the contrary, the League would be more in a position to withhold its recognition and not only to eschew all measures that might enable it to continue to operate but also to raise objections against its procedure and its existence and so to intervene directly. At the same time such a negation of the existence of a Court of Arbitration set up in accordance with the Treaty could only happen when—in so far as jurisdiction is concerned—it has palpably and evidently exceeded the limits imposed on it. The maxim holds good for international courts of justice as for domestic courts that they themselves are responsible, as a matter of principle, for making a declaration with regard to their jurisdiction. Incompleteness of jurisdiction annuls the procedure and the decisions—and this may be made effectual at any time and by anybody—only when it is so serious that it affects and modifies their very essence. That is the notion of “usurpation of jurisdiction,” which indeed obtains in the present case, but which loses its force from the fact that a Court cannot be said to exceed, manifestly, its quality, when its legal conclusion coincides with and is covered by that of the Permanent Court. There cannot be any question but that Judgments Nos. 7 and 8, like the Judgment of the Mixed Arbitral Tribunal, give statutory form to the principle of the applicability of ordinary international law, and thus the query as to whether it is to be applied to the interpretation of the Peace Treaties is brought within the compass of action incumbent upon the Courts themselves. Certainly it is not, on that account, outside the sphere of discussion; it is open to anyone to criticise the Judgment rendered as being legally wrong. But “judicial error” is not equivalent to “usurpation of jurisdiction.” That is recognised by Politis (*Justice Internationale*, p. 92) when he postulates that it “soit certain et indiscutable.” He contradicts his own view on this point when in another passage he makes the question, whether or not the Council is bound to carry out the designation of the Arbitrator, simply dependent on the problem of jurisdiction. (*Zeitschrift für Ostrecht*, 1927, pp. 1234, *et seq.*). In so doing he raises the doubt as to what Tribunal, above a Mixed Arbitral Tribunal, should be competent to decide this question of jurisdiction; but here too he becomes involved in contradictions. He says: “Now this Court cannot be the Council of the League of Nations because the latter is only empowered to intervene in political questions, whereas in this case the issue is a pure question of law,” only to add immediately after, “The decision as to whether the Tribunal has been guilty of a usurpation of jurisdiction pertains to the Council and to the Council alone.” Accordingly it is difficult to understand how he contrives finally to accept, simply, the conviction of the Council as to the lack of jurisdiction of the Tribunal as sufficient justification for abstaining from appointing the substitute Arbitrator. It is true, Schücking goes still further (*idem*. 1928, pp. 161, *et seq.*). For him it is enough that the League should raise “doubts” as to the

jurisdiction of the Arbitral Tribunal, to conclude that the appointment of the substitute Arbitrators would be absolutely inadmissible. Otherwise, in his opinion, such a step would constitute an injustice to Roumania. But would not failure to take that step be equally an injustice to Hungary? What could be the justification for exploiting the uncertainty of the situation in a one-sided manner to the advantage of Roumania and to the detriment of Hungary? Nor incidentally should the fact be overlooked that, when all is said and done, there is a kind of presumption of rightness about the legal opinion of the Mixed Arbitral Tribunal corresponding as it does to the judicial opinion of the Permanent Court, and that to weaken this presumption is Roumania's business. Besides Schücking himself cites a statement by Verzijl to the effect that with regard to international arbitration any appeal to the exception of "essential error" as well known in the older practice of arbitration must, without any doubt, be ruled out as a nominal reason for annulling arbitral awards, while any and every "manifest" usurpation of jurisdiction by the court of justice would most certainly entail legal consequences for the party to the suit. He should remember too that the grounds which are normally valid for nullity of the arbitral award are—besides usurpation of jurisdiction—non-effective contract and proved corruption or bad faith on the part of one of the arbitrators. It is clear from this juxtaposition of terms that even usurpation of jurisdiction can only be considered when it is flagrant, that is to say when it shows the same characteristics as these instances and those which Schücking himself puts forward as examples: such as when one national Arbitrator is continually insulted or maltreated by the President of the Arbitral Tribunal or by the national Arbitrator of the opposing party, or when a national Arbitrator of the opposing party is threatened with violence if he should fail to vote in a certain sense. An Arbitral Tribunal in which this sort of thing happens is, at any rate, to be considered by the parties as "not desired," and the same assumption would apply in the case when it is guilty of an ostensible and demonstrable usurpation of jurisdiction. In precisely opposite fashion the determination of mere doubts as to jurisdiction pertains to the immanent functions of the Arbitral Tribunal, and is to be considered as "desired" by the parties.

From all this it may be seen that Hungary not only has a claim for compliance with her demand based on Article 239, but the constitution of the League of Nations must compel it automatically to accede to Hungary's request and to procure respect for law and the Court for its own sake and not merely for the sake of justice. In a whole series of cases, the Franco-Hungarian, the Franco-Austrian, the Franco-Bulgarian, the Franco-German, the Germano-Polish, the Belgo-Hungarian, the Belgo-Austrian, and the Belgo-Bulgarian Arbitral Tribunals, the League has unhesitatingly applied the appropriate procedure. In this case it cannot evade it without sacrificing the future to the present and, for lack of a far-sighted view beyond this individual case, without producing results which will strike at the foundation of the great ideas by which it is inspired. Should it nevertheless refuse, in truth, not only the formal jurisdiction of the Court of Arbitration but the very prestige of the League itself would be called in question.

Translated from the German.

A LEGAL OPINION ON THE ROUMANO-HUNGARIAN OPTANTS DISPUTE

BY

Prof. Dr. JURIS MAX FLEISCHMANN
(Halle).

"A problem of international law is not a problem of mechanics to be solved by the application of material force, but an ethical problem which the power of mind must decide." (Lammasch, "The Doctrine of Arbitration," 1914, p. 211).

I am required to furnish a legal opinion on the following questions:—

1. Is the Council of the League of Nations on the basis of Article 11 of the League Covenant justified in overruling the binding decision of a Mixed Arbitral Tribunal on the grounds that the Tribunal exceeded the scope of its jurisdiction, or does Article 13, para. 4 of the Covenant, to the effect that it is the duty of the League to take any steps necessary for the enforcement of arbitration awards, apply equally to Judgments given by Mixed Arbitral Tribunals?

2. Is the League Council, whatever may be its answer to Question 1, obliged under all circumstances to appoint a substitute Arbitrator, or must the Council before appointing a substitute Arbitrator examine the question as to whether the complaint made by Roumania, that the Mixed Arbitral Tribunal wrongfully declared itself competent in the case, is justified?

* * * *

The questions to be answered are concerned with formal law. A proper approach to them, however, requires that a wider field be surveyed. It will be necessary to touch, at least, upon the technical questions which are connected with the basis of the dispute; this for the reason that it is not immaterial to a judgment on the formal aspect of the matter that the solution should be in harmony with the actual state of the facts. Even though a contradiction between formal conclusions and matters of fact could not of itself make the solution incorrect, it would nevertheless leave room for doubt as to its accuracy and would fail to satisfy that sense of justice which can still less than usually be excluded from legal judgment in the conditions of life of a legal system like international law which has not yet developed any wealth of positive rules.

I.

GENERAL.

The number of "cases" which, having their origin in the practice of national strife, have brought the issue into the domain of the science of international law, to survive as elements of a perception of international law made clearer and broader thereby, has now been extended by a further group, namely, those connected with the affair of the Hungarian optants in the districts formerly belonging to Hungary and now belonging to Roumania, who consider themselves injured by the Agrarian Law passed by Roumania on July 30th, 1921, and by its practical application.

The beginnings of the Roumanian Agrarian Reform go back at the least to the first years of the World War, when, following the precedent set by the Ancients, promises of land were made to the Roumanians engaged in the War, in the event of victory. In view of the oppressed condition of the peasant population in Roumania this was assuredly a powerful incentive. A State can only satisfy land hunger, however, by wresting the land from its former owners. At an earlier stage of history, when there was not yet the distinction between the rights of dominion of the State and the ownership of estates and land within the territory of the State, the dividing up of land won by conquest presented no special difficulty; the population was simply put to the sword or pressed into bondage as slaves; the conqueror was free to dispose of the land as he liked. The Germanic conquerors who found themselves on Italian soil, usually applied a milder system, viz., a partition of the land between the conquerors and the conquered—a method of administration which, as its not least result, conduced to assimilation of the inhabitants. Times have changed. The laws of war have become more humane. Right of ownership and right of dominion are so sharply distinguished that, almost in direct contrast with the above, the land population in the conquered territory must now be left rooted to the land—even in the case when they opt for their vanquished homeland and to go and settle there.

That is the tendency in the development of international law. Inevitably it comes into conflict with an opposite impulse when a victorious State seeks to extend the land possessions of its peasants in the conquered provinces. Politically this is a tragedy for both sides. But legally the axiom holds good: "*In pari causa est melior causa possidentis.*" International law does protect those in possession. That is the patent trend of international law, from which the standard for judging doubtful cases has to be derived. If domestic legislation conflicts with this, it impugns the fundamental idea in the law of a higher order. We need not go into the question of the primacy of international law as such. There can be no doubt, however, that when a state acknowledges a legal principle of international law, it incorporates it, too, into its domestic code of law. The Weimar Constitution of the German Reich, in its Article 4, simply states an already established principle: "The generally recognized rules of international law constitute binding constituent parts of the legal code of the German Reich." The State has bound itself by an international Treaty in respect of its legislative, administrative and judicial action. This is not only so in the letter but also in the spirit, in accordance with the range of the rules of international law. The victor-State accordingly may not contrive to achieve by a round-about way its purpose of uprooting the previously settled and resident population; nor may the State *in fraudem legis agere*, in order to secure a judicial decision in its favour. All the less can this be done, as these rules of international law have actually grown out of the assumption that the victor-State is the stronger (not merely socially), and that it is one of the titles to pride of modern international law, to aid the weaker by the strength of the law and not to deliver him over to the stronger power in order that the latter may catch him in the toils of the law.

That is what would happen, however, and threatens to happen when the settler could be deprived of his possession, though it might be ostensibly in the form of the law of the country. That being so, the question is not mainly as to whether the literal expression of a law avoids setting up a differential treatment of nationals of the victor-State and those of its opponent.

Hence, quite rightly, the view taken by the Permanent Court of International Justice in its Opinion on the question of the German settlers in Poland (10th September, 1923). Compare also "The Agrarian Law in Lithuania and the Minorities," by Paul Fachiri and Marcel Sibert, Paris, 1925, p. 18. And for this reason, in the Treaties which marked the conclusion of the World War, it was considered necessary, in individual cases, to institute those special clauses for the protection of certain minority populations. Especially in the Eastern States, and in Roumania more than in any other, past experience had been far from reassuring. The Cabinets of the Great Powers, right up to the outbreak of the War, were engaged with the difficulties caused by the opposition of Roumania to the execution of the Berlin-Balkans, 1878. That explains the insertion in the Peace Treaty of Trianon with Hungary, dated 4th June, 1920, of Article 250, which reads:—

"Notwithstanding the provisions of Article 232 and the Annex to Section 4, the property, rights and interests of Hungarian nationals or companies administered by them, situated in the territories of the former Austro-Hungarian Monarchy, shall not be subject to confiscation or liquidation as a result of those provisions. . . ."

"Any claims presented by Hungarian nationals in virtue of the present Article shall be submitted to the Mixed Arbitral Tribunal set up by Article 239. . . ."

Information about the preliminary negotiations is given by de Lapradelle in the "Zeitschrift für Ostrecht," Vol. 1, p. 1298. The Treaty of Trianon was ratified on the 26th July, 1921.

II.

THE DISPUTE.

The Roumanian Government published in the issue of its official Organ ("Monitorul Oficial"), dated 30th July, 1921, an Agrarian Law which had already been deposited in the Bureau of Parliament on March 23rd, 1921. On the basis of this law the Roumanian Government transferred the proprietary rights of estates belonging to a considerable number of Hungarian optants to the name of the Roumanian Government, in the Land Register, offering them a trifling sum by way of compensation, stated to be barely 1 per cent. of the actual value of the property.

The dispossessed see in this action an offence against Article 250 of the Treaty of Trianon. They have pleaded before the Roumano-Hungarian Mixed Arbitral Tribunal, that the Roumanian State should be induced to restore their property or, alternatively, to pay them a certain compensation for damages. The Roumanian Government has pleaded in defence that the measures taken do not constitute confiscation or liquidation and has, accordingly, disputed the jurisdiction of the Arbitral Tribunal. The Mixed Arbitral Tribunal has (in the case Emerik Kulin) in a Judgment dated January 10th, 1927, declared itself to have jurisdiction and enjoined the defendant State of Roumania to present its observations on the merits within two months.

For the Reasons:—

" . . . That, Whereas by the terms of Article 250 there shall be submitted to the Mixed Arbitral Tribunal any claims presented by Hungarian nationals, whether optants or non-optants, with regard to property, rights and interests, situate on the territory of the former

Austro-Hungarian Monarchy, so soon as such property, rights and interests shall have been subjected to certain measures mentioned in the aforesaid Article ;

“ That, in the present issue, it is precisely this last point to which the allegations of the defence refer, the defendant maintaining, as has just been shewn, that there is no question of measures of confiscation or liquidation in the terms of Article 250 ;

“ That, what is important in order to reach a just appreciation of the competence of the Tribunal, is, therefore, to establish whether the measures complained of in the present instance do or do not present the characteristic features of either of the measures which, by the terms of Article 250, may give rise to claims that may be submitted to the Mixed Arbitral Tribunal; that if the Tribunal finds that such is the case, it is already in possession of sufficient elements to establish its own competence, but, that only by examining the substance of the claim will the Tribunal be in a position to determine whether really the circumstances of the action are such as warrant the Application of Article 250 ; . . .

“ Whereas it is clear from the wording of Articles 232 and 250, as also from paragraph 3 of the Annex to Section IV that the liquidation referred to in Article 250 may be either liquidation as a war measure or as a post-war phenomenon, that the meaning of liquidation is the same in both cases and that only the purposes of the two liquidations are distinct; that in the one case as in the other, it is a question of submitting ex-enemy property, rights or interests to treatment which represents an infringement of the rules generally applied in the treatment of foreigners, and a violation of the principle that acquired rights shall be respected ;

“ That the question as to whether the expropriations in the present instance are, or are not, discriminative measures concerns essentially the merits of the case, and that accordingly there is no occasion to examine it at the present time ;

“ Whereas under these circumstances there can be no doubt but that the Tribunal has jurisdiction to take note of the claims presented on this head by any Hungarian nationals; that it must be reserved for an enquiry into the merits to establish whether, in the application of this measure, the defendant had or had not a title such as might give him authority to infringe international common law ;”

The Roumanian Government made a communication to the Arbitral Tribunal requesting that it should not proceed to an investigation of the main issue and withdrew the Arbitrator duly appointed by the Roumanian Government for the questions still in suspense (24th February, 1927). Roumania does not consider herself bound by the Arbitral decision and she has, further, appealed to the League Council to intervene under Article 11 of the League Covenant.

The Hungarian Government, on the other hand, in accordance with Article 239 of the Peace Treaty of Trianon, has applied for the appointment of a substitute Arbitrator to take the place of the withdrawn Roumanian Arbitrator.

III.

THE JUDICIAL FORCE OF A DECISION OF THE MIXED ARBITRAL TRIBUNAL.

(1.)

The Mixed Arbitral Tribunals are "International Courts of Arbitration." This is indicated by the name deliberately chosen for them. They exhibit all the preliminary conditions of arbitration, in that the Peace Treaty contains the agreement by which defines the jurisdiction and the composition of the Court. They have received their peculiar organisation in view of the nature of the litigation assigned to them. Hence, in the absence of any special regulation, the general principles, such as have been elaborated for the procedure of international arbitration, are to be applied. These principles again go back to the principles for any law-suit whatever under regular judicial authority, such as they have developed primarily under the State Courts and have then also been taken over in essentials by the Permanent Court of International Justice at The Hague.

Among these main principles is the one that the Court invoked for the judgment of a case has jurisdiction. With regard to this jurisdiction, which is not narrowly conditional upon local or specifically technical premises, but bases itself principally on the consideration of whether a Court as such or as a Court of this kind at all may deal with the matter—whether, in other words, it is capable of deciding cases of the nature of the one submitted—the Court has to come to a decision first of all. The legal procedure of every civilised State to-day rests on this basis. The limitation and distribution of authority among the individual organs of the State is a mark of the legal state, because only this provides proper organisation governing appeals to the various State Tribunals. I need hardly adduce evidence of this from national legislation.

The Peace Treaties confirm this too. Thus the Treaty of Versailles, Article 304b; the Treaty of Trianon, Article 239b:—

"The Mixed Arbitral Tribunals . . . shall give Judgment on the disputes which come within their jurisdiction, in accordance with Sections 3, 4, 5 and 7."

The identical principle is set forth in the Regulations for the Mixed Arbitral Tribunal, *e.g.* for the Franco-German in Article 87: "The Tribunal shall determine its competence by its interpretation of the Treaty." *C.f.* also the Belgo-German "règlement" Article 3, Germano-Polish "règlement" Article 3; still more definitely in Article 2 of the Italo-German regulations: "It is the sole judge of its own jurisdiction."

When the Statute of the Permanent Court of International Justice in the last paragraph of Article 36, says: "In the event of any difference of opinion as to the jurisdiction of the Court, the Court shall determine the question," it is only the expression of the general view with regard to the indispensable basis of judicial procedure, as may be seen from paragraph 1037 of the German Civil Law Procedure in regard to the domestic law concerning arbitration in civil causes.

When Article 250 of the Peace Treaty of Trianon lays down: "Such claims as may be presented by the nationals under Article 239, it pre-supposes that in some way or other doubts may be raised with

regard to 'confiscation' or 'liquidation.' Where no doubt exists, there is also no occasion for any claim. The doubt can, fundamentally, relate only to the question of the existence or non-existence of sequestration or liquidation. And, in order to settle this question and at the same time that of its own jurisdiction, the Arbitral Tribunal cannot possibly avoid determining its attitude to the question as to whether a certain measure which does not appear to be liquidation because it affects all subjects in common, must nevertheless, from its very nature have the effect of liquidation. The Arbitral Tribunal is engaged with the dispute which has come before it as to the decision upon its own jurisdiction up to the decision on the interpretation of its own pronouncement. (See Article 82 of the Second Hague Convention, No. 40 of the Anglo-German "règlement," Article 78 of the Franco-German "règlement," among many others).

An interim decision on the question of jurisdiction is also automatically binding upon the parties :—

"The High Contracting Parties agree to consider the decisions of the Mixed Arbitral Tribunals as definitive, and to make them obligatory on the nationals concerned." (Article 239g. of the Peace Treaty of Trianon).

* * * *

(2.)

"RES IUDICATA PRO VERITATE HABETUR."

The phrase carries with it the idea of something sacrosanct, as it were, from the sacerdotal origin of all legal pronouncements in the dim distant past. But the phrase appears also to contain a slight hint of doubt. Yet the doubt is suppressed; for all experience teaches that a court, particularly in the States with a more advanced standard of civilisation and where the organization is "collegial," bears within itself the guarantee of reliability, that its action has been impartial, and that it has also tested all the opinions which might have any value. In this way it has reached a conclusion which is as nearly correct as human agency can contrive. The decision has, after all, more substance than a guess. Allowance may be made, in fact, for a deviation from what may be objectively correct, because over and above the particular case a question of the general interest is at stake; namely, public order which might be imperilled by a prolongation of the litigation. Therefore : "res iudicata—finis rixarum."

Admittedly with the decision such serious errors might have occurred as to have contributed to that decision or there may be the possibility, and consequently the suspicion, that they had so contributed. Even for the fundamental notion of principles, therefore, it is necessary to provide a safety-valve so that confidence in the whole system of law be not shaken. That is what, in early times, led to the recognition of the "exceptiones sub-et obreptionis" so as to prevent any Judgment being surreptitiously obtained through a deception of the Court. Modern enactments with regard to procedure have made possible in different forms a "restitutio in integrum" (in Germany they are connected with the preliminary assumptions of para. 580 of the Civil Procedure Regulations, in France with those of Article 480 of the "Code de procédure civil.") There are only certain quite definite facts of a statutory character which permit of restitution on a special plea; otherwise the Judgment remains untouched, even if the objective inaccuracy of the reasons

for it be notorious. The same holds good even in the case when the Court was not composed in accordance with the regulations, always provided that from externals it could only appear to be a Court of the kind invoked (para. 579 of the German Code of Civil Procedure). The mere fact of lack of jurisdiction of the Court invoked is at once covered by the legal force of the decision.

That is the strength of the power of the Court, justified as it is by the nature of the Tribunals entrusted with the decision. It is not the same in the case of administrative Tribunals—and this divergence throws the range of judicial decisions into even sharper relief. The so-called “*excès de pouvoir*” and the permitted recourse to the Council of State in order to effect an adjustment—and this is recommended in some of the opinions with regard to the present optants dispute—only obtains as a defence against measures adopted by administrative authorities. It is, as a matter of fact, a specific invention of French jurisprudence which has been developed in practice from small appendices of 1790 into a whole system, simply as a “*moyen de bonne administration*.” (Hauriou, Summary of Administrative Law, 4th Edition, 1901, p. 311), and it is sanctioned in four “*ouvertures*”—on account of non-competence, error of form, offence against the law in the case itself and because of what is described as a “*détournement de pouvoir*.” At that point it enters into subtleties of the national law, which are such as to necessitate the greatest caution in taking over even the basic concepts of “*excès de pouvoir*” into other codes of national law or for that matter into the system of international law. The two extremes are in fact withdrawn from this recourse for *excès de pouvoir*; on the one hand the so-called *actes de gouvernement*, which are not subject to any re-examination; on the other the so-called *voies de faits* or *excès flagrants de pouvoir*, more precisely, *usurpations de pouvoir*. (Gaston Jèze in the *Revue de Droit public*, 1912, p. 718. *Idem*: Administrative Law of the French Republic, 1913, pp. 394 *et seq.* 417, Tezner in the Year-book of Public Law, Vol. V, 1911, p. 67. Wodtke, *Recours pour Excès de Pouvoir*, 1912).

The presumption throughout is that the Court was called upon to deal with a case of *such a kind*. If it were not so, then a judicial pronouncement would be divested of any effect. *That would then be an usurpation de pouvoir*. To go into further details on this aspect of the question would be inadvisable in view of the dispute which is here presented for judgment. In the last few years German science has turned its attention to this hitherto completely neglected field. This attention speaks for the importance of the question in itself, while the neglect suggests that in the organized conditions prevailing in civilized States to-day, the case, fortunately, does not occur very frequently. (An exemplary account of the matter with an exhaustive bibliography is to be found in “Administrative Law,” by Walter Jellinek, 1928, pp. 237, 260 *et seq.*)

* * * *

(3.)

The position as regards international disputes is not the same in every respect, even if the formation of the domestic judicature and courts of arbitration can be adduced to supply a standard and a support.

In *international litigation* the emphasis is laid with particular weight on settlement of disputes (*finis rixarum*). It is sought to circumscribe the area over which the poison of discord can spread. This enters

politically to a certain extent, into any legal dispute and, according to all experience, needs but slight nourishment to flare up very rapidly. For that reason international arbitration procedure, apart from a minute number of exceptions, has adhered to the *single-instance* type of judicature. But there is another and deeper reason—this second motive provides for the element of equilibrium—namely, the special *confidence* placed in courts of arbitration. Before the stage of international arbitration procedure is reached, the ground has been explored with all possible circumspection by both sides in order to make sure that the case is one for a court of arbitration. The judges called upon to render the decision are selected most carefully (see Article 44 of The Hague Peace Records), as is evident from the relative infrequency of international judicial disputes and also from the fact that a knowledge of international legal questions is confined to a narrow circle of interested persons. Finally, the procedure in international litigation is only developed with the help of the most carefully collected and sifted documentary material such as is furnished by State archives. Finally, confidence in the arbitration judgments is fortified by the order usually given for a statement in writing as to the grounds of the arbitral decision. All this justifies the principle that the decisions of arbitral tribunals in international law are unimpeachable.

A re-opening of the litigation for reasons such as are known to national codes of judicial procedure in restitution case, is incompatible with the above principles. The whole development of arbitration bears witness to the progress made from those first applications, in which the parties simply based their petitions on the ordinary civil law, to the state of affairs to-day. (Bulmerincq in "Holtzendorff's Handbook of International Law, Vol. IV, 1887, para. 11, also enumerates no less than twelve reasons for which an arbitration decision need not be executed, which betray their origin in an age when the diplomat was characterised as a man supreme in the art of telling lies).

After The Hague Conference in the year 1899, on the other hand (and repeated in the records of the Second Conference, Article 83), the parties may only *make reservations* in the contract of arbitration itself with regard to a revision of the arbitral decision. The proposal for revision, however, can only be based upon the substantiation of a new fact calculated to exercise a decisive influence on the arbitral decision and which at the conclusion of the trial was unknown to the Court and even to the party petitioning for re-examination. It is after the middle of the nineteenth century that the definite change set in. Even then the *Institut de droit International* thought itself constrained to recognise four cases of nullity (in the year 1877, "*en cas de compromis nul, ou d'excès de pouvoir, ou de corruption prouvée d'un des arbitres, ou d'erreur essentielle*"). The mere linking together of bribery and usurpation of jurisdiction is a reminder that we have to do with the methods of thought of a bygone age. For this reason Asser and Léon Bourgeois at the First Hague Conference expressed themselves in favour of the rejection, as recorded in the Proceedings of the Conference, because the admission of such grounds for an impeachment of the arbitral decision depended upon there being available a Tribunal of Appeal competent to give a decision as to the presence of these grounds.

(Comp. The Protocol of the First Hague Conference, Vol. IV, page 149, and the work by the Austrian representative at that Conference, Heinrich Lammasch, "The Doctrine of Arbitration, and all that it embraces," 1914, page 217).

Lammasch, dealing with the arbitral decisions given by a Tribunal of The Hague Arbitration Court, expressed himself very resolutely against the admission of a complaint of nullity, because the personality of the Arbitrators, the form of the proceedings and the whole atmosphere of the council of administration offer a sufficient guarantee against a nullity of the decision (page 223). Lammasch went on to remark cautiously with regard to Courts of Arbitration outside the Hague Arbitration Court: "In view of the possibly very varying characters of such Arbitration Tribunals, it would be, in my opinion, to acknowledge as a ground of nullity the fact that the agreement had been exceeded and the corruption of one of the Arbitrators *proved*, that is to say, that . . . corruption was here *legally proved*."

When Walter Schücking in his Opinion on the Roumano-Hungarian dispute (which only came to my notice after I had finished my own Opinion) calls to witness not only the obsolete views of Bulmerincq and those expressed in the *Institut de droit International*, but also thinks that he can claim, too, the support of Lammasch, he overlooks the fact that Lammasch in his last work expresses himself more clearly than in the earlier work referred to by Schücking concerning the legal force of international arbitral judgments (1913). He failed to note, especially, the sharp distinction which Lammasch draws between a properly constituted Court of Arbitration and a Court of Arbitration of a different composition. In the year 1914 the only Court of Arbitration which Lammasch recognized as having an eminently reliable organisation was The Hague Court of Arbitration. In the intervening period there has been a considerable development in the hierarchy of international courts of arbitration, not least among them the Mixed Arbitral Tribunals set up by the Peace Treaties. The *grounds* on which Lammasch based his views must be given due consideration. The reasons with which he supports his idea of the stability of the decisions of The Hague Court of Arbitration, must to-day in a similar manner hold good for the decisions of the *Mixed Arbitral Tribunals* deriving their authority from the Peace Treaties.

There is much to be said for the argument applied in this case to international tribunals—that in the movement for the reform of domestic arbitral tribunals a greater freedom should be proposed for the Courts of Arbitration in cases when permanent Courts are in question which are instituted by public law corporations. Accordingly a distinction is made between—to use terms employed by Lammasch—"isolated" Courts of Arbitration, on the one hand, and "institutional" Courts of Arbitration on the other. (Comp. Nussbaum, "The New Legal Organisation of Arbitral Settlement," 1918. (Memorandum of the Berlin Chamber of Commerce, presented to the State Secretary of the Reich Office of Justice); *vide* Staff (Member of The Hague Court of Arbitration), "The System of Arbitration in German Law To-day," 1926, page 318).

Thus the Mixed Arbitral Tribunals were able to admit in their Rules of Procedure a clause providing for the possibility of a revision of any one of their decisions, but exclusively in cases such as are provided for by the rules of The Hague Court of Arbitration. (Comp. Article 79 of the Franco-German "Règlement" of 2nd April, 1920, Article 76 of the Belgo-German "Règlement" of 19th October, 1920, Article 64 of the Serbo-German Rules of 27th March, 1921, Article 63 of the Czecho-German Rules of 9th November, 1921, Article 76 of the Germano-Polish Rules of 29th September, 1921, Article 68 of the Italo-German Rules of 20th December, 1921. (These Rules of Procedure are printed by Herm. Isay, "The Peace Treaty of Versailles," 1921).

Unmistakably these Rules give expression and validity to a principle uniformly drawn up.

(4.)

Only in the case when the Court of Arbitration goes absolutely beyond those groups in disputes which, by Treaty, were to be submitted to its jurisdiction, can there be any further discussion, as for instance when, in domestic law, an authority, perhaps even a legal authority, may endeavour to deal with matters which, according to the organisation of the State authorities, are entirely outside its province. It is true that, strictly speaking, this cannot be termed an *usurpation de pouvoir* or an *excès de pouvoir flagrant*, since in the French administrative law these terms are applied to encroachments by administrative authorities. But since the fundamental principles are the same there is nothing to prevent the use of this wording in a figurative sense even in the case of constraints by international courts of appeal. Such usurpation precludes the State laws from having any legal efficacy. The Act has only the appearance of being a State Law; any party to a dispute wishing to deduce legal consequences from the Act, would have to realize that the other party may refuse compliance and use every means of defence that may seem appropriate to him.

A merely mistaken view in the co-ordination of the facts under the rule of competence, must never be considered as *usurpation de pouvoir*, as long as the Court has kept within the limits of the dispute submitted to it.

(5.)

If these principles be applied to the *dispute now in question*, the conclusion is that: The Roumano-Hungarian Arbitral Tribunal has had to deal with a case of the nature of those prescribed assigned to it for decision in unmistakable words by Article 250 of the Peace Treaty of Trianon. It has, therefore, not exceeded its powers of authority and has usurped no new sphere of functions.

Therefore the arbitral award of January 1st, 1927, is legally irreproachable.

* * * *

IV.

IN RELATION TO THIS VIEW WHAT IS THE SIGNIFICANCE OF THE APPEAL TO ARTICLE 11 OF THE LEAGUE COVENANT?

(1.)

Article 11 is conceived in such general terms that any kind of dispute between States may be brought within its scope. If we consider the authorities charged with taking further proceedings, viz., the Assembly of the League or the Council of the League—and if we examine the occasion out of which such appeals under Article 11 arise—viz., any war or threat of war, in fact any circumstance that may affect international relations and consequently may be a menace to peace or that good understanding between States on which peace depends—the reference is clearly to *political* causes, matters which are to be brought up before a political court. Further, a settlement effected under Article 11 is, unreservedly, subject to the free will of both parties. It is otherwise with Articles 12-17, which lay down definite forms of procedure in the settlement of a dispute between two States, either by

means of international courts or arbitral tribunals or by the agency of the League Council, and which attach definite consequences to them, for the party that fails to comply with the rules. In comparison with Articles 12-17, Article 11 thus assumes a subordinate position as a kind of conventional preamble. Former Articles define the lines more clearly. They point to a settlement of a dispute by the League Council only as a secondary matter, whereas they determine that there shall be a decision by a Court or by an Arbitral Tribunal for all cases that are capable of such decision. In this is reflected a long experience of relations between States suggesting a practice which in the last generation has become a pronounced tendency: inter-State relations must be cleared of their political venom by the removal, as much as may be, of all the facts which may be judged by the rules of law. The difficult question is as to the rule *which* of the disputes are to be considered as appropriate to judicial settlement or for arbitral decision. (Comp. : For example, "International Law," by Liszt-Fleischmann, 12th Edition, 1925, p. 422).

This query, however, is answered as regards the *present case in dispute* by Article 250 of the Treaty of Trianon in the sense of judgment by arbitration. The high esteem in which is held this precious possession of a solution of international difficulties by reference to legal principles through judicial decisions may be appreciated from the fact that many writers make every effort to eliminate from the procedure of arbitration courts anything that might possibly appear like political influence, even the admissibility of any compromise contrived by the Arbitrators. (Comp., Lammasch, p. 175).

That is going too far, and it is not without causing some anxiety. The Rules for Mixed Arbitral Tribunals are wont to make allowance for such a compromise between the parties, which must be duly and explicitly confirmed by the court of arbitration.

But more decisively still than against the limitation of the courts of arbitration from this point of view, must we be on our guard—bearing in mind the development which arbitration procedure has taken in principle—against the danger of lightly re-establishing *political* influence in the procedure of international disputes. (Thus Politis in the "Zeitschrift für Ostrecht," Vol. I, pp. 1234 *et seq.* dealing with the Roumano-Hungarian dispute sings a hymn of praise in favour of settlement under Article 11, while giving consideration to the political point of view and—what is not at all necessarily the same thing—in favour of a settlement by the Council of the League of Nations as the instrument specially suited for political questions).

(2.)

The possibility of a parallel procedure under Article 11 and Article 250 does not mean that Article 232 of the Peace Treaty of Trianon is to be discarded under all circumstances.

In the life of nations, *political* motivation enters in so many ways into the structure of the law that political factors cannot be *a priori* and absolutely contrasted with the law, but must be understood in their reciprocal effect. Vital interests such as appear in the substance of the *clausula rebus sic stantibus*, or in the various contracts of arbitration, or the denouncing of the violation of a Treaty as a breach of a law of a criminal character, with consequent penalties. All this points to an original legal conception in international law which has not yet attained the stability necessary for a calm registration in accordance with purely

legal principles, perhaps indeed, cannot attain to that condition, as long as the vindication process, namely, war, continues to be recognised as a means not only of realising claims at law, but also of carrying through and consummating political interests.

In this way a legal dispute between States may take on a political aspect, which is not to be eliminated forthwith by the duly prescribed judicial settlement, and which might give some scope for the application of Article 11 of the League of Nations Covenant. The scope, however, in view of the considerations of principle brought out above, can only be limited in so far as it is likely to require being carefully hedged in. I would like to instance three possibilities in the matter :—

(a) The parties *need* not comply with the arbitral decision, if the Court of Arbitration itself has strayed from the path assigned to it by the mutual agreement between the parties and has consequently caused the dispute to become, or to become again, a contest of power between the States, viz., in the case of *usurpation de pouvoir*. In this case the League Council might be invoked to effect a settlement on the basis of the parties being convinced of the legal inefficacy of the judgment rendered are prepared to proceed further.

This is not the position, however, in this case.

(b) When a party does not *wish* to comply with the arbitral decision. That is here the case with regard to Roumania, as is proved by her conduct in recalling the Roumanian Arbitrator. In this case the next step is indicated by Article 239g. of the Treaty of Trianon. The parties to the Treaty have pledged themselves to consider as final the award of the Mixed Arbitral Tribunal, and to make it binding on their nationals. If a State repudiates its Treaty obligations, that constitutes a breach of the law and the other State has the right to petition the League to take action against the law-breaker. Article 13, para. 4, of the League Covenant should at least in the sense of the terms used be applicable: "In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto."

And if, as in the issue with which we are now concerned, it is the party rejecting the arbitral award which invokes the League, he cannot derive any advantage from having thus forestalled the other party. The League Council must safeguard the results achieved at Trianon in so far as it considers that they are of legal significance. According to this the League Council ought to reject Roumania's petition while referring Roumania to the fulfilment of her Treaty obligations.

(c) If a party believes that it *cannot* comply with the arbitral decision. The decision on the question of jurisdiction is, after all, only an interim judgment not actually to be executed. But suppose we take up the standpoint that the execution of that judgment forms part of the further procedure in the case, in order to reach a condemnation of the Roumanian Government. Now, the political situation might be such, even as against an arbitral award, that fundamentally *altered circumstances* might prevent its being carried out; it might be opposed to the vital interests of the State incurring the obligation.

Roumania does not, however, contend this explicitly at all. Nor could she very well maintain this point of view. For the circumstances,

as compared with conditions at the time when the Treaty of Trianon was concluded, have not changed or have not changed to that extent. The agrarian question was then, already, acute in Roumania. Long before the Roumanian Government had indicated that its solution might be found by the acquisition of land from conquered territory. While the Peace negotiations were proceeding fears were loudly expressed that the conclusion of peace would place Hungarians in the ceded territories entirely at the mercy of the Roumanian Government. That was precisely the reason for the safeguarding clause of Article 250 containing the right of appeal to the Arbitral Tribunal being inserted in the Peace Treaty for the benefit of the Hungarian minority. (Comp., de Lapradelle in the "Zeitschrift für Ostrecht," Vol. I, pp. 1298 *et seq.*). At that time Roumania might have refused to comply. Roumania signed the Peace Treaty, and ratified it, and she even carried out the ratification *after* the introduction in Parliament of the Agrarian Law which is the subject of the complaint. Since then there has been no decisive change in the political situation. Therefore, neither in itself nor from the point of view of altered circumstances in Roumania can it be contended that the final decision of the Arbitral Tribunal cannot be executed.

(3.)

For the Council of the League to make up its mind with regard to the kind of settlement which is the purpose of Roumania's petition, it will have to examine the controversial points from the angle of whether and to what extent they have provoked political differences, and how seriously the outbreak of these differences prejudices the one or the other of the parties. In the course of this enquiry the Council will come up against those legal restrictions which it may not transgress, unless it wishes to jeopardise the whole upward movement accomplished painfully by the States of the world community in the last few decades, which consists in the fact that *legal* questions, when once they have been recognized as such by the parties in agreement may not, owing to any political complications whatsoever, be submitted to revision by *political* courts of appeal.

At all events the League Council must rest content with a recommendation. Such a recommendation might also contain a reference as to possible application of Article 13 of the League of Nations Covenant. If, however, any such allusion were to amount to invoking the aid of a court of arbitration, that would only be to graft one court of arbitration on to another and so to strike at the basic principle of "un-revisability" of arbitral decisions. The utmost the Council could then do would be to turn to the *other* possibility—an appeal to the *Permanent Court of International Justice at The Hague*. As it is, in view of the previous discussion, *I cannot see any proper basis even for a reference of this character.*

* * * *

V.

THE APPOINTMENT OF A SUBSTITUTE ARBITRATOR.

The appointment of a substitute Arbitrator is determined by Article 239a and Annex, para. 1, of the Peace Treaty of Trianon. As regards the dispute with which we are concerned those Articles supply the conditions under which such an appointment would be made by the Council. In making its nomination the Council has only to make sure that the substitute Arbitrator is a subject of a State which remained neutral in the War. The ascertainment of the suitability of the nominee for the position of Arbitrator is assumed as a matter of course.

Whether the Council would be obliged to appoint a substitute Arbitrator in the event of the court of arbitration for which the appointment is desired having exceeded its powers and if the substitute had been called for simply so that the Court might continue to exercise its usurped functions need not be considered by me in the present case, since, in my judgment, no such usurpation of functions has occurred. Nor need I, therefore, dwell any further on the point, whether, even in the case of usurpation of powers the position would not be different for an isolated court of arbitration or an "institutional" court of arbitration, such as the Mixed Arbitral Tribunal of the Peace Treaty, the efficacy of which would be impaired for any further cases by the omitted appointment of the substitute Arbitrator. In fact, on this last point, I might summarise my Opinion by saying that *I consider the League Council to be under the obligation to comply with Hungary's request and to take the necessary further steps as prescribed in the Treaty of Peace for the appointment of a substitute Arbitrator.*

Translated from the German.

HOW FAR THE DECISIONS OF INTERNATIONAL COURTS OF ARBITRATION AND OF COURTS DEALING WITH THEIR JURISDICTION ARE BINDING, WITH SPECIAL REFERENCE TO THE HUNGARIAN-ROUMANIAN DISPUTE CONCERNING THE CARRYING OUT OF THE AGRARIAN REFORM IN TRANSYLVANIA.

By

Dr. ALFRED VERDROSS,
Professor at the University of Vienna.

(from the *Zeitschrift fuer Offentliches Recht*, Vol. VII., No. 3).

CONTENTS:—I. The theory on the binding character of the judgments of all arbitration courts (Grotius, Pufendorf). Vattel's reasoning on the theory of the *excès de pouvoir*. Its development up to the first Peace Conference at the Hague.—II. The Russian proposal on this point at the Conference. The views of the Comité d'examen. The decisive result of The Hague Acts. The Orinoco dispute before The Hague Tribunal.—III. The intention of the authors and the wording of Article 73 of the Pact for the peaceful settlement of international disputes. The *excès de pouvoir*, material and formal. Decision re jurisdiction (a) without a Treaty basis, (b) with apparent reliance on a Treaty, (c) on the basis of an interpretation, though possibly erroneous, of a Treaty.—IV. The subsidiary value of Article 73.—V. The facts of the Hungarian-Roumanian dispute and the standard rules.—VI. Objections to the duty of the Council to make appointments and their refutation.—VII. The importance of Article 239 of the Treaty of Trianon.—VIII. The general duty of the Council to execute the verdicts.—IX. The subjective and objective measure for judging the *excès de pouvoir*.—X. Examination of the case from a point of view based on Vattel's theory.—XI. Mediation and judicial procedure. Duty of the Council of the League of Nations.

I.

Even after the verdict in the *Betsey* case (24th February, 1804), in a dispute between the United States of America and Great Britain the principle began to gain ground that, in the absence of any definite provisions to the contrary contained in the agreement fixing their jurisdiction, arbitration courts are entitled to examine themselves the question whether they have jurisdiction in a certain case, or not.

On the other hand there existed no uniform conception as to how far the disputing parties were bound by such a decision. On the one side Grotius maintained that the verdict was binding under all circumstances: "*Quamquam . . . de talibus arbitris, in quos compromissum est, lex civilis statuere possit . . . ut ab iis provocare et de injuria queri liceat; id tamen inter reges ac populos locum habere non potest. Nulla enim hic est potestas superior, quae promissi vinculum aut impediatur aut solvat. Standum ergo omnino, sive aequum, sive iniquum pronuntia-verint . . . summam quisque causae suae judicem facit, quemcunque eligit . . .*" (*De jure belli ac pacis*, III, chap. XX, par. 46).

Pufendorf agreed with this doctrine in the following argument: "*. . . ubi super aequitate sententiae alteruter litigantium dubium moveret, ad alium foret arbitrum eundem, qui super ista cognosceret. De cujus aequitate si iterum ambigeretur, alius esset constituendus arbiter; et sic in infinitum.*" (*De jure naturae et gentium*, V, Chap. XIII, par. 4).

Vattel maintained, on the contrary, that the disputing parties were not bound, in case "*les arbitres passent leur pouvoir et prononcent sur ce qui ne leur a point été véritablement soumis*" (the Arbitrators exceed their powers and give a decision on that which has not really been submitted to them). (*Droit de gens*, II, Chap. XCIII, par. 329).

Following him several authors on international law have upheld various reasons for nullity, amongst them the reason on account of *excès de pouvoir*, which has also been admitted by the *Institut de droit international* amongst others. (See the representations in this matter by Lammasch: "The legal force of international arbitral decisions," 1913, p. 137, *et seq.*).

Up to the time of the first Peace Conference at The Hague (1899) there existed, nevertheless, no uniform conception of the question of nullity reasons, either in doctrine or in the practice of the States.

II.

In order to make an end of this unsafe and confused legal position the Russian Delegation made a double proposal at the first Peace Conference at The Hague: above all it should be established as a principle, that a revision of the verdict is out of the question, since it is the main object of arbitration courts to settle the dispute finally. The Russian delegate, Martens, emphasised this several times. For instance, at the first reading of the agreement for the peaceable settlement of international disputes, he remarked: "*Le but de l'arbitrage réside en ce fait que du moment où la sentence arbitrale a été dûment prononcée tout est fini et il n'y a que la mauvaise foi qui pourrait s'y attaquer.*" (The object of arbitration is found in the fact that, from the moment that the arbitral award has been duly given, that is the end and only bad faith could attack it). (*Conférence internationale de paix. La Haye, 18th May to 29th July, 1890. Ministère des affaires étrangères. La Haye, 1899. Quatrième partie*, p. 35. See further *idem* pp. 39, 148, 156, 159, *et seq.*). Article 26 of the proposed scheme, however, provided for three cases of nullity as exceptions to this principle, *viz.*, nullity of the compromise; *excès de pouvoir*; and proved bribing of an arbitration judge.

Against this the Dutch delegate Asser put in the *Comité d'examen* the question: "*si l'on ne pourrait trouver un pouvoir à qui incomberait la mission de déclarer nulle la sentence, afin de ne pas laisser cette appréciation si grave à l'arbitraire ou à l'initiative de l'Etat qui aura été condamné.*" (If a power could not be found whose mission it would be to declare the award null and void, in order not to leave so serious an appreciation to the arbitrary action or the initiative of the State which will have been condemned). The report of the Session then continues: "*Si, comme il le croit, on arrive pas à trouver ce pouvoir, al ors M. Asser est d'avis de supprimer l'article 26.*" (If, as it has reason to believe, such a power cannot be found, then Mons. Asser is of the opinion that Article 26 should be suppressed). The interpretation was agreed to. The Chairman of the *Comité de l'examen*, Bourgeois, especially was of opinion that it would not be possible "*de prévoir des cas de nullité, sans savoir en même temps qui sera juge d'apprécier ces cas . . .*" (to provide for cases being declared null and void, without at the same time knowing who will be the judge to appreciate such cases. . . .)

In the same sense the committee report of Descamps was sent to the plenum. The words in question read as follows: "*En ce qui concerne la question générale de causes de nullité de la sentence arbitrale, le projet russe renfermait la disposition suivante: La sentence arbitrale est nulle en cas de compromis nul ou de 'excès de pouvoir' ou de corruption prouvée de l'un des arbitres. M. Asser a demandé de son côté, si l'on ne pourrait trouver un pouvoir à qui incomberait la mission de déclarer nulle la sentence afin de ne pas laisser cette appréciation si grave à l'arbitraire ou à l'initiative de l'Etat qui aura été condamné. Le Comité s'est arrêté, dans l'examen de cette question, devant les inconvenients de prévoir des cas de nullité sans déterminer en même temps qui sera juge d'apprécier ces cas. On a fait observer toutefois que la Cour permanente d'Arbitrage pouvait mettre les Etats sur la voie d'une solution dans cet ordre.*" (With regard to the general question of the causes for the arbitral award being declared null and void, the Russian draft included the following provision: The arbitral award is null and void in the event of an invalid agreement or usurpation of jurisdiction or of proved corruption on the part of one of the Arbitrators. Mons. Asser, for his part, asked whether a Power could not be found whose mission it would be to declare the award null and void, in order not to leave so serious an appreciation to the arbitrary action or the initiative of the State which will have been condemned. The Committee was brought to a standstill, in the examination of this question, by the inexpediency of providing for cases being declared null and void without, at the same time, determining who shall be the judge to appreciate such cases. Attention was, however, drawn to the fact that the Permanent Court of Arbitration could put States in the way of a solution of this kind).

The Report adds further: "*Il est nécessaire de reconnaître au tribunal arbitral le droit de préciser la portée de ses pouvoirs par l'interprétation du compromis et des autres traités. . . .*" "*Les Parties peuvent, à coup sûr, limiter comme elles l'entendent l'extension des pouvoirs des arbitres, elles peuvent soumettre l'exercice de ce pouvoir à telle réserve qu'elles jugent nécessaires ou opportunes. Elles peuvent, si cela leur agrée, formuler les principes que les arbitres prendront pour guides dans leur décision. Mais il ne paraît pas possible de refuser aux arbitres le pouvoir d'apprécier, en cas de doute, les points qui rentrent ou ne rentrent pas dans leur compétence.*" (It is necessary that it should be recognised that the Mixed Arbitral Tribunal has the right to define the scope of its powers by the interpretation of the agreement and of the other Treaties. . . . The Parties may, most certainly, limit the extension of the powers of the Arbitrators as they understand those powers, they may subject the exercise of those powers to such reservations as they may consider necessary or expedient. They may, if they please, formulate the principles that are to guide the Arbitrators in their decision. It does not seem possible, however, to refuse to the Arbitrators the power of appreciation, where a doubt arises, of the points which do or do not fall within their jurisdiction). The plenum also agreed to the proposal of the Committee, to leave to the arbitration court: "*le pouvoir de déterminer sa compétence en interprétant le compromis et les autres traités. . . .*" (the power of determination of its jurisdiction to interpret the agreement and the other treaties . . .).

On the other hand, the proposal of the Bulgarian delegate, Stancioff, "*de dire s'il existe un cas où les Parties sont libéré de cet engagement (de se soumettre à la sentence arbitrale)*" (to say whether a case exists in which the Parties are freed from this undertaking to submit to an arbitral award) was not accepted.

To this result no material changes were made by the second Peace Conference of The Hague (1907). The important resolutions in the agreement for a peaceful settlement of international disputes, made at this Conference, are the following :

Article 37 says, amongst other things, that submission to the Arbitral Tribunal "*implique l'engagement de se soumettre de bonne foi à la sentence*" (implies an undertaking to submit to the award in good faith).

Article 73 : "*Le Tribunal est autorisé à déterminer sa compétence en interprétant le compromis ainsi que les autres traités qui peuvent être invoqués dans le matière et en appliquant les principes du droit.*" (The Tribunal is authorised to determine its own jurisdiction to interpret the agreement, as well as the other Treaties which may have been cited in the case, and to apply the principles of law).

Article 81 : "*La sentence arbitrale dûment prononcée et notifiée aux agents des Parties en litige décide définitivement et sans appel la contestation.*" (The arbitral award, duly given and notified to the Agents of the Parties to the dispute, decides the allegation conclusively and without appeal).

Article 83 : "*Les Parties peuvent se réserver dans le compromis de demander la revision de la sentence arbitrale.*" (The Parties may, in the agreement, reserve to themselves the right to demand a revision of the arbitral award).

Heinrich Lammasch summarises the effective results as follows : "The problem of revising verdicts of the arbitration courts, in the wider sense of the word, was not left unsolved, but was explicitly decided in the negative sense. The Peace Treaty refuses to recognise not only an appeal based on the plea of injustice, but also any complaint entered on account of wrong procedure, and it recognizes the immutability of the verdicts." Referring to Article 37, it is inconsistent with this axiom to suppose that the defeated State be its own judge in the question whether the verdict were affected by nullity and whether it can consequently claim the right to refuse execution, or even whether it might be entitled to refuse compliance, because the verdict is incompatible with its honour or its material interests.

Similarly Otfried Nippold maintains, "I am of opinion . . . that a decision, once given, should be considered binding without reservations. Whatever one may think about The Hague decisions and whatever postulates may be set up around them, for the time being they are certainly valid law." (Das Werk vom Haag, 2, Serie Die gerichtliche Entscheidungen, Erster Band, dritter Teil, 1914, p. 48). He remarks further "that although certain definite reasons for nullity have been defended at times, both in theory and in practice, they have not yet been recognized in common positive international law. The theory of the reasons for nullity is therefore more as a postulate than a complex of current standard law." (See also Nippold, "Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten," 1907, p. 347, *et seq.*).

The Hague Arbitration Court has interpreted the standing rules of The Hague Peace Pact in the same sense. For when the United States of America and Venezuela submitted to it, as a result of a compromise, the Orinoco dispute for the examination of the question, whether the Arbitrator, Barge, who had been commissioned by a previous compromise to decide the case, had exceeded his jurisdiction, The Hague Tribunal maintained that he could only enter upon an

examination of the nullity question, because the contending parties in their second compromise "*admettent au moins implicitement comme vices entraînant la nullité d'une sentence arbitrale, l'excès de pouvoir et l'erreur essentielle dans le jugement*" (admit, at least implicitly, usurpation of jurisdiction and an essential error of judgment as faults entailing the annulling of an arbitral award). In the absence of such special agreement the plea of nullity would have had to be dismissed, "*considérant qu'il est assurément de l'intérêt de la paix et du développement de l'institution de l'arbitrage international, si essentiel pour le bien-être des nations, qu'en principe semblable décision soit acceptée, respectée et exécutée par les Parties sans aucune réserve ainsi qu'il est prescrit par l'article 81 de la convention pour le règlement pacifique des conflits internationaux du 18 octobre 1907 que d'ailleurs, aucune juridiction n'est instituée pour reformer de semblables décisions*" (considering that it is assuredly in the interests of peace and the development of international arbitration—so essential for the well-being of nations—that such a decision should be accepted, respected and executed by the Parties without any reservation whatever, as is laid down in Article 81 of the Convention of 18th October, 1907, for the peaceful settlement of international disputes, and elsewhere, no jurisdiction is instituted for the re-forming of such decisions). Thus, as Nippold correctly points out, The Hague Tribunal has laid down that, in spite of the alleged nullity, it "considers the first verdict really as a definite one, and it only means to enter upon an examination of the nullity in consequence of the express desire of the parties."

III.

The history of the origin of The Hague Peace Pact, as set forth in the previous section, shows clearly and simply that its drafters were agreed to exclude any opposition to a properly recorded verdict on the plea of nullity at least so long as no judicial court of appeal had been established. For they were of opinion that in the interests of international legal security, it would be preferable to make all decisions binding rather than to leave it to the condemned State to judge whether the verdict were liable to attack for nullity. It is therefore undoubtedly wrong when Fauchille argues: "*Les conventions de la Haye de 1899 et de 1907 n'ont pas envisagé les cas de nullité d'une sentence arbitrale. Elles ont ainsi laissé les choses en l'état antérieur. Les juristes pourront donc continuer comme auparavant à enseigner que dans certains cas, quitte à déterminer lesquels, une sentence arbitrale est évidemment nulle.*" (The Hague Conventions of 1899 and 1907 did not consider the annulling of an arbitral award. They left things in their *status quo*. Jurists may, therefore, continue as formerly to teach that, in certain cases—which cases, they themselves need not determine—an arbitral award is obviously null and void) (*Traité de droit international public*, 1926, Vol. I, Third part, p. 565, *et seq.* In the same sense also Chr. Meurer, "Der Haager Friedenskonferenz," I, 1905, p. 349).

Although the intention of the authors was, without any ambiguity—at least until the creation of a legal court of appeal—to exclude all pleas of nullity absolutely, I am of opinion that such intention has not been expressed completely in The Hague Conventions.

Rules laid down in agreements can, however, be considered as binding only, provided the intention of the authors is definitely expressed in the text of such Treaty; since the will alone does not create law, but only the expressed will.

When we now proceed to examine the text of the Treaty to ascertain, whether it allows the plea of nullity on account of *excès de pouvoir*, we find the following :

Article 73, already referred to, of the Covenant for the peaceable settlement of international disputes, does not entitle the Arbitral Tribunal to decide on its own jurisdiction absolutely, but allows it only "*à déterminer sa compétence en interprétant le compromis ainsi que les autres traités qui peuvent être invoqués dans la matière*" (to determine its own jurisdiction to interpret the agreement, as well as the other Treaties which may be cited in the case).

From this it follows that the decision of the Arbitral Tribunal on its own jurisdiction is not binding on the contending parties under all circumstances, but only if it is taken as an interpretation of such Treaties as established the Tribunal.

Article 73, therefore, recognises the *excès de pouvoir*. The case, however, is not established, in the meaning of this rule, if one of the contending parties, or the scientific interpretation, is of the opinion that the Tribunal has exceeded its jurisdiction (material *excès de pouvoir*), the case is, however, established if the decision of the Tribunal on its jurisdiction is not based on an interpretation of the Treaties from which it derives its jurisdiction (formal *excès de pouvoir*).

According to Article 73, therefore, *excès de pouvoir* does exist, when the Arbitral Tribunal assumes jurisdiction without being able to base its claim on any agreement between the contending parties (Decision on jurisdiction without a Treaty basis), or when substantiating its contested jurisdiction, it points to such a Treaty, without proving, by interpretation, the existence of a rule on which its jurisdiction is based (Decision on jurisdiction by apparent reference to Treaty).

If, however, the Arbitral Tribunal proceeds by examining the Treaties on which its jurisdiction is based and develops them by interpretation as to why it considers its jurisdiction proved, then is such decision on its jurisdiction absolutely binding for both parties according to Article 73, even if the defeated State be able to put forward good grounds for considering the interpretation by the Tribunal of the compromise, or other relevant agreements, as erroneous (Decision on jurisdiction, based on interpretation, even possibly erroneous, of an agreement). In such a case, therefore, the State against whom the decision has been given is bound to submit to it according to international law.

For the meaning of Article 73 is just that, in the event of one of the contending parties disputing the jurisdiction of the Arbitral Tribunal, the decision in this matter rests with the Tribunal itself, in so far as it is entitled and in duty bound to solve this question, as any other juridical question, by an interpretation of the authoritative Treaties.

Consequently, any decision on its jurisdiction derived from the sense of Article 73, can never be "*extra compromissum*," but always "*in compromisso*."

Since Article 73 has been in force, every international arbitral tribunal, or other court of justice, has, therefore—in the absence of any contrary agreement between the contending parties—two duties: it has to decide first on its own jurisdiction and then on the merits of the case.

Thus two spheres of its duties are united which, in principle, might be separated. There is, however, good reason for such union, since both problems have this in common that, in either case, questions of law have to be decided by way of interpretation.

A comparison of the genesis with the wording of the Peace Pact leads to the following result: It is quite certain that all the authors wanted to remove all grounds for a plea of nullity, as Lammasch and Nippold, in particular, have shown. But this intention has only found incomplete expression in the wording of the Treaty. There is, by the way, a hint to this effect in the Report of the Committee dealing with the jurisdiction of the arbitral tribunal to decide upon its own jurisdiction, which I have referred to above under II.

The intention of the authors is, however, only so far authoritative as it has been definitely expressed in the text of the Treaty. We must thus discriminate between two kinds of *excès de pouvoir*. The one is recognised by Article 73. It arises, in the event of the verdict not justifying the jurisdiction of the Arbitral Tribunal "*en interprétant le compromis ainsi que les autres traités qui peuvent être invoqués dans la matière*" (to interpret the agreement, as well as the other Treaties which may be cited in the case). Such formal *excès de pouvoir* is maintained in spite of Article 73. Any other involved kind of *excès de pouvoir* is, however, negatived by Article 73, since it entitles the Arbitral Tribunal itself to settle any dispute between the contending parties concerning its jurisdiction, by a binding decision.

On the other hand, as far as the wording of Article 73 is concerned, the history of its origin, as sketched above, is of the greatest importance.

When one considers that it was the intention of the authors to exclude all grounds of nullity, it follows that they also rejected the kind of *excès de pouvoir* excluded by the wording of Article 73. If, however, the wording of Article 73 in this respect is covered by the intention of the parties to the Treaty, then the meaning of this rule cannot be attacked.

The right of the Arbitral Tribunal to make a decision on its jurisdiction the basis of the authoritative Treaties is further confirmed by Article 36, last paragraph of the statutes for the Permanent Court of International Justice, which, in this respect, implies nothing new in The Hague Peace Pacts. It is true that this passage only says "*En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide*" (in the event of dispute on the point as to whether the Court has jurisdiction, the Court is to decide). But any "*décision*" can only be given, according to Article 56, provided it is "*motivée*" (founded on reasoning). Article 53 is still more explicit on this point: "*Lorsqu'une des Parties ne se présente pas, ou s'abstient de faire valoir ses moyens, l'autre Partie peut demander à la Cour de lui adjuger ses conclusions. La Cour, avant d'y faire droit, doit s'assurer non seulement qu'elle a compétence aux termes des articles 36 et 37, mais que les conclusions sont fondées en fait et en droit*" (When one of the Parties is not present, or refrains from giving effect to his arguments, the other Party may request the Court to adjudicate on his submissions. The Court, before complying with this request, must ascertain not only that it has jurisdiction in accordance with the terms of Articles 36 and 37, but also that the submissions are founded in fact and in law). The Report of the Committee of Jurists, charged with the elaboration of the statutes, adds the following remark: ". . . Il se peut que l'une des Parties, dûment citée devant la Cour, refuse de comparaître; déniant compétence à la Cour, elle ne se présente que pour faire valoir cette exception. . . Si la Cour estime que c'est un cas de sa compétence

elle retient l'affaire . . .” (It is possible that one of the Parties, duly summoned before the Court, may refuse to appear; denying the jurisdiction of the Court, he only presents himself in order to give effect to this objection. . . If the Court considers that the case is one within its jurisdiction, it will retain the case. . .”

IV.

The maxims contained in Articles 73 and 81 as quoted above are universally binding on all signatories to The Hague Pact, unless the parties have agreed upon other rules. For Article 51 of The Hague Convention for the peaceful settlement of international disputes says: “*En vue de favoriser le développement de l'arbitrage, les Puissances contractantes ont arrêté les règles suivantes qui sont applicables à la procédure arbitrale, en tant que les Parties ne sont pas convenues d'autres règles.*” (With a view to encouraging the development of arbitration, the Contracting Powers have laid down the following rules which shall apply to arbitral procedure, in so far as the Parties are not bound by other rules).

Such rules are, therefore, binding on all international deciding tribunals in a subsidiary sense, unless different rules of procedure have been laid down.

The principles of Article 37 is, therefore, absolutely valid.

V.

After the general discussions under I to IV, we can now proceed to deal with the Hungarian-Roumanian dispute by examining what consequences for it can be drawn from the above premises. The facts may be stated very briefly as follows: Some Hungarian subjects, whose lands situated in Transylvania had been seized by Roumania, brought an action against Roumania before the Roumanian-Hungarian Mixed Arbitral Tribunal, based on Article 250 of the Treaty of Trianon, which reads:—

“*Nonobstant les dispositions de l'article 232 et de l'annexe de la Section IV, les biens, droits et intérêts des ressortissants hongrois ou des sociétés contrôlées par eux, situés sur les territoires de l'ancienne monarchie austro-hongroise, ne seront pas sujets à saisie ou liquidation en conformité de ces stipulations. . . Les réclamations qui pourraient être introduites par les ressortissants hongrois, en vertu du présent article, seront soumises aux tribunaux arbitraux mixtes prévus par l'article 239. . .*” (Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions. . . Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239. . .).

The representative of Roumania contested, whilst the representative of Hungary defended the jurisdiction of the Mixed Arbitral Tribunal. This question, with which we need not deal here in detail, was most carefully discussed. The printed copy of the indictment, of the other printed matter and of the Pleadings cover (apart from the Opinions submitted) no less than 424 closely printed pages.

On 10th January, 1927, the Mixed Arbitral Tribunal came to the conclusion that the main case lay within its jurisdiction and gave detailed reasons for its resolution. It is based on the relevant decisions of the Peace Treaty of Trianon, which establish the jurisdiction of the Mixed Arbitral Tribunal, developing the decision on its jurisdiction "*en interprétant les traités qui peuvent être invoqués dans la matière*" (to interpret the Treaties which may be cited in the matter). From the very comprehensive arguments I will only quote two important passages which may serve as proof: "*Attendu qu'il échet tout d'abord de relever qu'en insérant l'article 250 dans le Traité de Trianon, les Puissances . . . ont voulu mettre les biens . . . des ressortissants hongrois, situés sur les territoires de l'ancienne monarchie austro-hongroise, entièrement à l'abri de toutes les mesures mentionnées aux articles 232 . . . et placer ces biens . . . sous l'empire du droit international commun; que cela résulte clairement des travaux préparatoires relatifs aux articles 267 du Traité de St. Germain et 250 du Traité de Trianon, aussi bien que du texte même de ce dernier article . . .*" (Whereas it should be duly noted in the first place that, in inserting Article 250 into the Treaty of Trianon, the . . . Powers desired to afford full protection to the property . . . of Hungarian nationals situated in the territories of the former Austro-Hungarian Monarchy, from all measures referred to in Article 232 . . . and to place such property . . . under the rule of generally accepted international law: whereas this follows clearly from the preliminaries relating to Article 267 of the Treaty of St. Germain and Article 250 of the Treaty of Trianon, as well as from the actual text of the latter Article . . .). Further: "*Attendu que le défendeur soutient que la mesure que l'article 250 vise sous le nom de 'liquidation' est une mesure de guerre prise dans un but de guerre dont le trait le plus caractéristique est qu'elle frappe les biens ex-ennemis 'comme tels' . . . Attendu qu'il ressort clairement des termes des articles 232 et 250 . . . que la liquidation au sens de l'article 250 peut être soit une liquidation de guerre, soit une liquidation d'après guerre . . . que dans l'un et l'autre cas il s'agit de soumettre les biens . . . ex-ennemis à un traitement qui constitue une dérogation aux règles généralement appliquées quant au traitement des étrangers et au principe du respect des droits acquis. . .*" (Whereas the Respondent maintains that the measure referred to in Article 250 as 'liquidation' is a war-measure applied for purposes of war and of which the chief characteristic is that it is applied to ex-enemy property "as such" . . . whereas it is plainly obvious from the terms of Articles 232 and 250 . . . that liquidation within the meaning of Article 250 can be either war-time or post-war liquidation . . . and, in both cases, it is a question of subjecting ex-enemy property . . . to a treatment which constitutes a derogation from the regulations ordinarily in force for the treatment of foreigners and from the principle of respect for vested rights . . .). (A. de Lapradelle, *Recueil de la jurisprudence des Tribunaux arbitraux mixtes, créés par les Traités de paix*, IV, *Compétence*, Paris, 1927).

On account of such decision by the Mixed Arbitral Tribunal on its own jurisdiction, Roumania recalled her national Arbitrator on 24th February, 1927, so as to prevent the Mixed Arbitral Tribunal from examining the merits of the case, advising the Council of the League of Nations according to Article 11, paragraph 2, of the Covenant. On March 7th, 1927, Hungary also lodged an appeal with it, based on Article 239 of the Treaty of Trianon. Article 239 reads: "*Un Tribunal arbitral mixte sera constitué composé de trois membres. Chacun des Gouvernements intéressés désignera un de ses membres. Le Président sera choisi à la suite d'un accord entre les deux gouvernements . . . Au cas où cet accord ne pourrait intervenir, le Président du Tribunal et deux*

autres personnes . . . seront choisis par la Société des Nations et, jusqu'au moment où il sera constitué, par M. Gustave Ador, s'il y consent. . . Si un Gouvernement ne pourvoit pas . . . à la désignation ci-dessus prévue d'un membre du Tribunal, en cas de vacance, ce membre sera choisi par le Gouvernement adverse parmi les deux personnes mentionnées ci-dessus. . ." (A Mixed Arbitral Tribunal shall be established . . . consist(ing) of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments . . . In case of failure to reach agreement, the President of the Tribunal and two other persons . . . shall be chosen by the (Council of the) League of Nations, or, until this is set up, by Mons. Gustave Ador, if he is willing . . . If in case there is a vacancy a Government does not proceed . . . to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above . . .). And paragraph 1 of the Annex to Article 239 lays down, "*En cas de décès ou de démission d'un membre du Tribunal, ou si un membre du Tribunal se trouve, pour une raison quelconque, dans l'impossibilité de remplir ses fonctions, la procédure, qui a été suivie pour sa nomination, sera employée pour pourvoir à son remplacement*" (Should one of the members of the Tribunal either die, retire or be unable for any reason whatever to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him).

Nevertheless the Council of the League of Nations has not yet begun to proceed according to these rules for making appointments.

VI.

Against this duty of the Council to appoint an Arbitrator, K. Strupp certainly maintains that, under Article 239, the Council has the right to proceed as set forth, but that it is not obliged to do so, since, for the League of Nations, Article 239 is "*res inter alios acta,*" "*Pour la Société des Nations, sujet du droit, un traité en vigueur entre d'autres parties, en l'espèce le Traité de Trianon, est . . . une res inter alios acta. Il dépend toujours de la libre volonté de la Société des Nations . . . si elle veut accepter cette offre . . . de nommer des arbitres . . . ou si elle veut la décliner*" (For the League of Nations, subject of the law, a Treaty in force between other parties, in this case the Treaty of Trianon, is . . . a *res inter alios acta*. It invariably depends on the free-will of the League of Nations . . . whether it will accept this offer . . . to appoint Arbitrators . . . or whether it will decline it). (*Le litige roumano-hongrois concernant les Optants hongrois sur territoire roumain*, page 12, et seq., Paris, 1927). It is, however, easy to refute this objection.

Above all, Article 239 itself makes a very evident distinction between the appointment of Arbitrators by the Council and the appointment by Mons. G. Ador. For, whereas it definitely charges the former with such a task, it adds, in the latter case, "*s'il y consent*" (if he is willing).

This clear discrimination is quite to the point. For, as far as Mons. G. Ador is concerned, the Treaty of Trianon is surely a *res inter alios acta*, which therefore cannot lay any duties upon him. For the League of Nations, however, this Treaty is by no means—any more than those of Versailles, St. Germain and Neuilly—a *res inter alios acta* (as Strupp thinks), since the League of Nations was founded just by these Treaties.

If, however, these Treaties had the power to institute the League of Nations with all its rights, they were also entitled to impose duties upon it; in which case it is naturally immaterial in which chapter of the Treaties such duties are enumerated. As a matter of fact, the duties of the League of Nations are contained not only in Sections I and XIII, but also in other parts of the Peace Treaties. It is, for instance, sufficient to call attention to Articles 45 *et seq* (Saar Valley) and 100 *et seq* (Danzig) of the Treaty of Versailles, as examples.

The obligations of the Council being laid down, are binding on later members too. The mistake made by Strupp is, therefore, that he mixes up the foundation Treaties with the others, and does not understand that, although these are *res inter alios acta* for the League of Nations, the former are not.

There can be no doubt, therefore, that Article 239 imposes a definite obligation on the Council of the League of Nations.

VII.

Article 239 is strictly formal. It imposes on the Council the absolute obligation to select an Arbitrator as soon as the conditions of Article 239 are present. It is, therefore, not entitled to make the carrying out of the selection dependent on any other conditions than those quoted in Article 239. Quite apart from the wording, this follows from the fact that the League of Nations can never get into the position to intervene, when an Arbitrator is removed if, owing to lack of agreement between the parties as to the person of the President, it has itself made such appointment together with the nomination of two substitute Arbitrators. For if, at a later date, one of the Arbitrators appointed by one of the parties withdraws and is not replaced within one month by a new Arbitrator, the other State is entitled to select one of the two substitutes in place of the withdrawn Arbitrator, without any further co-operation of the League of Nations.

Even in the case of Article 239 not existing at all, the Council would still be responsible for seeing that the procedure of the Mixed Arbitral Tribunal is carried on.

VIII.

Such obligation of the Council follows from the last paragraph of Article 13 of the Covenant of the League of Nations, which lays it down that: "*Faute d'exécution de la sentence, le Conseil propose les mesures qui doivent en assurer l'effet.*" (In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto).

For such "faute d'exécution" (failure to carry out an award) is not only established if the verdict is not executed in its main provisions, but also, if the execution of the decision on jurisdiction is frustrated. Commissioner Gore already recognized this in the *Betsey* case mentioned under I. The relevant passage in this decision reads: "*Ne pas nommer des commissaires d'eût été violer le traité. En serait-il autrement si les commissaires refusaient d'assister aux réunions et rendaient aussi toute décision impossible dans les cas autres que ceux où, par leur concours, il sanctionneraient l'avis de la majorité? Leur présence est aussi nécessaire à l'exécution . . . que leur nomination.*" (Not to have appointed delegates would have been a breach of the Treaty. Is the case any different if the delegates refuse to attend meetings and also render any

decision impossible in cases other than those in which they would, by their participation, sanction the opinion of the majority? Their presence is as necessary to the carrying out . . . as their appointment). To the question whether those Arbitrators who have been out-voted on the question of jurisdiction are entitled to withdraw from the main proceedings, he replies therefore: "*Si mon opinion est exacte que la Commission a le droit de se déclarer compétente, il est évident que tous les commissaires sont liés par cette décision et dans l'obligation absolue de ne pas arrêter le cours de la procédure par leur absence.*" (If my opinion is correct, the Commission is entitled to declare itself to have jurisdiction, it is obvious that all the delegates are bound by this decision and under an absolute obligation not to stay the course of the proceedings by their absence).

IX.

The Council would only be absolved from the duty, imposed by the last paragraph of Article 13 of the Covenant, if the verdict given were really null and void in accordance with the deductions set forth above under III. In spite of this, Mons. Politis, for instance, tries to justify the procedure up to now of the Council by arguing that the Mixed Tribunal "should be accused of exceeding its jurisdiction."

Against this the following can be asserted: As shown in IV, Article 73 of The Hague agreement for the peaceable settlement of international disputes, which has been ratified, and in this respect unreservedly ratified by Austria-Hungary and Roumania, applies to all arbitration procedures, unless definite agreements to the contrary have been made by the contending parties. Since, however, no rule involving a derogation from Article 73 has been agreed upon as far as the Mixed Tribunals are concerned, whose character as an international arbitral court has never been questioned by either of the parties, this rule must be applied to the present case too.

According to Article 73 there is certainly no usurpation of jurisdiction, if the decision regarding the jurisdiction was made: "in interpreting the agreement as well as the other Treaties which might be cited in the matter."

Now the slightest doubt cannot exist and it has never been denied by any party, that the relevant decision of the Mixed Arbitral Tribunal regarding its jurisdiction is based on an interpretation of the Treaties concerned.

Roumania has certainly thrown doubt on the "correctness" of this interpretation. As regards the question of usurpation of jurisdiction, it does not matter, according to present international law, whether the interpretation of the rules on jurisdiction is "correct," but solely and exclusively whether the decision regarding jurisdiction has been derived by way of interpretation from the rules regarding jurisdiction, or not.

Thus an objective measuring scale takes the place of a more or less subjective one. For it is evident that an interpretation of a passage in a Treaty need not in all cases lead to a result having one meaning only, since frequently good reasons can be put forward for the one as well as for any other interpretation. It will, therefore, often be disputed which interpretation is to be considered as "correct." It is, however, possible to decide objectively, whether the Arbitral Tribunal has arrogated a jurisdiction to itself, or whether it has obtained it by way of interpretation of the Treaties relating thereto.

It indicates, therefore, a great advance, hardly yet sufficiently appreciated, when The Hague Pact establishes such an objective method for judging the question of usurpation of jurisdiction as a binding rule.

X.

Such discrimination between the subjective way of judging just mentioned and the objective one underlies, unconsciously, the still older-widely-disseminated doctrine.

Vattel, for instance, the originator of this conception, writes: "*. . . si par une sentence manifestement injuste . . . les arbitres s'étaient eux-mêmes dépouillés de leur qualité, leur jugement ne mériterait aucune attention, on ne s'y est soumis que pour les questions douteuses . . .*" (. . . if by a manifestly unjust sentence . . . the Arbitrators had deprived themselves of their authority, their judgment would merit no attention and it was not submitted to except for doubtful questions. . .)

Following him, Commissioner Gore says in the *Betsey* case, mentioned under I, "*. . . Il est contraire à la foi des traités de ne pas se soumettre à la sentence des arbitres, excepté si elle est manifestement injuste . . .*" (. . . It is contrary to Treaty good faith not to submit to the sentence of the arbitrators, unless it is manifestly unjust . . .).

We find the same distinction to-day for instance in Lapradelle and Politis. Elsewhere Politis demands that the usurpation of jurisdiction shall be "*certain et indiscutable*" (certain and indisputable). (*Justice internationale*, p. 92. Doubtful is G. Salvidi: *La corte permanente di giustizia internazionale*. Extract from the "*Rivista di diritto internazionale*," see p. 132, et seq, 1923/24).

With Erich Kaufmann, however, it must be stated: "A 'certainty' and 'indisputability' of a transgression of limits can certainly not arise in the presence of The Hague judgment." To prove this it is sufficient to refer to the numerous important authorities on international law, as Bellot, Borchard, Dupuis, E. Kaufmann, Lapradelle, Pillet, Scelle and Vallotton. (*La réforme agraire roumaine en Transylvanie devant la Justice internationale et le Conseil de la Société des Nations*, "*Quelques Opinions*," Paris, 1928, and "*Zeitschrift für Ostrecht*"), all of whom have defended at length the jurisdiction of the Mixed Arbitral Tribunal in our question.

XI.

If, therefore, there is no case of usurpation of jurisdiction, either according to existing international law, or according to the doctrine dating back to Vattel, then the Council of the League of Nations is in duty bound to see that the Mixed Arbitral Tribunal continues to function.

It may certainly try at first to bring about an amicable settlement between the parties according to Article 11, par. 2, of the Covenant. This depends, however, entirely on the good will of both parties. The Council has no jurisdiction to impose it upon either party. If, therefore, the mediation fails, the Council is bound, in accordance with Article 13 of the Covenant and Article 239 of the Treaty of Trianon, to cause the necessary steps to be taken to ensure that the legal procedure pursues its regular course.

Translated from the German.

AN OPINION ON THE QUESTIONS CONNECTED WITH
THE APPOINTMENT OF SUBSTITUTE ARBITRATORS
TO THE ROUMANO-HUNGARIAN MIXED ARBITRAL
TRIBUNAL BY THE COUNCIL OF THE LEAGUE OF
NATIONS.

GIVEN BY

Dr. VIKTOR BRUNS
(*Privy Councillor of Justice*).

Sometime Professor of Jurisprudence at the University of Berlin ;
Director of the Institute of Foreign Public Law and International
Law in Berlin.

Published: Berlin, Carl Heymanns Verlag, 1928.

Arising out of the Roumano-Hungarian Optants Dispute there are two proceedings to be considered separately by the Council of the League of Nations.

1. The proceedings initiated by Hungary under Article 239 of the Treaty of Trianon for the appointment of substitute arbitrators to the Roumano-Hungarian Mixed Arbitral Tribunal, at present unable to function owing to the recall by the Roumanian Government of the Roumanian arbitrator.

2. The proceedings in law entirely independent but in fact not unconnected, which have been initiated by Roumania under Article 11, Section 2, of the League Covenant with which it is sought to bring about an intervention of the League in the proceedings under Article 239 of the Treaty of Trianon. These two proceedings are subject to entirely separate legal considerations.

The proceedings under (1) require a solution on purely juridical grounds, those under (2) a political solution. Nevertheless, in spite of this difference in principle there remains a connection between the two proceedings. They do not depend upon but they influence one another, inasmuch as the proceedings under Article 239 of the Treaty of Trianon impose restrictions on the proceedings under Article 11, Paragraph 2, of the Covenant and inasmuch as the appeal made under Article 11, Paragraph 2, of the Covenant hinders the actual progress of the proceedings under Article 239 of the Treaty of Trianon.

Both proceedings are to some extent connected for common treatment and decision: everything that is alleged by the two parties is valid in either case, and, after being recast to fit the classification governing the particular proceedings and must be taken into consideration in each of the proceedings. This practical unity should not, however, be allowed to obscure the view to be taken by expert opinion on the special features of each proceedings. However much they may appear to be a single thing from the practical and the political point of view, from a legal standpoint they are fundamentally distinct.

II.—PROCEEDINGS UNDER ARTICLE 239 OF THE TREATY OF TRIANON.

1. Article 239 of the Treaty of Trianon reads in extract as follows:

(a) A Mixed Arbitral Tribunal shall be set up between each of the Allied and Associated Powers of the one part, and Hungary of the other part, within three months of the coming into force of the present Treaty. Each of these Tribunals shall consist of three members. Each of the Governments concerned shall nominate one member. The President will be chosen by agreement between the two Governments concerned.

In the event of the two Governments not being able to reach an agreement the President of the Tribunal and two other persons, both of them competent to act as substitutes for him, should occasion arise, shall be selected by the League Council, and until the latter body has taken shape by M. Gustave Ador, subject to his consent. These persons shall be nationals of those Powers which remained neutral during the war.

If, when a vacancy occurs, a Government fails to make the appointment of a member of the Tribunal, as stipulated above, within the period of one month, that member shall be chosen by the other Government from the aforesaid two persons other than the President.

When there is a vacancy in the composition of the Arbitral Tribunal it is, then, the League Council to which the right and the duty of making such appointment was assigned by Article 239 of the Treaty of Trianon, must appoint the substitute judges. The appointment is made by a majority vote in accordance with Article 9 of the Council's Standing Orders. This was, in fact, the Council's procedure when in the year 1923 the German Government withdrew its arbitrators from the Franco-German and Belgo-German Arbitral Tribunals (see League of Nations, Official Journal, 1923, pp. 242-243, and Reports, pp. 399-400).

The only question which the League Council has to consider in this case is that of whether the question of its jurisdiction has arisen, i.e., as to whether the request of the Government making the appeal is for a tribunal in the sense of Article 239 of the Treaty of Trianon, and whether there is or is not a vacancy in that court.

2. But has the League Council the right to examine a judgment pronounced by the Mixed Arbitral Tribunal, for instance, as in this particular case a judgment as to jurisdiction which is disputed by one of the parties as to its correctness as a judgment?

The answer is no. The League Council is essentially not a judicial court at all. Even if it were, it could only have jurisdiction to re-examine a judgment already delivered if it were expressly endowed by the parties setting up the tribunal with jurisdiction to revise the judgments of that tribunal. That, however, did not happen, and, moreover, it cannot be inferred from any interpretation of Article 239 of the Treaty of Trianon. It rather seems to me possible by way of interpretation of Article 239 of the Treaty of Trianon—to prove that the parties who concluded that treaty not only omitted to confer on the court to which the appointment of substitute judges was entrusted, the right of revising the judgments of the Arbitral Tribunal, but that they even deliberately excluded such a right. At any rate there

is nothing in the wording of Article 239 of the Treaty of Trianon which would suggest that the League Council has any right of revision. Had it been the wish of the parties to confer such an important right—contrary to all the principles of arbitral procedure—it must have been expressly stated, especially in view of the clause concerning binding character of paragraph (g) of Article 239 of the Treaty of Trianon.

In particular, the following argument appears to me to be conclusive: By the terms of Article 239 of the Treaty of Trianon the right to appoint substitute-arbitrators was vested in the League of Nations, and, pending the establishment of the League, in M. Gustav Ador. Accordingly a case might well have arisen—a contingency which had evidently been foreseen or there would have been no sense in specifying the appointment of M. Ador—when this single personage would have been in the same position as the League Council finds itself in to-day. In other words, it would have been the business of M. Ador, in fact, of a single private individual, to examine and determine whether the vacancy in the tribunal was caused by one of its decisions being contrary to the facts or not. If this were the result desired it would have meant practically that a single person—and a private individual into the bargain—with no official authority over the parties, might have made a judge of revision to supervise a court composed of several members with every requisite means of help at their disposal. (Article 239 f.)

A paradoxical idea, indeed, if one further bears in mind that there exists in no civilised State a court with jurisdiction to revise the decisions of lesser tribunals, which is numerically weaker than the tribunal whose decisions it is its duty to examine.

But the position of the League Council should manifestly differ in no way from that of M. Gustav Ador. Nothing in the text of the treaty warrants any conclusion that the League Council, in fulfilling its duty under Article 239 of the Treaty of Trianon, should be allowed to exercise any greater powers, when doing so, than M. Ador. From this it follows that if, as must be assumed after what has been stated, the right is not to be assigned openly to M. Gustav Ador to undertake the revision of a decision of the Mixed Arbitral Tribunal, this right must also be withheld from the League Council.

3. Even though League Council's right of revision does not exist, the objection raised by Roumania against the Hungarian request that another arbitrator should be appointed, on the grounds that she had produced the vacancy in the tribunal because it had wrongfully claimed jurisdiction, has a decisive importance for the procedure before the League Council.

If it is not within the power of the League Council to concern itself with the legal decisions of the Mixed Arbitral Tribunal in the past, it still has a definite interest in the future activity of this Tribunal, in so far as the latter is to be made possible through its co-operation.

Considered from this point of view, the objection raised by Roumania means that the Mixed Arbitral Tribunal would, in consequence of the appointment of new arbitrators be placed by the League Council in the position to deliver judgment of fact in a matter with which it has no jurisdiction to deal; in other words, that the League Council, if it should appoint new arbitrators, would place the Arbitral Tribunal in a position to take action contrary to international law against Roumania.

It goes without saying that co-operation in a course of action contrary to international law cannot be imputed to the League Council. This case would occur, for example, if a request for appointments were made in accordance with Article 239 of the Treaty of Trianon, although evidently and admittedly the Arbitral Tribunal has no jurisdiction for the intended purpose. The matter cannot be left simply to the assertions of the two parties, even if one of them can claim that the Arbitral Tribunal has already declared itself in an interim judgment, to have jurisdiction.

As follows from the nature of arbitral procedure and as it is specifically laid down in paragraph (g) of Article 239 of the Treaty of Trianon, the parties are bound by the decisions of the Arbitral Tribunal, but only in so far as the Tribunal has given judgment on questions which were submitted to its jurisdiction by the parties. For it is generally recognised and more specifically by the authority of the Permanent Court of International Justice that an Arbitral Tribunal may derive its power of jurisdiction from the will of the parties. If the declaration of jurisdiction be wrongfully made, then it has no importance for the subsequent activities of the Arbitral Tribunal. The validity of the judgment delivered later on the merits of a case is not established simply by the existence of an affirmatory decision of the Arbitral Tribunal (see also what is stated below, under 6). A state which, by exploiting a wrongful declaration of jurisdiction, endeavoured to enforce an unjustifiable arbitral award in its own favour on the merits, would act in "*dolos*." It is, therefore, not entitled to presume upon any such declaration of jurisdiction, "*Sub hac enim conditione committitur stipulatio nequis doli praemium ferat*" (Ulpian L. 31, D. h. c. 4, 8).

But, on the other hand, the mere assertion by Roumania that the declaration of jurisdiction was wrongfully made and that the appointment of an arbitrator was desired by Hungary for action by the Court which did not lie within its jurisdiction, does not by itself mean that the League Council should refuse the nomination. The legal view of one party is by itself of no significance for the efficacy of an arbitral decision; "for if it were necessary to be convinced of the justice of a sentence before submission to it, it would be quite useless to accept arbitration." (Vattel International Law Book 11, Chapter 18, paragraph 329.) Roumania must indeed furnish proof that the action of the Arbitral Tribunal to which the Tribunal intends to proceed on the strength of its declaration of jurisdiction is an action which is not prescribed for it in the arbitration contract, in other words, an action which, because it may not effect it, would represent an interference, contrary to international law, with the Roumanian state. As a matter of fact, the declaration of jurisdiction does not matter at all, this judgment has rather the significance of establishing through its pronouncement the direction which the future activity of the Court should take. (A view which, evidently, is also the basis of the report at the Council Meeting of 17th September, 1927, as appears from the series of questions formulated in it.)

Roumania maintains that such action is contrary to international law. If she is right, then the League Council has no authority to appoint substitute arbitrators.

4. Roumania's objection that the Arbitral Tribunal exceeded its powers in issuing its declaration of jurisdiction, is nothing else than an "*exceptio doli*" pleaded against the Hungarian request that

new arbitrators should be appointed, the substance of which is that, after the appointment of the substitute arbitrators by the League Council, Hungary intended to make use of the tribunal in order to act illegally towards Roumania.

From this arises for the League Council the necessity for a revision of the case, as it is made aware by the allegations of the parties that it might, under certain circumstances, render possible an action contrary to international law. The Council can now no longer confine itself—as it would in a normal case—to the appointment of the arbitrators, after an examination of the normal conditions for its own competence exclusively. It must ascertain whether or not there is an impediment to the course of action prescribed for it by Article 239 of the Treaty of Trianon, viz., the aforesaid "*exceptio doli*." If it is established that this "*exceptio doli*" is well founded, the Council may refuse to appoint the new arbitrators.

It must be noted that the problem must not be stated so as to imply that the League Council may only proceed to make the appointments if it has established that the "*exceptio doli*" is not well founded. This way of proceeding would only be possible if it were permitted to suppose that Hungary were making its proposal in accordance with Article 239 of the Treaty of Trianon in order to attain ends contrary to international law. In intercourse between states, however, improper dealing must not be presumed, in other words, it has to be presumed that the purpose of Hungary's demand under Article 239 of the Treaty of Trianon is to obtain from the League Council assistance in the prosecution of legitimate aims. If this presumption is not disproved the Hungarian demand is thereby shown to be legitimate and the League Council *must* proceed to the appointment of the new arbitrators. (Comp. Publications of Permanent Court of International Justice, Series A. Collection of Judgments Number 7, Page 30: . . . only an abuse of this right or a violation of the principle of good faith can give an act of alienation the character of a breach of the Treaty; such an abuse may not be presumed, but it is for the person who alleges it to furnish proof of his allegation.)

5. What is to be the method of voting as regards this case?

It has been shown above that the appointment of substitute arbitrators, as a "Decision referring to persons," is only to be determined by a majority vote. (Article 9, Standing Orders, League Council.) The procedure is not applicable when the Council decides whether the "*exceptio doli*," pleaded by Roumania against Hungary's demand, is well founded or not. In the settlement of this question, which should not be confused with that of the arbitrator as such, we are not concerned with a "decision referring to persons" but with a decision by which it can be determined whether the charge made by Roumania is justified, that, by her appeal under Article 239 of the Treaty of Trianon, Hungary is trying to obtain from the League Council the facilitation of action by the Arbitral Tribunal which would be contrary to the treaty. This decision, in common with all not especially privileged decisions of the Council, must be unanimous, if it is to be effective for the further procedure of the Council (Comp. Article 5, Section 1, of the League of Nations Covenant), that is to say: unless all the members of the League Council present at the decisive meeting (which means at least a majority of the members of the Council according to Article 6 of the Standing Orders of the

League Council), record their opinion that Roumania's protest is justified, the League Council must, without further discussion, proceed to select by vote those persons to be appointed substitute arbitrators. (Comp. with the above: Schücking-Wehberg, "The Covenant of the League," 2nd edition, top of page 337, where it is also mentioned that preliminary questions must be determined by a majority vote, even though the decision in the main question may be taken by a majority vote.)

6. A further question remains to be cleared up: Have the parties not submitted themselves without reservation to the jurisdiction of the Arbitral Tribunal in so far as they agreed to consider all the facts which the Mixed Arbitral Tribunal classed under the motion of liquidation as coming within its jurisdiction?

In determining the jurisdiction of international tribunals two types have to be distinguished in principle.

(a) The states agree that an Arbitral Tribunal shall distinguish between some historical event which has happened in the past. In this case there can be no doubt as to the jurisdiction of the court, for, owing to the fact that every historical incident is determined unequivocally in time and space, it is impossible for either the tribunal or for one of the parties to be in error as to the case which is to be presented before the jurisdiction of the tribunal.

(b) The states agree that certain groups of facts relating to the past or the future, which are to be determined, not by historical but by juridical criteria, are to come under the jurisdiction of a court, as for instance all facts which constitute a liquidation.

It might then be alleged that, if the parties have transferred to an Arbitral Tribunal the decision of cases which are determined by juridical characteristics, not those of time and space, they are disposed to accept the settlement of this preliminary legal question by the Arbitral Tribunal, therefore also the declaration of the tribunal that it has jurisdiction for a particular case. In other words, that in such cases an objection of usurpation of jurisdiction is excluded.

Such a view would be incorrect. An Arbitral Tribunal, it is true, must establish its jurisdiction. An arbitral decision on the question of merits, however, is to be respected by the parties only if it comes within the limits of that which the parties intended to submit for decision. (Comp., in preference to all else, Lammasch "The Doctrine of Arbitration, in its Whole Extent," in the Manual of International Law, 1914, page 213 *et seq.*) *Extra compromissum arbiter nihil facere potest* (Book 32, Section 21, sub-sections 4, 8). In cases like the above-mentioned under letter (b), usurpation of jurisdiction is just as possible as in the case described under letter (a), only in the one case it depends upon a historical and in the other on a legal error. Nevertheless there is an important difference.

Just as in the case (a) the facts which are to be examined are established unequivocally and without room for error, so in the case (b) the facts submitted to the court are first tested by legal criteria to determine whether the tribunal appealed to can assume the jurisdiction for its judgments. This examination and judgment on the facts cannot, however, be final. The examination, for instance, cannot decide whether the case presented for judgment is liquidation, since a declaration of jurisdiction must be prejudicial for a decision on the merits. (Comp. Publications of the Permanent Court of

International Justice, Series A., Judgment No. 6, pp. 15-16: . . . At this point the Court, in view of what it has now to determine, shall consider it a duty to proceed with the enquiry, as prescribed above, even though it may be induced by this enquiry to touch upon questions affecting the main issue, it being duly understood, nevertheless, that nothing which is said in the present judgment shall restrict the complete freedom of the court, when the case comes to be considered on its merits, to examine again any arguments that may be brought forward on one side or the other on these same points.) The declaration of jurisdiction is intended rather to establish whether the facts presented for judgment—to keep to the same example—*can* be liquidation. When once the court has come to a conclusion on this point, it may proceed to a decision on the case in which the final judgment may, in certain contingencies, indicate that there is no liquidation.

These reflections concerning the tribunal's duty to examine into the matters affecting its jurisdiction, indicate also the degree of severity which the League Council can and must claim for itself in its task of re-examination. On no account can the severity be greater than that incumbent on the tribunal itself. (Comp. the phrase "touch upon" (*effleurer*) in the passage previously quoted from Judgment No. 6 of the Permanent Court.) It has already been demonstrated that the League Council has no authority to re-examine the declaration of jurisdiction of the Mixed Arbitral Tribunal as such. It may, however, use the decision as an unanswerable presumption as to which facts the Arbitral Tribunal in its new composition will give judgment upon. If to this we add what was said earlier about the *exceptio doli* and the view to be taken of it, we may complete the argument by saying: If the League Council decides unanimously that the cases on the merits of which the Mixed Arbitral Tribunal will pronounce judgment *cannot* be liquidation, in other words, that the application of the motion of liquidation must be categorically excluded from the facts in question, it may refuse to appoint the substitute arbitrator.

7. What, then, are the facts that constitute "liquidation," especially in the sense of Article 250 of the Treaty of Trianon?

(a) The prohibition for Roumania to liquidate property in the provinces ceded by Hungary to the detriment of the Hungarian nationals is not based on the Treaty of Trianon. Liquidation as an encroachment on the acquired rights of foreign nationals is forbidden by public international law. (Comp. the ruling made by the Permanent Court of International Justice in its Advisory Opinion, No. 6, especially page 38: As has already been shown, the court considers that no preliminary agreement is necessary in order to protect rights or to maintain obligations of this nature.) The provisions of Article 250, para. 1, of the Treaty of Trianon do not, therefore, constitute a rule of law but are meant simply as a statement of fact. That which goes beyond ordinary international law in this Article 250 of the Treaty of Trianon is the provision in para. 3: Claims put forward by Hungarian nationals in virtue of the present article shall be submitted to the Mixed Arbitral Tribunal prescribed by Article 239. It is thus evident that Article 250, para. 1—beyond the partial suspension of the authority given to Roumania to liquidate property under Article 232 of the Treaty of Trianon—was mainly intended to provide for the jurisdiction of the Mixed Arbitral Tribunal over the sequestration or liquidation of the property, rights and interests of Hungarian nationals, etc.

(b) The conception of liquidation in the sense of international law includes the idea of injury, by state measures, to property rights of nationals of another state. It is not necessary that these measures should be for war purposes, or that they should arise from the requirements of adapting a given district to circumstances and interests which have changed as a result of the war and its effects. Liquidation may be applied quite independently of wars and peace settlements. This requires no further explanation. Who would care to deny that the confiscation of the property of nationals of states, which have never been at war with Russia, carried out by the Soviet Government for the purpose of its programme of socialisation, must be deemed in law to be identical with the confiscation of the property of nationals belonging to states which were at war with Russia?

That the national system of law, by which an encroachment on acquired rights is justified, does not hold good in international law is stated unequivocally in a ruling by the Permanent Court of International Justice in its judgment No. 7, p. 22 in the following terms: "The legal interpretation given by one or the other of the parties concerned in the dispute is not considered to have any value, if, in actual fact, the measure affects the German nationals in any way contrary to the principles set forth above."

(c) The idea of liquidation carries with it no element of differentiability. It has been alleged that, when the measures taken affect nationals as well as foreigners, there is no liquidation. This is not correct. In place of anything else it is sufficient to quote the legal decision given by the Permanent Court of International Justice in its judgment No. 7, pp. 32-33:—

"As regards, on the other hand, the Polish contention, reproduced above, the Court, without in any way contesting the fact that the system of liquidation established by the Treaty of Versailles and the actual measures of expropriation sanctioned by the third article of the Geneva Convention do apply to German private property as such, does not see fit to attribute as much importance as the Polish Government does to the circumstance that Articles 2 and 5 of the Law of July 14th, 1920, affect a certain category of property, irrespective of the nationality of the property-holders. Even if there was proof—and the Court does not consider it necessary to examine this point—that in fact the law applies equally to Polish and German nationals, it would not follow at all that the suppression of rights, which such a law imposes on German nationals, must be in accordance with the third article of the Geneva Convention. Expropriation without compensation is certainly contrary to Article 3 of the Convention; a measure which the Convention prohibits cannot be made legitimate in regard to that instrument by the fact that the state applies the law also to its own nationals." (Comp. p. 699 of Series C. of the publications relating to this judgment, containing the allegations laid before the Court by Poland.)

(d) Liquidation, further, exists not only when the confiscation has been made only so far as to hit the foreigner as such, in other words, when confiscation would not have taken place if the dispossessed person had not been an alien.

Since this objection is actually nothing else than an affirmation that the motive of discrimination is of the essence of liquidation, reference in its reputation may be made to the passage quoted under letter (d) from Judgment No. 7 of the Permanent Court.

(e) It is only essential for the notion of liquidation that there should have been an encroachment on the property rights of foreign nationals and that this encroachment is not authorised by ordinary international law. (Comp. on this point the legal opinion of the Permanent Court, expressed on page 32 of Judgment No. 7: "according to the German conception, 'authorised liquidation' comprises any measures contrary to international common law, but specially permitted by some international convention. The Court has already made a statement to the effect that it need not dwell on this hypothetical case, from which it selects only the essential element namely, the fact of a law being contrary to international common law. It is all the more certain that this element is present in the case of 'non-authorised liquidation'." And again on page 22: "it follows from these same principles that the measures prohibited are only those which international common law forbids to be passed regarding foreigners.")

(f) Any alteration of legal status may be *per se* an infringement of rights and as such a violation of international law irrespective of the question of compensation, that is to say irrespective of whether or not the property of those affected has diminished in quantity or value. Ordinary international law authorises such encroachment on rights, however, in some cases, among others, in the public interest (*pour utilité publique*—comp. page 22 of Judgment No. 7 of the Permanent Court). An agrarian reform is surely—of that there can be, in my opinion, no doubt—a state action contrived "*pour utilité publique*" (always providing that its purpose is a serious one and not intended as a screen for other illegal designs). From this aspect the expropriation would not be contrary to international law.

(g) International law prescribes, however, in such cases that adequate compensation must be paid to anyone whose property is annexed by the foreign state (comp. for the latest information J. L. Kunz On the Notion of "Civilised Nations," Bulletin of Public Law, 1927, Volume 7, Page 98). The Treaty of Versailles itself contains, indeed, instructions to the effect that the German Reich should compensate those German nationals dispossessed on the basis of the liquidation provisions of the Treaty of Versailles in Article 297, if it should happen that the proceeds of liquidation were not paid immediately by the state carrying out the liquidation. This is not to be considered a special legal benefit in favour of the persons affected, but a precept of ordinary international law.

Among states belonging to the community of international law there is a legal requirement of a certain minimum standard to be observed by the states in their attitude towards foreigners. The way in which a state treats its own nationals concerns foreign states to some extent only when this right has been specially conceded to them, for example, in the Minority Treaties. The observance of this minimum standard as regards foreigners need not be expressly prescribed. It belongs to the unwritten laws of positive international common law.

"Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilisation." This is a statement by the General Claims Commission, U.S.A. and Mexico, in the case of U.S.A., on behalf of H. Roberts, of Mexico. (Opinions of Commissioners, 1927, Page 105.)

It is pertinent to this "Standard of Civilisation" required by international law that even in the case of "the public interest" expropriation may only be carried out subject to adequate compensation. There is, indeed, no state belonging to the international law community which has not developed the adjustment of its general system of legislation from the *opinio necessitatis*. A few isolated exceptions to this principle confirm the rule. Decisive is the general system of legislation and not a single law. (Comp. the phrasing of Article 232 of the Treaty of Trianon and Article 297 (h) of the Treaty of Versailles: "... measures passed by the Government of the state in question outside its general legislation," and the legal view of mixed arbitral tribunals, in particular the German-Polish, on this point).

Nothing in the provisions of Article 250 of the Treaty of Trianon suggests that the notion of liquidation, by which the jurisdiction of the Mixed Arbitral Tribunal is determined, is in any way different from the generally accepted one. In particular it does not appear from the text of the Article that liquidations, in the sense necessary for the jurisdiction of the tribunal, should be only expropriations directly connected with the war. It has already been demonstrated that, legally speaking, liquidation has nothing to do with war or state successions *per se*. (Advisory Opinion No. 6 of the Permanent Court, page 38: "It is true that the Peace Treaty does not specifically and formally enunciate the principle that, in the event of a change of sovereignty private rights must be respected, but this principle is clearly admitted by the Treaty. Hence, when the term liquidation occurs in a treaty under international law, and this idea is not expressly connected with war or the succession of states, its meaning is that of general international law. The contention that, when the term liquidation occurs in a peace treaty, only such acts of expropriation can be meant as could be carried out as the result of war and the effects of war, would be decisive if the right of liquidation were to devolve on one of the states concluding peace from the mere fact of war conditions or a cession of territory. The term liquidation would then, logically, have to be related to the state of war or to the circumstances connected with the cession of territory. Since, however, war and cession of territory, as shewn above, have no legal consequences of this kind, the contention here combated falls to the ground. As there is no time-limit fixed for the activities of the Mixed Arbitral Tribunals, there is established, then, under Article 250 of the Treaty of Trianon, a permanent judicial organ under international law, to which any and every case of liquidation may be submitted. This situation has in it no element of paradox. It is indeed accurate to say that Hungary in these relations to Roumania is in a better position than the states which have no arbitral courts with Roumania. But between these states and Roumania, there exist no possibilities of conflict of the kind that may arise as a result of the extraordinary cessions of territory by Hungary to Roumania, and in view of the large number of Hungarian nationals possessing property on the territory of the Roumanian State.

In view of the circumstance that the meaning of Article 250 of the Treaty of Trianon is absolutely clear and that the legal consequences which result from the terms used are logical, there is no need for purposes of interpretation to explore the history of its origin. Even if such an examination were to contradict the interpretation given, it could not change the clear meaning of Article 250 of the Treaty of Trianon, now become law. The law is wiser than

he who makes the law. ("The Court desires to recall in this order of ideas what it has declared in certain previous judgment and opinions, namely that no account should be taken of preparatory work if the text of a convention in itself is sufficiently clear." Judgment No. 9, page 16.)

The only connection with Article 250 of the Treaty of Trianon, linking the liquidation with the war, is one of time. The liquidation must have come about during or after the war, *post bellum* not *propter bellum*.

It is no concern of international law that Roumania had already planned her agrarian reform before the war. The decisive factor is the date when the Hungarian nationals were affected by it. This happened after the war, and therefore the jurisdiction of the Mixed Arbitral Tribunal is established, if the expropriation was carried out without adequate compensation.

III.—THE PROCEDURE UNDER ARTICLE 11, PARA. 2, OF THE COVENANT OF THE LEAGUE OF NATIONS.

1. Parallel to the procedure under Article 239 of the Treaty of Trianon is that under Article 11, para. 2, of the League Covenant. Just as the first is purely juridical, so is the other purely political. As the consequences of the one are inevitable legal consequences, not to be influenced by considerations of expediency, in the same way the consequences of the other are of a purely political character. Article 11, para. 2, of the League of Nations Covenant states: "It is also declared to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."

It is true that this paragraph 2 of Article 11, which alone is in question, says nothing about measures which might be taken by the League, but it is clear that the League, if Article 11, para. 2, is to have any meaning, must be able to respond in some way to a communication made to it by any party.

In consequence of the purely political character of the procedure based on Article 11, it is a matter of indifference what considerations the League may found its measures upon. It may take whatever steps it likes whether it considers the declaration of jurisdiction of the Arbitral Tribunal to be justified or not. Political expediency alone must decide.

2. What is likely to be the nature of this response by the League? Evidently it may be of any kind that the League chooses. With one reservation, any action taken by the League Council on the basis of Article 11, para. 2, must avoid anything in the nature of compulsion. The League can only make proposals, which are not binding on the parties: "Action taken under this Article (Article 11) by the Council or the Assembly cannot be obligatory upon the parties, in the sense in which recommendations under Article 15 have binding force, unless they have given their consent." (Report on the Geneva Protocol of 29th September, 1924, submitted to the fifth Assembly J.O. Special Supplement No. 24, page 126.)

The League Council cannot compel the parties to accept its proposals.

3. There is a further restriction to the action of the League by reason of the legal character of the dispute submitted for the mediation of the Council: "Article 11 of the Covenant does not apply to situations for which law supplies rules that are applicable by a judge. It only applies in the case of those for which international law has not yet established a ruling. It reveals, in fact, precisely the existence of *lacunæ* in the law." (Report The points here established coincide, moreover, with the attitude adopted by the representative of Italy in the Corfu case. Comp. J.O. 23/1287 *et seq.*)

If, then, a ruling according to international law is prescribed for a dispute, that procedure has to be adopted, and the party condemned by the legal ruling cannot evade the application of the law by having recourse to the political possibilities of Article 11, Para. 2 of the League Covenant. The Preamble of the League Covenant lays down: "it behoves the members of the league to abide by the firm establishment of the understanding of international law as the actual rule of conduct among Governments, and to cleave to the purpose of the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another."

This point of view also corresponds only to the rule of international law that *lex specialis derogat legi generali*. Article 239 of the Treaty of Trianon, as compared with Article 11 of the same Treaty, which is identical with Article 11 of the League of Nations Covenant, is the more special settlement of the legal relations, which are to obtain between the signatories of the Treaty.

As long as Article 239 of the Treaty of Trianon exists, there is no possibility for the powers pledged to the observance of it to evade the consequences resulting from the application of the law. Should it be desired to escape, then the statement of the law as a whole must be cancelled or changed. The way of doing this is indicated by Article 19 of the Covenant of the League of Nations. As long as Article 239 is in force the evasion of the application of its legal consequences in any individual case would be a capricious action.

4. The League of Nations under Article 11 of the Covenant has only mediatory functions (comp. Lord Robert Cecil, official journal 23, Page 1,305 *et seq.*). It can propose to the parties that they should severally renounce their legal positions of view and effect a compromise. It cannot deprive the parties of their rights in law: "according to Article 11, the Council plays the part of a mediator in the strict sense of the term; by applying Article 4, sub-section 5 of the Covenant its duty is to invite the parties concerned to send representatives and to endeavour to ensure that the solution proposed be accepted. But it is not competent to impose any solution. The parties are entirely at liberty to conform or not to conform with the Council's proposals." (Mirosias Gonsiorowski, Leagues of Nations and Problem of Peace, 1927, Vol. 2, Page 329.)

Nevertheless, in view of the character of the League, it cannot be denied the right of using its influence on the parties: the right of adopting provisional measures (comp. the examples in Mandelstam's "International Conciliation," Page 519), for instance, the right to suspend any legal proceedings brought before itself by one party against the other, as long as the possibility exists that the parties might settle their differences amicably. This suspension of the

proceedings cannot, however, be unlimited as regards time, as that would mean that one of the parties would be deprived of the faculty of enforcing by legal proceedings the establishment of its right, which, actually, cannot be disputed.

The suspension of the proceedings comes to an end when it is established beyond all doubt that an agreement between the parties is impossible. For from that moment it is certain that the League of Nations cannot exercise the only function available to it, that of mediation. The rôle which the League of Nations, under Article 11, Para. 2 might play, thus becomes hopeless and the judicial procedure must take its course in accordance with Article 239 of the Treaty of Trianon.

Furthermore, since the members of the league are bound by the legal obligation assumed by them (and the obligation of appointing substitute arbitrators in accordance with Article 239 of the Treaty of Trianon is a duty of this kind), they must, if their action as mediators has failed, act as required by Article 239, being careful to eliminate the political aspects such as might have been decisive in their action as mediators. For as little as the League can positively impose obligations on a state against its will, so little can it exert pressure by abstaining from action when its action is legally imperative.

When it is established beyond all doubt that the mediatory action undertaken by the League of Nations under Article 11, para. 2, of the League Covenant has not produced agreement between the parties, the League Council must decide whether the objection raised by Roumania against Hungary's request for the appointment of substitute arbitrators to the Mixed Arbitral Tribunal, is justified and, if it does not answer that question in the affirmative unanimously, it must proceed to the appointment of the substitute arbitrators. To make this action dependent on the acceptance of certain conditions by one of the two parties is not admissible. That would mean that the League Council arrogates to itself a right of compulsion on the parties, and that it arbitrarily commits a breach of the obligations incumbent upon it.

Translated from the French.

THE USURPATION OF JURISDICTION

BY

A. de LAPRADELLE,

Professor of International Law at the University of Paris.

Revue de Droit International, No. 5—January, February, March, 1928.

In the course of a recent sitting of the Council of the League of Nations ⁽¹⁾ which dealt with a judgment on jurisdiction of the Roumano-Hungarian Mixed Arbitral Tribunal on the 10th January, 1927, it was, in grave circumstances, definitely and dogmatically affirmed that, in the case of usurpation of jurisdiction of the arbitrator, or to speak still more precisely, "when an international tribunal has delivered judgment on a matter which is not within its jurisdiction," "there is not only lack of jurisdiction; there is usurpation of powers" and that "the sanction of usurpation of powers is non-existence":—

M. Titulesco: In regard to this point of view, permit me to quote you some lines from an opinion of Professors Basdevant, Jèze and Politis.

After having laid down the rule that every Tribunal must examine its own jurisdiction, but that, after all, if a Tribunal exceeds its jurisdiction in internal law, the matter is less grave, for each legal dispute has a judge, these eminent Professors add:—

In public international law the situation is altogether different. When an international tribunal has judged a matter which is not within its jurisdiction, it has not delivered judgment in the place of another tribunal, it has usurped the function of judge. There is not only lack of jurisdiction; there is usurpation of powers. The international tribunal, which exceeds its jurisdiction, usurps a power which does not belong to any other tribunal. It violates the fundamental principle of public international law that disputes are not settled by Courts.

And these Professors conclude that the sanction of the usurpation of powers is non-existence. As regards the characteristic of non-existence it is that there is no need for a public authority, a judge, to assert this non-existence. The act will produce none of the juridical effects desired by its author. Anyone interested will be able to invoke this non-existence by any means (action or objection) at any time. The irregularity never can be covered in any manner . . ."

* * * * *

Under the signatures of MM. Basdevant, Jèze and Politis, a declaration of this kind is impressive.

But we are no longer in an age when one swore by the word of the masters. It is not enough to affirm, we must prove.

The learned authors invoked the following considerations:—

The difference between juridical nullity and non-existence is considerable.

⁽¹⁾ September, 1927. Cf. this *Revue*, 1927, I., p. 940, and the Article by M. Charles Dupuis.

In internal public law, the distinction between lack of jurisdiction and usurpation of powers is admitted without difficulty; it is shown in practice by the various juridical consequences which they involve.

In his *Principes généraux du Droit administratif* (Third Edition, Paris, Vol. I, 1925, p. 76 et seq.), Professor Jèze has described as follows the effects of the *non-existence* itself juridical act: "The act must be held to be non-existing as a juridical act; it is not necessary for a public authority, a judge, to establish this non-existence. The act will produce *none of the juridical effects* desired by its author. Anyone interested will be able to invoke this non-existence *by any means* (action or objection) *at any time*. *The irregularity never can be covered in any manner*. No prescription, no ratification can make the irregularity disappear. If the author of the action is a public agent and he attempts to put it into execution, he *commits, necessarily, a wrongful act*, with all the consequences attached to this idea, in particular, if it is a question of possession. *The return is possible; peaceful resistance is lawful*. *The personal responsibility* (criminal or only civil) of the agent of the execution is involved."

The juridical rule of non-existence is, in essential, the same in public international law. The sentence of an international tribunal which gives decisions beyond its jurisdiction is vitiated by usurpation of power. It is non-existent. It will produce no juridical effect. This non-existence may be invoked by any means, "action or objection," at any time. The irregularity can never be covered; no prescription can make the irregularity disappear. Only the ratification of the defendant State can cover the irregularity. This ratification, provided that it emanates from the public authority competent to create the tribunal, or to invest it with jurisdiction, is equivalent to the attribution of jurisdiction which was wanting to the international tribunal.

This is the solution taught by Professor Politis in his book on *International Justice* (Paris, 1924, pp. 91 and 92). The possibility of a refusal of execution is inconceivable except when the sentence is vitiated by nullity. It has this character in the hypothesis of an irregular compromise, and in that of an usurpation of jurisdiction on the part of the arbitrator. Usurpation of jurisdiction can originate in various ways. It is thus, first of all, in the case of a wrongful interpretation of the compromise. It is the same if the arbitrator has undertaken the examination of points not included in the compromise, or of points already settled, of which only the application has to be determined or the consequences deduced from it. It is the same also in the case of the ignoring of the imperative dispositions of the compromise concerning the rules to be applied. And he quotes the refusal of the United States to execute the arbitral judgment given on the 10th January, 1831, by the King of the Netherlands, which was vitiated by usurpation of jurisdiction.

In the same way Professor Basdevant has, in the *Revue Générale de Droit International Public*, 1912, p. 306, established that: "it is admitted that the usurpation of jurisdiction is a cause of nullity of arbitral judgments." He invoked in particular the authority of Professor Weiss, to-day Vice-President of the Permanent Court of International Justice, and of Professor Fiore, both of whom testify to their unanimous agreement in the doctrine on this point, the second adding that this common opinion, in accordance with which "the arbitral sentence has no validity, when the arbitrator has not observed

the prescriptions of the compromise or when he has arrogated to himself a jurisdiction not stipulated therein," is "imposed by the general principle of law and by the nature of things."—*Revue Générale de Droit International Public*, 1910, p. 118 seq. and p. 247 seq.

This solution is consecrated by international jurisprudence.

In the affair of the *Betsey*, judged as between the United States of America and Great Britain (24th February, 1804), Commissary Gore said: "We owe it to our respective Governments to refuse to them a decision in the cases which have not been entrusted to us, but we are under the same obligation to pronounce on the affairs which form part of our mission. It may be asked how, if the Commission has the power of itself deciding which cases are submitted to it, a nation cannot avoid burdening itself with inconveniences which its contract does not involve. The answer is obvious. It is that of International Law, of the Common Law of England and of common sense: a party is not bound by the decision of the arbitrators when the matter itself does not come within the terms of the compromise: such a decision is a dead letter: it is not a decision." (Vattel, Book II, chap. XVII, p. 329. De Lapradelle and Politis, *Recueil des arbitrages internationaux*, 1, 69).⁽²⁾

Thus in turn are invoked, in support of the preceding conclusions, the theories of the authors—Vattel amongst the ancients, Fiore among the moderns—the practice of arbitral jurisprudence, especially in the celebrated case of the Arbitration on the North-Eastern Frontier in 1831 between the United States and Great Britain, and, more especially, at a still earlier date, the opinion of the British Commissary Gore in the affair of the *Betsey*. Of other authors and of their opinions there is no trace. Of the work of the Institute of International Law and of the Conferences of The Hague, of 1899 and 1907, there is no mention. From the jurisprudence of the Court of The Hague, on this same question, there is no quotation: no case is referred to. These are, perhaps, gaps which can be explained, without doubt, by the incidental manner in which the question was dealt with in an opinion given, not even to the Roumanian Government, on the precise question of the usurpation of jurisdiction, but to the Czecho-Slovakian Government, on the question of the jurisdiction of the arbitral tribunals, in respect of an expropriation for which a justification was sought, not under the special legislation of war time, but under the general legislation of the time of peace.

It is none the less remarkable that, on the basis of this brief summary, a declaration as grave as that of Mr. Titulesco, could have come before the Council, and that, since then, in the doctrine the question of the usurpation of jurisdiction, on the basis of this assertion, should have been considered as definitely closed without even the discussion having appeared possible: "To place the Tribunal, by the appointment of a substitute arbitrator in a position to resume the examination of these agrarian affairs"—writes Mr. Sibert (*Recueil Roumain* p. 377)—"that, without doubt, would mean saving the cause of an arbitration objected to on the ground of being a usurpation of jurisdiction by one of the parties, and which the doctrine of incontestable authorities permits to be recognised as such.

(2) Basdevant, Jèze, Politis, *Consultation sur la compétence du Tribunal arbitral mixte*, in the "*Réforme agraire en Roumanie et les optants hongrois de Transylvanie devant la Société des Nations*". Paris, 1927, p. 506, et seq. We shall henceforward refer to this publication under the title: "*Recueil Roumain*."

However high such authorities may be, it is nevertheless not permissible at the present moment, as does Mr. Sibert, with such deferential confidence, to cling to the literal word of the masters.

Do not the masters, on whom the authorities invoked rely, namely, Vattel, Fiore, Gore—among others—protest against the doctrine in support of which their names are quoted? Do not other authors, other decisions, the international conventions themselves, give us here other formulæ on the question of usurpation of jurisdiction by the arbitrator? Is the documentary material so slight, the historical erudition so poor, the science of law so faulty?

Rejecting in all circumstances every conclusion not supported by duly verified proofs, could it not be enquired a little more closely what are the titles of this opinion, which, as soon as formulated, has, as by a miracle, been invested, not only with the confidence of a new policy, but with that of a young literature?

Our researches will be devoted to three points: (1) the individual or collective doctrine; (2) the international conventions; (3) the jurisprudence.

They will be pursued successively, from period to period of the League of States to the League of Nations.

I.

LEAGUE OF STATES.

In the League of States, arbitration progresses slowly from the 17th century to the commencement of the 20th.

Its development is divided into three periods:—

1. Up to the Alabama affair;
2. From the Alabama affair to the first Conference of The Hague.
3. From the first Conference of The Hague to the Great War.

First Period.

The Authors.—From the end of the 17th century to the end of the 18th arbitration progresses very slowly, in the midst of innumerable difficulties. The great epoch of imperial arbitration and of pontifical arbitration is past. But arbitration none the less remains an attribute of sovereign power; its peace-making usefulness is manifest; but its juridical value is the more uncertain as the position of the arbitrator is higher. The juris-consultants fear the imperfection of the judgment, which is subject to no appeal, without daring to give to the party which has entrusted itself to a King, the power of resisting a Prince-judge.

It is the supposition of justice that the question can, before the definite judgment, be heard and reheard. This is made possible by internal law, with its many degrees of jurisdiction; even internal arbitration fits into the frame of a series of methods of appeal and recourse; on the contrary, international arbitration, looking for a sovereign judge, whose judgment no one will dare to criticise, only knows definite decisions, without appeal or recourse. Acquiescence is necessary, whatever the error may be. Grotius points this out: "Between kings and peoples," it is not lawful to complain of any injustice being committed by the arbitrators, "for there is here no

superior power which can judge or break the bonds of the promise." "We must, therefore, absolutely adhere to the judgment they have given, be it just or unjust." "It is one thing, in effect, to ask what is the duty of the arbitrator; and another, what is the obligation of the parties agreeing to arbitration?"⁽³⁾

Pufendorff, (4) in his turn, declares that a State cannot evade the execution of an arbitral judgment by simply alleging that it is erroneous and contrary to equity: "When, then, the judgment of the arbitrator appears unjust to either of the parties or really is so, there would arise from this circumstance a new trouble, for which, as the decision could not rest either with the arbitrator or the parties, an appeal to another arbitrator would become necessary, and after him, to still another, and so on indefinitely. Hence it follows, that the convention, by which the parties pledge themselves to submit their case to the judgment of an arbitrator, must be absolute and simple and not with the condition that the sentence must be just.

"It is clear also that no appeal is possible from the judgment of an arbitrator, as there is no superior judge to correct the judgment. . .

"Moreover, when it is said that the stage of the arbitral judgment must be gone through, whether the judgment is found to be just or unjust, this must be understood with some reservation. I admit that, whatever good an opinion one party may have formed of the goodness of its cause, that does not suffice to authorise it to renounce any compromise. But if it appears manifest that there has been collusion between the arbitrator and one of the two parties, or that it has gained it by bribery, or that they had together made an agreement to the prejudice of the other party, then this latter is not bound to submit to the sentence of such a judge, who, having shown so obvious a partiality, can no longer play the part of arbitrator."

There is no great difference, in this respect, between the XVII and XVIII centuries.

The doctrine of Vattel (1758) is cited by one of the principal supporters of the Roumanian thesis, M. André Prudhomme⁽⁵⁾ in these terms of striking lucidity, but of doubtful style: "*A party is not bound by the decision of the arbitrators, when the case does not come within the terms of the compromise; such a decision is a dead letter.*" (sic) Vattel, Bk. II and XVII, § 239 (sic). Duly examined, the quotation is wrong, taken at second hand in an analysis, which did not give it, in its summary form, the appearance of a concise maxim in clearly coined phrases, which it affects to-day. A vague recalling of ideas: an approximate quotation without literal transcription, no quotation marks, no italics. The italics and quotation marks are by M. A. Prudhomme. Without separating such a formula, with so much emphasis, from its context, it would have been prudent to look up the passage itself. In Book II, Chapter XVIII, *De la manière de terminer les différends entre les Nations*, § 329, *De l'Arbitrage*, Vattel, in 1758, wrote: "When Sovereigns cannot agree on their claims, and when they, nevertheless, desire to maintain or to re-establish peace, they sometimes confide the settlement of their disputes to arbitrators, chosen by common agreement. As soon as the Compromise is laid down,

⁽³⁾ Grotius, *Le droit de la guerre et de la paix*, book III., chapter XX., para. XLVI.

⁽⁴⁾ Pufendorff, V., chapter XIII., para. IV., translated by Barbeyrac, Amsterdam edition, 1734, vol. II., p. 175.

⁽⁵⁾ *Recueil Roumain*, p. 297.

the parties must submit to the sentence of the Arbitrators. They have pledged themselves to it, and the faith of the treaties must be maintained. Nevertheless, if by a sentence *manifestly unjust and contrary to reason*, the Arbitrators were, by their own act, to deprive themselves of their quality, *their judgment would merit no attention*; it was only for doubtful questions that submission had been made to it. Supposing that the Arbitrators, for the reparation of some offence, condemned a sovereign State to make itself subject to the offended State, would any man of sense say that the former State must submit? . . . There is no reason to fear that, in granting the parties the liberty of refusing to submit to a sentence, which is *manifestly unjust and contrary to reason*, we should render arbitration useless; and this decision is not contrary to the nature of the submission or of the compromise. There can be difficulty only in the case of vague and unlimited submission, in which the subject of the dispute had not been determined precisely, nor the limits of the opposing claims laid down. It may then happen, as in the example just quoted, that the Arbitrators exceed their powers and pronounce judgment on a point which actually has not been submitted to them. Called upon to judge of the satisfaction which one State owes for an offence they condemn it to become the subject of the State offended. Surely that State never gave them a power so extended, and *their absurd Sentence does not bind it.*"

This then is the "dead letter."

The exceeding of powers which allows the Party to *refuse to pay any attention* to the judgment, is illuminated by an example, and this example, twice repeated: is the absurd annexation, in virtue of the Arbitral Decision of the State, which is charged with an offence, to the offended State. With Vattel in hand—an authentic Vattel!—the exceeding of powers would appear if the decision of the 10th January, 1927, had, in order to repair the injury done by the Roumanian State to some Hungarians, pronounced the annexation of the whole of Roumania to Hungary. "An *absurd Sentence* has no binding force," "the parties are free to refuse to submit to a sentence *manifestly unjust and contrary to reason*"; if by a "Sentence *manifestly unjust and contrary to reason*" "the Arbitrators had, by their own act deprived themselves of their quality." Twice the same terms are used: "*manifestly unjust and contrary to reason.*" These are the two features of the arbitration which *has no binding force*.

And here the comparison is necessary with the denial of internal justice, which is the foundation of reprisals. Vattel, *infra*, Bk. II, Chap. XVIII, § 350. The same condition, which Vattel lays down—"judgment *manifestly unjust and partial*," "very evident and palpable injustice"—for the denial of internal justice, he also lays down, symmetrically, for the denial of international justice.

And, to give an example, he repeats the same thing twice: the annexation of the State, which has committed the offence, to the offended State! A stupendous example: the only one which, nevertheless, is indicated, and this at a period when the institution of arbitration, with the birth of the modern political world resulting from the Peace of Westphalia, was very feeble in presence of the all-powerful sovereignty of the State. ⁽⁶⁾

It is true that at that time the Arbitrator was a Prince, whom no one dared to insult politically by criticising his opinion.

(6) Cf. Vattel, *Le Droit des Gens*, Carnegie Edition, Introduction to the photographic reproduction of the first edition, p. XIX.

“ Judgment manifestly unjust and contrary to reason ”; “ what is absurd has no binding force ”: an annexation in place of pecuniary indemnity, such formulæ, illustrated by such an example, this enormous overstepping of the bounds of the compromise, this is not the juridical formula which the authorities invoked by Roumania thought they had read in Vattel to justify the assertion, necessary for their case, that arbitration, as soon as it surpasses the limits of the compromise, should be a dead letter, or—as Vattel would have said—be quite underserving of attention.

What did the Arbitrator decide on the 10th January, 1927? That he would continue to pursue his examination of the case and nothing more. Is that an injustice? In any case, one of slight consequence and of not absolute evidence. Now, Vattel says, Bk. II, Chap. XVIII, § 329: “ If injustice is of small consequence, it must be suffered for the good of peace, and if it is not absolutely evident, it must be borne like an evil to which one has voluntarily exposed oneself. For if it were necessary to be convinced of the justice of a decision before submitting to it, it would be quite useless to appoint Arbitrators.”

PRACTICE.—The great decisions of jurisprudence are, at this time, those of the mixed Commissions (which are not, however, without a close relation to the mixed Arbitral Tribunals of to-day). At this moment, when the question of jurisdiction arises, the Commissioners hesitate. In the case of disagreement they have a tendency to turn to the Government which appoints them. For an arbitrator to act in this way is to abdicate his mission: he is not a mandatory, but a judge⁽⁷⁾

Together with this question of jurisdiction arises the question of the overstepping powers. The arbitrator understands that he cannot turn to the Government which appointed him to ask it for further instructions. He must deliver judgment on the objection as regards the jurisdiction: deliver judgment himself by the interpretation of the Compromise. But is there not a danger lest he, the arbitrator, may take cognisance of matters totally irrelevant and, by his decision, bind the Governments? Here we come to the notion of usurpation of jurisdiction:

“There is no greater absurdity,” says Mr. Gore (actually quoted by the authorities invoked before the Council), “than to imagine that two nations would nominate Commissioners to examine and judge the complaints of their nationals, would prescribe the rules for their examination, would authorise them to receive evidence . . . with a view to allotting sums of money, and would give, the one to the other, their word that such an arbitration should be final and definite . . ., but without these two nations being able to give to these commissioners the power of saying whether they have before them one of the complaints which are in question. . . . When they admit that the execution of the reparation shall be made on the basis of a precise figure at the exact moment fixed by the Arbitration, they also admit that the party called upon to make payment could always do so at its discretion and, without breaking its word, could prevent a decision contrary to its own interest. . . .”

“The interpretation, which would render an act void and of none effect, is therefore inadmissible. . . . It must be interpreted so that

(7) De Lapradelle and Politis, *Recueil des Arbitrages internationaux*, Vol. I., p. 102, et seq.

it can have its effect, and shall not be vain and illusory (Vattel, Bk. II, Chap. XVII, paragraph 283.)" (8)

But is there not some danger in permitting a decision on jurisdiction by the arbitrators? To this question Gore himself gives the answer by another reference, no longer direct, in the form of an express quotation but in an indirect form.

This reference is to the passage itself from Vattel, which we have reproduced and commented on above. Here, the opinion of Mr. Gore is worth reproducing in its entirety:—

"Supposing that the Commission decides, with two of its members disagreeing, that the matter is not within its jurisdiction, have the dissentients the right to withdraw from the Commission so effectively that no other act of procedure can take place in the matter? If my opinion is correct, that the Commission has the right to declare itself to have jurisdiction, it is evident that all the commissioners are bound by this decision and are under an absolute obligation not to stop the course of procedure by their absence.

"To cease to act, when our duty orders us to act, is a wrong which we have not the licence to commit. We owe it to our respective Governments to refuse them a decision in the cases which are not entrusted to us, but we are under an analogous obligation to pronounce judgment on the affairs which are part of our mission. If this reasoning is correct, the two commissioners have not, in these circumstances, the right to withdraw, for it would be to suppose them to have the right to omit doing their duty, or to do it ill.

"It may be asked how, if the Commission has the power of deciding itself which cases are submitted to it, a nation can avoid burdening itself with troubles which its contract does not involve. The answer is obvious. It is that of the Law of Nations, of English Common Law, and of common-sense: a party is not bound by the decision of the arbitrators when the case itself does not come within the terms of the compromise: such a decision is a dead letter: it is not a decision (Vattel, Bk. II, Chap. XVII, § 329)." (9)

It is curious to notice that, in the Roumanian use of the quotation from Gore (see above), occurs the passage that is so important: "*Supposing that the Commission decides, with two of its members disagreeing, that a matter is not within its jurisdiction, have the dissentients the right to withdraw from the Commission so effectively that no other act of procedure can take place in the matter?*" This is precisely our case. Decided in the light of the opinion of Mr. Gore, it would be settled in a sense absolutely contrary to the Roumanian claims, for, to have the right to withdraw one's arbitrator "so effectively that no other act of procedure can take place in the matter," it would be necessary that the matter should not come within the terms of the Compromise; not according to the simple declaration of the party, for that is precisely what Mr. Gore wishes to avoid, but according to the formula of Vattel, i.e. in the hypothesis of an enormous usurpation of jurisdiction, "fantastic," to use the expression of a juridical expert of a later period, (10) in short, in a case of manifest extravagance, at bottom, and not of simple error on the point of jurisdiction.

(8) De Lapradelle and Politis, *Recueil*, Vol. I., p. 67.

(9) De Lapradelle and Politis, *Recueil*, Vol. I., p. 69.

(10) H. Lammasch, *Rechtskraft internationaler Schiedssprüche*, 1913, p. 136.

But there is more. In the case of Roumania it is not that at the mere sight of the request, elevating the simple denial of jurisdiction to the level of an usurpation of jurisdiction, the Government withdrew its judge; it was after the question had been pleaded, ostensibly out of deference to the Tribunal. A singular deference which allows the judge to pronounce judgment in one sense only and not in another. According to the great mixed arbitral Commissions of the Treaty of Jay, this is not an admissible argument: it is expressly judged by Mr. Gore to ring not true:—

The objection that the board is incompetent to decide whether these cases, or any of them, are within the description submitted, arrests and stops all proceedings and in fact renders the article null and illusive. . . .

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet no authority to decide that a case is within its jurisdiction, appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favour of one party only—in favour of the party complained against, but not in favour of the complainant—cannot be true. ⁽¹¹⁾

To reconcile the right of the arbitrators to deliver judgment on their jurisdiction on the one part, and the impossibility for them to usurp entirely different powers, there is only one criterion: the error as regards jurisdiction is not in itself a cause of nullity; it would be different only if the sentence given, on the merits, by a tribunal without jurisdiction, were of a "stupendous, fastastic, inadmissible kind."

* * * * *

This was exactly the case a little later, in 1831, of the famous judgment of William I, in the matter of the North Eastern Frontier. Here, the arbitrator, King William I of the Netherlands, called upon to settle a difference relating to the tracing of the frontier between the United States (State of Maine) and Canada, gave judgment in such conditions that, from arbitrator, he changed himself into mediator. Instead of causing the frontier to pass over a mountain, he makes it follow the course of a river. Instead of basing himself on the express provisions of the Treaty of 1783, he declares that he cannot rely on them. He attributes to himself, without receiving additional powers, the functions of a friendly peacemaker. Being unwilling to pronounce the *non liquet*, he alters the nature of his attributions. In this case the refusal of acquiescence in the judgment can be understood. And, thereupon, after a slight resistance on the part of Great Britain, the latter bowed before the opposition of the United States. But an essential element, though one, nevertheless, passed over in silence in the Roumanian quotation of the case: the United States have no wish to escape purely and simply from the arbitration proved to be in usurpation of jurisdiction. Remembering, no doubt, the fine phrase that Thucydides puts into the mouth of Archidames, *It is impossible to attack as an enemy one who offers to answer before a tribunal of arbitrators*—they refuse to conform to the arbitral judgment of William I of the Netherlands only in proposing a new arbitration to the other party. After having written: "that no question would have arisen on the validity of the judgment, if the arbitrator had determined and designated the frontier as that

(11) Reproduced by Jackson H. Ralston, *The law and procedure of International Tribunals*, Second Edition, 1926, p. 45.

provided for in the Treaty of 1783; that he had not done so, but seemed to have abandoned the character of arbitrator and assumed that of mediator by advising the two parties to accept, as being the most convenient for both, the frontier which he indicated to them."⁽¹²⁾ the American Government proposed to the British Government "a new Commission composed of an equal number of commissioners with an arbitrator chosen by a friendly sovereign from among the most competent persons in Europe." In short, if in this case in practice a refusal is shown to acquiesce in an arbitration obviously vitiated by usurpation of jurisdiction, it is on the condition that the party which takes exception to it immediately proposes the substitution of a new arbitral instance in place of the old.

Further, the two parties recognise the usurpation of jurisdiction : without which, naturally, the proposal would have been to bring the matter before an arbitrator on this preliminary point. In no case, on the admission of the party itself, can the result of disputing the arbitral sentence be to restore full and entire liberty to it. It withdraws itself from one arbitrator only to find another.

Whoever invokes usurpation of jurisdiction must, in the light of this precedent, either offer another arbitration on the merits, or, at least, in the case of dispute on the nature of the usurpation of jurisdiction, accept a new arbitration on this preliminary point.

Besides, according to the actual terms of the mixed Commission in the affair of the *Betsey*, the existence is necessary of a manifest injustice, of a flagrant error and not only of a simple error of judgment : "for, if it were necessary to be convinced of the justice of a judgment before submitting to it, it would be quite useless to appoint arbitrators." (Vattel, Bk. II, Chap. XVIII.)

SECOND PERIOD.

The great notoriety of the Alabama affair, the increase of zeal with which it inspired pacific societies, the growing influence which from that moment arbitration assumed in public opinion, gave rise to many theoretical works on the subject. But at this moment the authors found international law in a singular condition. When, with G. F. de Martens, they said : "Arbitration is rare," the causes for rejection of a judgment might be so equally. But when arbitration, passing from the Prince to the mixed Commission, ceased to be royal and became technical, the jurists no longer conceived it as an infallible sovereign, floating majestically in a respect which permitted of no criticism. When the arbitrators of kings and peoples, according to the saying of Grotius, are no longer kings, their tendency is to treat arbitration in public law in the same way as judgments under private law, of which the procedure has many degrees : concerned for the absolute character of definite judgments, which are the less rare work of more modest authorities, they strove to liberate the party from its arbitral obligation, in all cases where the absence of a second degree of jurisdiction involves the risk of placing it at the mercy of an error. Generously, the United States, in the case of an unjust judgment, to the advantage of their own nationals, refused or returned the money resulting from the condemnation pronounced⁽¹³⁾, The cases of fraud and corruption, which are unfortunately not without their application in some more or less distant arbitrations, must free the

⁽¹²⁾ Mr. Livingston to Mr. Bankhead, 21st July, 1832, de Lapradelle and Politis, I., p. 395.

⁽¹³⁾ See specially the Pelletier affair, *Journal de droit int. privé* (Clunet), 1999, p. 375.

parties: this is not new. It will be the same with cases of exceeding the compromise. It is only the error, which, if essential, may allow the parties to refuse the execution of the arbitration.

According to the just remark of Lammasch ⁽¹⁴⁾: "The authorities on international law, who wrote between the middle of the XIXth century and the First Conference of The Hague, make great efforts to seek cases in which the States could evade the execution of arbitral judgments. Every one of these authorities makes it a point of honour to find a new case. The enumerations approach more and more closely to those under the laws of civil procedure in the different States." In the opinion of Heffter ⁽¹⁵⁾:—

The arbitral sentence is open to attack in the following cases: (a) if it has been given without a valid compromise, or outside the terms of the compromise; (b) if it emanates from absolutely incapable arbitrators; (c) if the arbitrator or the other party has not been in good faith; (d) if the parties, or one of them, have not been heard; (e) if it has been given on a question not submitted; (f) if the decision is absolutely contrary to the rules of justice.

In the opinion of Bluntschli ⁽¹⁶⁾, Article 495: The decision of the arbitral tribunal may be considered null and void: (a) in the measure in which the arbitral tribunal has exceeded its powers; (b) in the case of unfairness and denial of justice on the part of the arbitrators; (c) if the arbitrators have refused to hear the parties or violated any other fundamental principle of procedure; (d) if the arbitral decision is contrary to international law. But the arbitral decision cannot be attacked on the pretext that it is erroneous or contrary to equity.

According to Pasquale Fiore, whose ideas, which, so to speak, have not varied, are only set out more clearly in his *Droit international codifié* ⁽¹⁷⁾:

The arbitral sentence shall be considered null: (a) if the decision has not been taken with the collaboration of all the arbitrators appointed to constitute the arbitral tribunal; (b) if it is entirely lacking in foundation, either of fact or of law; (c) if the disposing part is contradictory; (d) if it has not been drawn up in writing and signed by all the arbitrators, or if a lack of the signature of one of them is not mentioned in the record, stating the presence of the arbitrator who has not signed and his presence at the moment of the decision and of the vote.

The arbitral decision can be attacked by the party which refuses to execute it, and may be annulled: (a) If the arbitrators have pronounced judgments beyond the limits of the compromise, or in virtue of a compromise which is null, or which should be considered as being extinguished; (b) if it has been given by a person who had not the legal capacity to be an arbitrator, or who had lost it during the hearing, or by an arbitrator who could not legally replace another one who is absent; (c) when, in virtue of a proof duly produced, it must be considered either as based on error, or as extorted by fraud or by violence; (d) when the corruption of one of the arbitrators can be established in a regular and complete manner; (e) when the forms of procedure stipulated in the agreement under penalty of nullity, or those which are established

⁽¹⁴⁾ *Die Rechtskraft Internationaler Schiedssprüche*, Publication of the Norwegian Nobel Institute, Vol. II., Section II., p. 137.

⁽¹⁵⁾ International law of Europe, p. 210.

⁽¹⁶⁾ *Droit international codifié*, 1st edition, 1869, 3rd edition, 1881, p. 289.

⁽¹⁷⁾ *New edition entirely revised*, translated from the Italian by Charles Antoine, Paris, 1911, p. 619.

according to conventional common law and to which the parties have not expressly declared themselves unwilling to accept, or those which must be considered indispensable according to the general principles of international law, because they are necessary by reason of the nature of the arbitral instance, have not been observed.

According to Mr. Carnazza-Amari: ⁽¹⁸⁾

Arbitral decisions are null: (a) when the arbitral tribunal has exceeded the powers which it derived from the compromise, and has settled questions which are not within its jurisdiction; (b) when the arbitrators, instead of deciding according to justice and law, are guilty of deceit or fraud in regard to one of the parties, for example, by receiving a sum of money; (c) when they have refused to hear the parties, or have failed to observe either the formalities laid down under penalty of nullity by the compromise, or any other fundamental rule of procedure; (d) when they have violated the fundamental principles of the law of nations, or an essential right of the States, as in the case where they might have decided on the subjection of one nation to the advantage of another."

Bulmerincq ⁽¹⁹⁾ admits as many as ten cases of reasons for appeal against the arbitral sentence: (1) When the compromise was null (Heffter); (2) When the compromise has been violated (I. 22, para. 21 D. 4, 8); (3) When the sentence is absolutely contrary to law (Vattel, Martens, Twiss),—for it is not sufficient to say that, since there is no superior judge in international law, submission to an unjust sentence is necessary (Wildman, I, 186); (4) In the case where the Judgment contains an inaccuracy of fact, or when one of the parties, or the arbitrator, has been guilty of error; (5) when the parties have not been heard or when they have not been sufficiently heard; (6) When the arbitrator has given a partial judgment (Vattel, Pufendorff, Heffter); (7) When one of the parties has used trickery or unfairness (Heffter); (8) When one of the parties has used inadmissible arguments, such, for example, as might be contrary to the honour and independence of a State (Martens, *Guide*); (9) When one of the parties has corrupted one of the arbitrators (Pufendorff); (10) When one of the parties has used a trick with regard to his adversary (I. 31 D. 4, 8).

But Pradier-Fodéré argues against the opinion which, during a certain period, had, on this point, been dominant among the authorities on international law: "Little restrained by the fear of seeming to multiply the occasions for evading the moral obligation of submitting to the judgments of arbitrators, the most justly famous authorities have drawn up lists of cases which are generally confused one with another." ⁽²⁰⁾ He is careful to unite into four groups the

⁽¹⁸⁾ Carnazza-Amari, *Traite de droit int. public*, translated by Montanari-Revest, I., p. 564.

⁽¹⁹⁾ Holtendorffs *Rechtslexikon*, III., 557, *Holtendorffs Handbuch des Völkerrechts*, IV., 43.

⁽²⁰⁾ Pradier-Fodéré, *Droit international public européen et américain*, Paris, 1894, VI., p. 433. Cpr. Bluntschli, *Le droit international codifié*, French translation by C. Lardy, 1881, art. 495, p. 289; Pierantoni, *Gli arbitrati internazionali*, p. 91 and following; Heffter, *Le droit international de l'Europe*, French translation by J. Bergson, 1873, para. 109, p. 210; Calvo, *Le droit international théorique et pratique*, 1881, book X., II., para. 1533, II., p. 575 and following; Pasquale Fiore, *Nouveau droit international public*, French translation by Antoine, 1882, No. 1215, Vol. II., p. 642 and following; Kamarowsky, *Le tribunal international*, French translation by Serge de Westman, 1887, book III., chap. II., p. 348 and following; Travers Twiss, *The Law of Man and of Nations*, 1889, chap. I., No. 5, Vol. II., p. 7 and following, etc.

numerous causes of nullity suggested by the various authors: open departure from the terms of the compromise; non-observance of universal and fundamental principles of procedure in general; partiality of the arbitrator, bad faith on the part of the arbitrator or of the parties; decisions absolutely incompatible with the principles of justice and international law.

When the authorities, broadly speaking, include thus the causes of non-obligation to submit to the judgment, what do they conceive them to be?

Do they ratify the formula of the non-existence of the decision which over-steps the limits of the compromise? Not at all. It is here, according to their own expression, a question of cases of appeal, of grounds of nullity. Bluntschli, for example, says: "The decision of the arbitral Tribunal may be considered as null:

(a) in the measure in which the arbitral Tribunal has exceeded its powers." But he adds, on the same line, "If the arbitral decision is contrary to international law," and, in this case, to demonstrate this contradiction, he is certain that a procedure must be instituted. He ends: "The decision of the arbitrators cannot be attacked on the ground that it is erroneous and contrary to equity."

Attack, it is not in this way that one speaks of non-existence, but only of nullity. Fiore, quoted by the experts consulted by Roumania in the sense that the non-existence of the decision which over-steps the terms of the compromise, expresses himself, on the contrary, in quite a different way. He begins by "*considering as null*" the arbitral sentence in certain cases (for example, if the disposing part is contradictory, if it has not been reduced to writing and signed), then, in the opposite case, he goes on to declare that it "*might be attacked*" by the party which refuses to execute it, and might be annulled: (a) if the arbitrators have given a judgment outside the limits of the compromise.

On the other hand, even when they interpret not too strictly the cases of nullity of the arbitral sentence, thus multiplying the possibilities of a re-consideration, the jurisconsultants nevertheless do not fail to state precisely that "the arbitral Tribunal decides on the interpretation of the compromise between the parties, and consequently on its own jurisdiction." (Bluntschli, No. 492 bis.)

Finally, in order to make their system acceptable, the authors understand that it is necessary to provide for a court of nullity or annulment.

Certain authors, like Fiore, go so far as to foresee, in a wisely perfected organisation of international society, the setting up of two authorities, the one, the Congress, which legislates; the other, the Conference, which administers: "The demand for nullity or annulment made by the party which takes exception to this means of refusing to execute the arbitral sentence must be introduced before the Conference." (*Droit international codifié*, No. 1376.)

Others—such as Rolin-Jaequemyns—wish to place the question of the examination of cases of nullity on a juridical basis, and to entrust the validity of the arbitration to a regular jurisdiction: "It is to be desired that international compromises, while immediately constituting the arbitral Tribunal as the only judge on the merits of a case, should provide for the procedure to be followed for the formation of a second Tribunal, which would eventually be judge of the causes of the nullity

alleged against the principal judgment. Perhaps, by the means which we have indicated, it will be possible to arrive at the creation of an international custom which would open a practical road to the constitution of a permanent tribunal of this kind." (21) Later, Kamarowsky (22) will be found to agree to this system.

To reduce to order this theory, which, since Vattel, has been so profoundly transformed, to clear up the too numerous causes of nullity, which would make the conflicts last for ever—and arbitration would thus fail in its object—to fix, in the case of necessity, a procedure of nullity and to determine the relation of the cause of nullity to the court trying the annulment, by making the first dependent on the second, it is necessary to examine, as a whole, the most authoritative and scientific representatives.

This is exactly what was made possible in 1873 by the creation of the Institut de Droit International by Rolin-Jaequemyns.

* * * * *

The Institute of International Law had scarcely been founded in 1873 for "fostering the progress of international law" and "formulating the general principles of the science," than it devoted itself, from the moment of its first meetings at Ghent, Geneva, and The Hague, to the drawing up of a scheme for regulating international arbitral procedure. At the session of Ghent in September, 1873, where the first work was divided between various commissions, Messrs. Dudley-Field, de Laveleye, Pierantoni, Goldschmidt, and Vernon Harcourt, were entrusted with the duty of examining the following question: The forms to be followed in the use of international arbitration. (23) Appointed Reporter of the Commission, Mr. Goldschmidt presented his draft rules at the session of Geneva (24) (in 34 articles), relating to arbitral tribunals, their formation and their procedure. This draft "complete, detailed, supported by strong reasons" (25) was the subject of a long discussion in which Messrs. Mancini, Pierantoni, Asser, Holtzendorff, Bulmerincq, Martens, Westlake, Esperson, Goldschmidt, and de Parieu took part.

The preparatory discussion took place at the session of Geneva, at the sittings of 31st August and 1st and 2nd September, 1874. (26) The draft which resulted from the deliberations of Geneva (27) included 32 articles. Submitted to a new examination by a commission, of which M. Rivier was to have been the reporter, it was, after modifications, submitted to the Institute in its session of The Hague. Messrs. Bluntschli, Pierantoni, Neumann (28) took part in the discussion on 28th August, 1875.

Articles 1 to 26 were adopted unanimously, Article 27 by a simple majority. (29)

(21) *Revue de droit international et de législation comparée*, 1872, p. 139.

(22) *Le Tribunal international*, Paris, 1887, p. 359.

(23) *Revue de droit international*, 1973, p. 667.

(24) The text of these draft rules, accompanied by a remarkable study by Mr. Goldschmidt, dated Leipzig, 20th June, 1874, was published in the *Revue de droit international et de législation comparée*, the organ of the Institut de Droit international, VI., 1874, p. 421.

(25) Report of M. Rivier made in 1883, at Munich, on the work done by the Institute since its foundation. *Archives Diplomatiques*, 1882, 1883, IV., p. 399 et seq.

(26) *Revue de droit international*, 1874, p. 587 et seq., V., also *Annuaire de l'Institut*, 1877, p. 46.

(27) *Revue de Droit international*, vol. VII., p. 418 et seq.

(28) *Annuaire de l'Institut*, 1877, p. 84 to 87.

(29) *Revue de Droit international*, 1875, p. 277.

It was a question, according to the proposition of Mr. Moynier,⁽⁸⁰⁾ of "proposing an eventual set of rules for the working of the arbitral tribunal." But, as Goldschmidt pointed out in his draft scheme of rules (*Revue de droit international*, VI., p. 427), "the rules (drawn up by the Institute) are, in the first instance, based on the practice, is not very extensive, it is true, of international law. In the second instance, they are the result of independent deductions in which account has been taken of the juridical principles, accepted in matters of arbitration in various civilised countries." He laid weight on "taking into account the strength of international custom." Addressing himself "to the adversaries of international tribunals, both those who wish to safeguard completely the liberty of States, and those who advocate the creation of a permanent international tribunal," he declared: "They do not see that in fact it is more difficult to refuse obedience to the arbitral sentence delivered than to escape from a claim made unilaterally. . . . *They fail to understand, finally, that it is possible, also in an international action, to attack successfully a judgment given.*"

This last question, as the report of Goldschmidt shows, thus attracted the eager attention of the Institute. In his remarkable report, the erudite Goldschmidt, a consummate jurist, one of the most illustrious masters of modern commercial Law, after learned disquisitions on arbitration in Roman law and the modern codes of procedure, then on their comparison with international arbitral practice, indicates a certain number of fundamental principles:

§18. The arbitral Tribunal is the judge of its own jurisdiction. If the objection of lack of jurisdiction is not opposed at the first opportune moment, or if the objection raised at the proper time has been rejected by the arbitral Tribunal, the parties proceed further, without making any reservation, every later dispute as to the jurisdiction is excluded.

§ 30. The duly pronounced judgment (§ 24-29) decides within the limits of its scope, the dispute between the parties.

"The direct effect of the arbitral award is recognised generally in actual law," continues Goldschmidt. . . . "The great jurists of Rome drew from the nature of the compromise and from the arbitral sentence just conclusions, which modern jurisprudence and practice have often changed in character. If the force of the arbitral award consists, by virtue of the agreement of the parties, in taking the place of a juridical sentence, the result is that effect can be refused to it only in the following cases: when the consent of the parties is lacking; when there has been no real arbitral tribunal; when the award has been given in contradiction to the express or tacit agreement between the parties; when, finally, the maintenance of the award would appear to be a manifest violation of all legal order and of all morality. The grounds for appeal in §32, 1-11, therefore, have, in substance, their sources in Roman Law. . . . Roman Law allows direct effect to the arbitral award only inexceptionally; Justinian was the first to allow to the award, accepted expressly or tacitly, by both parties, an effect analogous to that of a judgment. It results herefrom that, in Roman Law, the appeal regularly assumes this shape: the payment of the sum, promised in case of non-adherence to the award, is refused, and the judge gives judgment on the justification for this refusal. But in no case is he authorised to examine the arbitral award to decide upon its material correctness or its justice.

⁽⁸⁰⁾ *Revue*, VI., p. 496.

Thus, there is against arbitral awards neither an appeal nor any other legal weapon. These principles, so simple, have been laid down in different ways by jurisprudence and legislation ever since the Middle Ages. It was right to depart from Roman Law and to give to the arbitral award a direct effect analogous to that of a judgment. But further progress was made. The system of methods of appeal against judicial decision was extended to arbitral awards. The appeal was allowed as if it were a matter of a judgment delivered by a judge of the first instance. . . . Further, the action for nullity, or an analogous remedy, was allowed as a defence against certain flagrant cases of illegality. And even in cases where appeal was forbidden, attack on the sentence was permitted on the grounds of gross unfairness, confusing the *arbiter with the arbitrator*. It is only in these later times that German jurisprudence and the Laws of Procedure (Geneva, Bavaria, Germany) have returned to just rules by excluding the appeal in principle and by restricting nullity. The facts, which we have just pointed out, were naturally bound to have an influence on the theory of international arbitration. As there was no apparent way of obtaining a subsequent revision and a decision by the judge, it necessarily seemed all the more equitable to refuse efficacy to an unjust award. There is on this point a great divergence of opinions. The older masters excluded appeal, or allowed it only on a small number of grounds which were incontestably just, but Daries, in his *Observationes juris nationalis socialis et gentium*, Jéna, 1751, Vol. II., Note 13, §13 seq., allows the refusal of obedience to all unjust awards. Vattel, II., 18, §18, 329 (Vol. II., p. 305 of the Edition of M. Pradier Fodéré) is of the same opinion, at least in cases of injustice or evident absurdity. Similarly, Neumann (*i.c.* §21) in case of *dolus illicita vel inhonesta praecepta, aliave nullitas admissa*. Many authors, more recent ones, admit these wide categories. They declare the award to be null: in the case of fraud or manifest partiality of the arbitrator; of fraud of the opposite party; of incomplete hearing of the parties; of a decision the contents of which could not be the valid grounds of a convention; of material falsity; of error caused by the parties or the arbitrator; of flagrant violation of the fundamental principles of all procedure; finally, in the case of an award contrary to the commandments of international law and of humanity.

Discussing the too numerous causes of nullity suggested by the authors, the eminent reporter retains eleven of them, among which are :

(1) If the compromise has not been validly concluded; (2) if the compromise validly concluded was later extinguished; (3) if the arbitral tribunal has not deliberated and delivered judgment with all the members present and voting; (4) if, in spite of the compromise having set forth the grounds, the award has been given without grounds; (5) if the arbitral tribunal has decided without hearing the appellant; (6) *if the arbitral tribunal has exceeded the limits of the jurisdiction which the compromise gave it.*

It is important to define and limit, as far as possible, the causes of nullity, if an attempt is to be made to raise them from the embryonic state of conscientious scruple, not susceptible of control, in which they are at the present moment, in order to raise them to the status of juridical grounds which permit the judgment to be attacked by a regular procedure. If this attempt succeeds, the efficacy which the decisions of the international arbitral tribunal should be able to claim as being judicial international decisions, will be guaranteed as far as is permitted by the present state of international law. But to achieve this end, the creation of a superior instance is necessary.

It is with this instance and with the procedure which should be followed by it that paragraphs 33 and 34 deal :—

§ 33. The appeal should be made before the Tribunal, or the arbitral Tribunal, designated or appointed for this purpose in the compromise, or in a subsequent convention between the two parties. In default of such designation, or appointment, or if it should not be possible to form validly the arbitral tribunal designated, or if the arbitral tribunal validly formed has been dissolved, or if the tribunal designated refuses to decide, the appeal should be brought before the Supreme Court of the State or territory, in which the arbitral Tribunal has sat.

§ 34. The Tribunal pronounces only on the grounds of the appeal indicated in the memorandum supporting the appeal. If it finds them to be well founded, it reverses the arbitral judgment. If the arbitral sentence contains decisions, independent one of the other, on various points in dispute, only the effective decisions attacked will be reversed.

The decision of the Tribunal is definitive.

The dispute can be remitted for new trial to the arbitral Tribunal which has judged it, or to another, only with the consent of the parties.

In commenting on this text Dr. Goldschmidt adds :

The best, without doubt, would be an international or permanent tribunal, or one created *ad hoc* for the particular case. The objections, which might be made to an institution of this kind, cease to have great weight as soon as a material decision is no longer asked for on the points in dispute, but only a judgment on the strictly limited grounds which allow of an attack on an award. . . .

When at Geneva on the 1st and 2nd September, 1874, a discussion arose on the Goldschmidt's drafts, on para. 18, after animated debates, in which Messrs. Mancini, Pierantoni, Asser, Goldschmidt, Esperson, de Parieu and von Holtzendorff took part, the question was gone into as to how far it was possible to declare, in an absolute manner, the arbitrators to be judges of their own jurisdiction. The following report was adopted :—

“ The arbitrators must pronounce on the objections based on the lack of jurisdiction of the arbitral Tribunal, subject to the appeal reserved in paragraph 32 No. 6, and in conformity with the provisions of the compromise.

No way of appeal shall be open against preliminary judgments on jurisdiction, except cumulatively with the appeal against the final arbitral judgment.

In case that the doubt on the jurisdiction depends on the interpretation of a clause of the compromise, the parties shall be deemed to have invested the arbitrators with the power of settling the question, subject to any clause to the contrary. ⁽³¹⁾

(31) *Revue*, VI., p. 593.

Finally, when the general discussion was opened on § 32, Messrs. Field, Bulmerincq and Westlake demanded the suppression of these paragraphs. M. de Parieu did not think that the appeal could be organised. He thought that the method suggested by the Commission would often result in preventing the States from agreeing to arbitration. He believed that here, as well as in the question of the bringing of an action, it was not possible to go beyond the indirect invitation to organise a method of appeal. M. Pierantoni advocated the discussion of the draft. M. Mancini proposed the following text, in place of paragraphs 32-34, which was adopted:—

The arbitral award is null in case of nullity of the compromise, of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, if it has influenced the majority, or of essential error caused by the production of false documents.

The compromise will determine before what person, or what faculty of law, or established court, the appeal in nullity shall be brought and within what period.

At the session at The Hague the discussion was resumed⁽³²⁾ M. Goldschmidt, prevented by the state of his health, was no longer present. M. Rivier was the reporter. He read the conclusions on the modification of the draft adopted by the Institute at Geneva.

Paragraph 30 of the original draft (Goldschmidt) must be restored as Article 24 in these terms: "the award duly pronounced decides, within the limits of its scope the dispute between the parties."

This was adopted.

The reporter proposed to make Article 24 of the draft of Geneva, Article 27 and last of the final draft, and to amend the last paragraph of that Article as follows: "The arbitral award is null in case of nullity of the compromise or of usurpation of jurisdiction, or of the proved corruption of one of the arbitrators, or of essential error." The Geneva text wished that the error should have been caused by the production of false documents. The reporter thought that it should be sufficient for it to have another cause. M. Pierantoni disputed this point of view. The amendment proposed by the Commission was put to the vote and adopted.

The provisions of the draft of the rules of the Institute for international arbitration procedure referring to the point under examination are as follows:—

Art. 14, § 2: The arbitrators must pronounce on the objections based on the lack of jurisdiction of the arbitral Tribunal, subject to the appeal mentioned in Article 24, par. 2, and in conformity with the provisions of the compromise.

§ 3: No way of appeal shall be open against preliminary judgments on jurisdiction, except cumulatively with the appeal against the final arbitral judgment.

§ 4: In the case when the doubt on the jurisdiction depends on the interpretation of a clause of the compromise, the parties shall be

⁽³²⁾ *Annuaire de l'Institut*, I., p. 84-87.

deemed to have invested the arbitrators with the power to settle the question, subject to any clause to the contrary.

Art. 25 : The sentence duly pronounced decides, within the limits of its scope, the dispute between the parties.

Art. 27 : The arbitral sentence is null in case of nullity of the compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error.

* * * * *

Applying the principles brought out by the Institute of international law to the case, at present in suspense before the Council of the League of Nations, of the fate of the decision of Mixed Arbitral Tribunal of the 10th January, 1927, which delivered judgment by interpreting the compromise, we are led to the following conclusions :

Jurisdiction is presumed :

Art. 14, § 4 : " In the case when the doubt on jurisdiction depends on the interpretation of one of the clauses of the compromise, the parties shall be deemed to have invested the arbitrators with the power to settle the question subject to any clause to the contrary."

The quite modern authors, whom one should believe to have been converted to the most favourable views with regard to the progress of arbitration, which, since 1873, the Institute of International Law has been striving to assure, Messrs. Basdevant, Jèze, and Politis, signatories of the joint opinion cited by M. Titulesco, write as follows : Second principle. The previous verification of the jurisdiction is quite specially imposed on international tribunals. The jurisdiction of international tribunals is much narrower than that of national tribunals. Not only is it always exceptional, but further it derogates from a fundamental rule of common international law : international disputes are not settled by courts . . . in public international law all international tribunals are exceptional. A State can only be subject to the jurisdiction of an international tribunal of its own free-will." To this narrow point of view, based on the respect of the sovereignty of States, the report of M. Goldschmidt, even in 1874, opposes a very different conception. (33) " M. Rolin-Jaequemyns remarks very justly that the question of jurisdiction must not be solved by a strict interpretation of the compromise, but that, in case of doubt, it must be settled affirmatively. In fact, this affirmation in no way prejudices the cognisance of an ordinary tribunal. On the contrary, it makes a judicial decision possible on a point which without that would remain in dispute."

From still another point of view, the study of the deliberations of the Institute of international law is not without instruction in respect of the present case.

In ordinary procedure the judgment on jurisdiction is a preliminary judgment which however ranks among final judgments because it has the force of a "*chose jugée*."

But, although in internal procedure a way of appeal is open against the judgment on the jurisdiction, in the Rules of Procedure prepared by the Institute of international law, it is not so :

(33) *Revue*, vol. VI., p. 440.

Art. 14, § 3: "No way of appeal shall be open against preliminary judgments on jurisdiction, except cumulatively with the appeal against the final arbitral judgment."

This is exactly our case. The decision of the 10th January, 1927, in deciding on jurisdiction, still gives no solution in fact of the dispute. Its only result is to allow the tribunal to continue the examination of the requests brought before it. Would there have been usurpation of jurisdiction, or even a simple overstepping of the jurisdiction, if the Arbitral Tribunal had connected the question of jurisdiction with that of the merits? Obviously not. The different reasons on the merits invoked by the Roumanian State for the purpose of evading a possible judgment against herself by the Mixed Arbitral Tribunal, have not yet been judged, nor even, more simply, prejudiced, by the decision of the 10th January, 1927. It has been shown that a large part of the arguments of the Roumanian Government is based on the fact that it would be unable to meet adverse judgments delivered against it, whether they were in the nature of restitution of property or (what is assuredly more practical) pecuniary indemnities, proportionate to the damage caused. Now, in order to discover the amount of these indemnities, it would be necessary to have a judgment, no longer preliminary, but final, which no longer decides in an abstract way on the question of procedure, but concretely, by an affirmative or a negative, and, in the case of admission, with figures, on the merits. Finally, it should be pointed out that the considerations of law, on which the Roumanian Government relies for the purpose of opposing a possible condemnation, are only enumerated without yet having been examined in the judgment of 10th January, 1927, which limits itself to indicating, without deciding on them. What advantage would these have been in having recourse, then, to the grave procedure of usurpation of jurisdiction, when no injury, as yet, was threatening? "In order that a usurpation of jurisdiction should render refusal of execution legitimate, it must be certain and indisputable. There must also be a real interest in taking advantage of it. A double condition . . ." Thus reasons the excellent juris-consult, M. Politis, outside the joint Opinion, in his scientific work (*La justice internationale*, p. 92). There his ideas are in agreement with those of his great predecessors of 1873. In effect, if, in order to attack a decision on the grounds of usurpation of jurisdiction, it is necessary: "to have a real interest in taking advantage of it," this cannot be the case here, since the condemnation is still only problematical, in no way certain, and in any case has not yet occurred. Unless the Roumanian Government has particular reasons, which we cannot believe, for withdrawing from all judicial discussion the application to ex-enemies of its Agrarian Law, we cannot see how there could be, at the present moment, "real interest." It has, as the rules of the Institute demand, made all reserves on the jurisdiction of the tribunal. Thus its rights have been preserved in view of the possible later proceedings for nullity. But the moment has not yet come, since these rights have been reserved, of arguing against the decision, which is only problematical, of a nullity, of which the coming into force at the present moment, would be premature.

Further, one important consequence follows from the work of the Institute of international law when, in Art. 27, it is provided in its draft scheme of the rules that the arbitral award is null in case of nullity of the compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error, it was, in the intention of the Institute, to be only an indication destined to induce the interested

States, in conformity moreover with previous practice, to form a new tribunal to judge on the merits of the case, or, in accordance with the suggestion of Goldschmidt, a new tribunal to judge the special point of the alleged nullity.

To the illustrious Mancini is due the substitution for §§ 32-34 in the Goldschmidt draft, of a version, which regards, as the cause of nullity, only nullity of the compromise, usurpation of jurisdiction, corruption and essential error. Now, he adds this: "The compromise shall determine before what person or faculty of law, or established court, the appeal for nullity shall be brought, and within what period." This phrase has been dropped. M. Parieu, who *presided*, did not believe that the appeal could be organised. He thought that the method suggested by the Commission would often result in preventing States from consenting to arbitration. He thought that here, as in the question of the bringing of an action, it was impossible to go beyond the direct invitation to organise a method of appeal.

Now, if we compare these declarations together with those of the *indisputable* Opinion, cited as an affirmation of law by M. Titulesco, we shall discover that, between the point of view of the consultants and that of the great predecessors of 1873, consummate jurist-consults, each of whom had been a specialist in an important branch of law before becoming one in international law, there is an essential difference. For M. Jèze, particularly, the sanction of the violation of the rules of jurisdiction is non-existence: "When it is a question," the Opinion says, "of a national tribunal, the violation of the rules of jurisdiction has not in principle the effect of causing the judgment to be considered as an action performed by simple private persons absolutely devoid of authority. In public international law the situation is entirely different. There is not only lack of jurisdiction; there is usurpation of powers, which is much stronger than lack of jurisdiction. The sanction of the violation of the rule of jurisdiction is the juridical nullity of the decision. The sanction of the usurpation of power is the juridical non-existence of the decision." And all this, although a certain looseness of language may cause doubt, under this trenchant formula that any overstepping of jurisdiction is an usurpation of power: "The international Tribunal must, before examining into the merits, very carefully verify its jurisdiction. If it does not do so, the sanction will be much graver than in public internal law. The award must be considered not as emanating from a tribunal, but as emanating from a personality absolutely without authority." And lower down: "The award of an international tribunal, which delivers judgment outside its jurisdiction, is vitiated by usurpation of power. It is non-existent. It will produce no juridical effect." Therefore, following this entirely new theory, the lack of jurisdiction of the judge, who goes beyond the terms of the compromise in judging that which the latter, according to the allegation of one of the parties, does not permit him to judge, renders the decision, by which he affirms his jurisdiction, absolutely non-existent.

It was, perhaps, not useless to oppose to these entirely new ideas, hitherto unknown to international law, the point of view of the Institute of international law, in 1873. Whereas, nowadays non-existence is claimed, at that time nullity was considered sufficient. If there is any reason for this change between 1873 and the present moment, it would be interesting to know it.

In any case, to shake the authority of the Institute of international law, it would, at least, be necessary not to pass it over in silence, but to recall it, examine it and discuss it.

* * * * *

Finally, it is interesting, on a last point to consider together the work of the Institute of international law with the present question and the new formula.

In the terms of article 25 of the draft of rules of the institute : "The award *duly pronounced* decides, within the limits of its scope, the dispute between the parties."

If the limits fixed to the jurisdiction by the compromise have been overstepped, at least according to the allegation of one of the parties, this is sufficient, it is hinted, for the award to be not *duly pronounced*, and that, consequently, it does not decide the dispute.

Simple lack of jurisdiction, without usurpation of jurisdiction, would therefore be a reason for nullity of the sentence. Our eminent colleague M. Walther Schücking who passes very quickly over the work of the Institute of international law (*Recueil roumain*, p. 621), is careful not to omit this detail. We quote : "The Institute of international law occupied itself in 1877 with the question of the validity in law of the awards of the international arbitral court, and passed the following resolution : "the sentence *duly pronounced* decides, within the limits of its scope, the dispute between the parties." (Art. 25 : *Annuaire*, I., p. 133.) Unduly pronounced, it decides nothing.

Lack of jurisdiction would, therefore, come to be the same as usurpation of powers, and perhaps would go beyond it.

It is very regrettable that in the circumstances, our learned colleague should have adhered to the letter of the rules of the Institute without re-considering in detail the elaboration of these rules, on the basis of the remarkable draft of his eminent compatriot Goldschmidt.

Article 25 of the rules of the Institute is word for word § 30 of Goldschmidt's draft : "The sentence *duly pronounced* (§§ 24 to 29) decides, within the limits of its scope, the dispute between the parties." (34)

Thanks to this precision (§§ 24 to 29), we know what is to be understood by "duly pronounced." § 24 : "The pronouncement of the final decision must take place within the period fixed by the compromise or by subsequent agreement." § 25 : "Every decision, final or provisional, shall be taken by the majority of all the arbitrators. The discussion and decision must take place in common, etc." § 26 : "If the arbitral Tribunal does not find the claim of either of the parties to be well-founded, it must make a declaration to that effect, and if it is not limited in this respect by the compromise establish the real state of the law (case in which the arbitrator acts, subject to contrary prescription, really as *arbiter finium regundorum*—the affair of San Juan)." § 27 : "The arbitral judgment must be drawn up in writing, etc."; and, similarly, in § 28 : statement of facts. § 29 : notification to the parties.

(34) *Revue de droit international*, VI., p. 446.

Thus, when the Institute of international law speaks of an award duly pronounced, it takes into consideration conditions quite other than those of jurisdiction, which are expressly regulated by § 18 of Goldschmidt's draft.

It is therefore an obvious error to interpret "duly pronounced" as implying, on the part of the arbitrator, the fact that he has not exceeded his jurisdiction.

From this follows a very important consequence: it is that, in the case of the jurisdiction being exceeded, the award is not to be considered as null, as soon as the usurpation of jurisdiction on the ground of the jurisdiction having been exceeded, is invoked. In fact, if article 27 foresees causes of nullity, among which is usurpation of jurisdiction, and that, although vitiated according to the allegation of one of the parties, by one of the causes of nullity foreseen in this article, the award is none the less considered, however, as, duly pronounced (since, in the consideration of the due pronouncement, only elements of pure form enter, which have, anyhow, been fulfilled, art. 24 to 29 of Goldschmidt's draft, having become articles 20 to 24 of the present rules), it results therefrom that, as long as it has not been dropped, it retains its obligatory force.

The situation for the State which alleges usurpation of jurisdiction is, therefore, this: it is face to face with a decision which has the force of a "*chose jugée*," before which it must bow, unless it can establish that the cause of nullity which it alleges is well-founded.

* * * * *

On what basis?

Usurpation of jurisdiction; but usurpation of jurisdiction is not to be confused with the error on jurisdiction: it requires more than a lack of exact harmony between the award and the compromise; it needs a grave error, born of a flagrant injustice, on the merits.

Usurpation of jurisdiction thus exists only in the injustice of the condemnation, not in the faulty judgment on the jurisdiction.

How, then, finally to establish usurpation of jurisdiction?

By what procedure?

The rules of the Institute discreetly indicate the causes of nullity (Art. 27).

It looks no further.

But the result, both of the report of Goldschmidt and of the explanations of Mancini, whose text was substituted for that of Goldschmidt, when finally analysed, at Geneva, is that a new instance must then be organised by the common wish of the parties.

In order to conform to the discussions and the resolution of the Institute of international law, which was their conclusion, the Government, which alleges usurpation of jurisdiction, must offer to bring the question of this excess of powers before another tribunal and obtain the consent of the other party to the constitution of this tribunal: in the present circumstances, the Hungarian State, since it is that State which,

by creating a mixed arbitral Tribunal, has made it possible for its petitioners to find access to the tribunals which it had stipulated, first under article 239, then under article 250 of the Treaty of Trianon.

The conclusion can therefore admit of no doubt :

1. It is only a final judgment, not a preliminary judgment on jurisdiction, which, according to the Institute of international law, can be the subject of procedure for usurpation of jurisdiction ;

2. Usurpation of jurisdiction, on a point of jurisdiction, must not be presumed more than in any other matter, for, in the case where the doubt regarding jurisdiction depends on the interpretation of a clause of a compromise, the parties are deemed to have invested the arbitrators with the power of setting the question saving any clause to the contrary ;

3. The sentence is "duly pronounced" even when the arbitrator has, by error, gone beyond the limits of his jurisdiction ;

4. Usurpation of jurisdiction, whatever may be its source (and it is by no means certain that an error on jurisdiction suffices to constitute an usurpation of jurisdiction), is a cause of nullity, not of non-existence ;

5. The party alleging the nullity must propose the arbitration.

THIRD PERIOD.

With the convocation of the Peace Conferences of 1899 and 1907, arbitration entered into a new phase. Internal justice is characterised by these two essential traits, so familiar that, finally, they are no longer noticed : permanence and obligation. International justice has a tendency to model itself on it. But the obstacles are great. Great to the principle of obligation, great even to the principle of permanence. The Conference of 1899 only with great difficulty succeeded in giving it a first form, more apparent than real : of temporary tribunals in a permanent frame. The second Conference, that of 1907, incapable of finding true permanence, in the arbitral Court of Justice, could still less realise the great design of an obligatory arbitration, scarcely admitted, by some special conventions, in certain limited cases. The moment has come, nevertheless, for fixing in advance the features of the institution of arbitration, in the purely optional framework : not only to give it a Court, but to create for it statutes to which, in the absence of any more precise ordinance, the fate of the arbitrations between the signatory States should be entrusted. Together with the institution of the permanent arbitration Court, accepted, from that moment, saving express reserves, by the parties signatories of the Convention relating to the specific solution of international conflicts, these rules of arbitral procedure are, in a great measure, inspired by those of the Institute of international law.

The draft of the rules of the Institute read, article 27 : "The arbitral sentence is null in the case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption on the part of one of the arbitrators, or of essential error."

Article 26 of the Russian draft lays down : " The arbitral sentence is null in the case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption on the part of one of the arbitrators."

Thus, already, Russian initiative placed itself, among causes of nullity, on a more restricted, a more limited, terrain.

Still less could it envisage, for the different causes of nullity, any other sanction than the offer, as soon as one of these causes had been invoked, to prove its accuracy before a new tribunal.

Among the members of The Hague Conference, there were some who, being members of the Institute of international law, had enjoyed the happy privilege of assisting at the elaboration of the rules of 1875. Amongst them was Mr. Asser. When the Russian project came to be discussed (tenth sitting, 26 June, 1899, p. 143, *et seq.*, particularly p. 149), the minutes state :

Art. 26 (question of nullity).—Mr. Asser asked whether it was not possible to find an authority to entrust with the mission of declaring the award null, so as not to leave this weighty consideration to the irresponsible will or initiative of the State which had lost the case. *If, as he thought it was not possible to find this authority, then Mr. Asser was of the opinion that Article 26 should be suppressed.*

The President was of the opinion that the observation of Mr. Asser *should call for the most serious attention* of the Committee.

M. le Chevalier Descamps thought that this was just the great service which a permanent Court of Arbitration could render.

Mr. Odier observed that the drafting of this article was subordinate to the question of deciding whether or not there should be a permanent Court.

The President did not think that it would be possible to foresee cases of nullity, without at the same time knowing who would be the judge to consider these cases. It was unthinkable, on the other hand, to impose on the parties the decision of the permanent Tribunal in Courts in respect of which they had not contemplated having recourse to this jurisdiction.

M. le Chevalier Descamps asked that this so serious question of nullity should be reserved, as well as that of *revision*.

Paragraph 1 of article 26 was reserved.

The two other paragraphs of article 26 formed later article 27.

* * * * *

There was nothing more remarkable than this exchange of views.

None of the members present suggested that the cause of nullity could exist without the party opposing it being exempted from offering a new arbitration in order to decide it.

The bond which historically had thus been formed, in theory, as in practice, between the cause of nullity and the Court, a bond which had been thrown into relief by the work of the Institute of international law, is here very particularly emphasised.

But, while at the Institute of international law it had appeared that the cause of nullity could be indicated, subject to the subsequent creation of a Court, here, on the other hand, it seems that the cause of nullity can no longer be accepted, or even mentioned, as soon as there is, at the same time, no determination of an instance.

In the solution of the Institute of international law, the party which alleged usurpation of jurisdiction, or, more generally speaking, the cause of nullity, could invoke it, on condition of coming to plead it.

In the formula, much more favourable to the final character of the awards, of the Hague Conference in 1899, the cause of nullity was not even to be named, because, in order to make it effective, it was necessary to imagine a superior jurisdiction.

Are cases of nullity to be admitted?

Three hypotheses present themselves.

1. To allow the losing State to withdraw from the arbitration by invoking the cause of nullity, but by declaring itself the only judge : that is what Mr. Asser calls the *arbitrary proceeding* of the losing State ;

2. To permit the losing State to take the initiative in setting up a new arbitration, dealing with the alleged nullity : that is what Mr. Asser calls, in a word, the *initiative*.

3. To allow the winning State to refuse any kind of negotiations on the question, entrenching itself behind the final character of the sentence : that is the solution accepted by the Hague Conference.

According to the formula of the President of the Commission, Mr. Leon Bourgeois, himself, *it is impossible to foresee cases of nullity without organising a tribunal* : it is impossible to impose on the parties, on the other hand, the jurisdiction, in these matters, of the permanent Court of arbitration, which was just about to be created at the end of the work of the Conference.

It is therefore as much out of respect for the final character of the sentence and the authority of arbitration, on the one part, as out of regard for the optional character, in all matters, even of procedure, of the new Court, that the Hague Convention of 1899 refused categorically to make a place for article 27 of the draft rules of the Institute, which, in substance, became article 26 of the Russian draft.

According to the declarations of the reporter himself, the Chevalier Descamps :

“ So far as concerns the general question of causes of nullity of the arbitral award, the Russian draft included the following disposition : ‘ The arbitral sentence is null in the case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators.’ Mr. Asser, for his part, asked whether it would not be possible to find an authority which might be entrusted with the mission of declaring the award null, so as not to leave so serious a decision to the arbitrary action or to the initiative of the State which would have been condemned.

“The Committee hesitated in the examination of this question, before the embarrassment of foreseeing cases of nullity without, at the same time, determining who should be the judge to consider these cases. It was, at the same time, remarked that the permanent Court of arbitration could guide the States on the road to a solution in this sense.”

* * * * *

These categorical declarations leave no room for doubt.

It would be vain to attempt to say that, in the terms of the Convention (art. 54 of 1899, art. 81 of 1907), it was a question of an award duly pronounced. ⁽³⁵⁾

We know what is understood by these terms: *award duly pronounced*. For, we have seen, these terms were in the draft rules of the Hague, and in the rules of Dr. Goldschmidt, before forming part of article 25 of the draft rules of the Institute. Now, as we have said, Dr. Goldschmidt himself was careful to explain what was to be understood by award duly pronounced. ^(35*) It is a question of an award pronounced in prescribed forms, without regard to its contents, in respect of the merits.

In vain it might be suggested, with the regretted Paul Fauchille: “The Hague Conventions of 1899 and 1907 did not contemplate the case of nullity of an arbitral award. They thus left matters in their former state. The jurisconsults can thus continue to teach, as before, that, in certain cases, without stating which, an arbitral award is obviously null.” ⁽³⁶⁾

To reason thus is to assume, that, by the non-insertion of article 26 of the Russian draft, the Conference had intended to leave the trouble of recognising and enumerating the causes of nullity to doctrinal controversy.

The motive of this non-insertion is quite different.

It did not constitute, on the part of the Conference, an abandonment, by reason of failure to come to an understanding, as in the famous case of a levy in mass in an invaded country ^(36*), but on the contrary, a formal solution.

Will it be said that the will which manifested itself, without any doubt whatever, at the Hague, is obligatory only in the measure in which it has found expression in the text of the Convention? “Obligatory contractual stipulations exist, according to a representative of the new Austrian school, only in the measure in which the will of the persons drawing up the rules has received a corresponding expression in the text of the treaty, for it is not the simple will, but the *declared will* which creates the right.” ^(36**)

⁽³⁵⁾ Walther Schücking *Recueil roumain*, p. 620.

^(35*) Cpr. *supra*, p. 24.

⁽³⁶⁾ *Traité de droit international public*, 1926, vol. 1, part 3, p. 565. In the same sense, Ch. Meurer, *Die Haager Friedenskonferenz*, 1905, p. 349. According to Meurer, the fact that one of the parties can demand the question of nullity of the award being brought before a tribunal, implies that each party decides by itself whether the award is valid or not, *Friedensrecht*, p. 349.

^(36*) A. de Lapradelle, *La Conférence de la Paix*, 18th May-22nd July, 1899, Paris, 1900, p. 99.

^(36**) Verdross, *Die Verbindlichkeit der Entscheidungen internationalen Schiedsgerichte*, 1928.

Even then, it would be necessary to recognise that a text does exist.

Article 48.—The Tribunal is authorised to determine its jurisdiction by interpreting the compromise, as well as the other treaties which may be invoked in the matter and by applying the principles of law.

From this text it follows that if the arbitrator declares, in his award, that he has interpreted the compromise, the award cannot be attacked on the ground of over-stepping of jurisdiction. Usurpation of jurisdiction is never in an interpretation of the rule of law (jurisdiction or merits, but in an omission of procedure: for want of motives, for example, and especially liberty taken with the compromise, as in the case where the arbitrator refuses to take account of a treaty text which the compromise demands that he should apply. In short, in the light of the law of the Hague, the decision of the commissioners, in the affair of the *Betsey* (and, consequently, in the present Roumano-Hungarian affair) would be unattackable, and the commissioners or the judge of the minority would not have the right to withdraw. But the award of the King of the Netherlands in the affair of the North-East frontier would remain subject to procedure of nullity on the ground of usurpation of jurisdiction. It would be the same case with an award of which the motives had not been set forth or which was contradictory.

The concession is important: it is not sufficient. If article 48 expresses the will of the Conference, article 54 expresses it in the same way by attributing a definite character to the award duly pronounced. "The act of the Hague has rejected not only the appeal for reasons of the injustice of the sentence, but also the demand for annulment by reason of violation of the award and it has recognised the *immutability* of arbitral awards," declares H. Lammasch.⁽³⁷⁾ And, similarly, Nippold: "One may think what one likes of the stipulations of the Hague, they constitute the law in force." And later: "Various causes of nullity have often been defended in doctrine and in practice, but up to the present they have not been recognised by positive common international law."⁽³⁷⁾

Too much importance was attached, even before he became a member, and, later, President of the permanent Court of international Justice, to the juridical doctrines of M. D. Anzilotti, to allow us to pass over in silence the feeling which he expressed on this point in 1915 in a book which, too modestly, is stated to be for the use of students, as it is, on the contrary, rich in instruction for the masters.⁽³⁸⁾

According to him, in order that the will of the authors of the Hague Convention should have a juridical value, it is not enough that the history of this Convention should prove that such was the design of its authors: a conception, however clear it may be, expressed in the work in preparatory of a law, or of a collection of juridical rules, does not suffice to justify an interpretation which is not supported by the rule itself. The authors of the Convention started from inaccurate ideas on the nature of the arbitral award, and have deduced from it, in order to exclude the grounds of nullity, a reason which, if it were true, would be equally valid for every juridical act between States, suppressing between

⁽³⁷⁾ Die Rechtskraft internationaler Schiedssprüche, p. 162, Das Werk vom Haag, 2nd series: Die gerichtlichen Entscheidungen, vol. I., part 3 (1914), p. 48, and Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten, 1907, p. 347.

⁽³⁸⁾ *Corso di diritto internazionale, Appunti ad uso degli studenti*, III., part I., p. 110 and following, especially p. 128 and following.

them even the conception of nullity. It is not, after that, possible to follow Lammasch and Nippold. For their system would lead to absurdity if, for example, the arbitrator were to judge that which he should not judge, or to condemn a party to a physically or juridically impossible payment, etc.

These considerations are, naturally, of the gravest kind. If their consequence must be that the law of the Hague can serve here only as conventional law, not as common international law, it is, assuredly, permitted to subscribe to it, in order to return to the previous law, which the author very justly presents as follows: *if the parties are agreed in recognising the existence of the motive of nullity, well and good; otherwise we are faced with a new controversy, which may eventually be submitted to another arbitration, of which, indeed, international practice offers examples.*

For it is clear that with an authority such as that of this eminent juriconsult, there could be no question of the non-existence of the simple discretion of the party which, alleging that it has been wrongly interpreted in its compromise, might, on the ground of overstepping of jurisdiction, entrench itself behind the fortress of its sovereignty, and would not quit it. The agreement of the award with the compromise is a contractual right, based on the agreement of the wishes which serve as the basis of the judgment, a right which the party appearing before the tribunal could not lose without changing the essential contractual nature of the arbitration. But that which the will creates, the will can extend. "And it is perhaps useless to add that the parties can renounce, expressly or tacitly, the objection of nullity."⁽³⁹⁾ Moreover, the rights of the arbitrator, arising out of the very nature of his role, to the jurisdiction of his jurisdiction, must be reserved.⁽⁴⁰⁾

It is only within these limits, which are precisely those of the positive law of nations, that the usurpation of jurisdiction of the arbitrator had to produce its effect before the Hague Conference.

It is within the same limits that it would have to do so now.

From the suppression of article 26 of the Russian draft, it would therefore not result that the award charged with usurpation of jurisdiction would be delivered to the arbitrary action, as claimed by the partisans of *non-existence*, but to the *initiative* of the party which alleges and which can, appealing to the sentiment of justice, the good faith, and the honour of the adversary, induce him to recognise the cause of nullity, or, in case of dispute, to organise, for the purpose of remedying it, by common agreement, a new and special Court: a point of view the more reasonable because it is precisely that of positive law commonly received before the Hague Conference.

But the question is not one of ascertaining what the States signatory to the Hague Convention ought to have desired.

It is of ascertaining what they did desire.

What they desired, they have said.

First, no nullity without a tribunal: thus is eliminated the arbitrary action of the claimant in usurpation of jurisdiction.

⁽³⁹⁾ *Op. Cit.*, p. 130.

⁽⁴⁰⁾ *Op. cit.*, p. 105.

Further, no instance without a previously constituted Tribunal.

Finally, no chance tribunal, but, as far as possible, a constant jurisdiction : by preference, the Court.

But, no previously constituted Court without acceptance, in this case, of its jurisdiction, and in the general, not to say unanimous, opinion in 1899, no Court except an entirely optional one.

At this critical moment of its development, where it approaches *Permanence*, the Institution of arbitration runs the risk of shipwreck on the question of *Obligation*. Permanence, obligation : international justice can grasp these two fundamental characteristics of internal justice only slowly, prudently, one by one. To possess itself of the first, it must, for the moment, renounce the second. It is to the permanent Court that, from then, the Powers sacrifice, for the moment, at the same time as obligatory arbitration, *in any case whatever*, the causes of nullity which can be understood only in a system, even partial, of obligatory arbitration.

Right or wrong, such is their reasoning.

Correct or not, such is their will.⁽⁴¹⁾

By the Hague Convention, of 1899, on the pacific settlement of international differences, the signatory Powers pledged themselves, in the interest itself of arbitration, to submit themselves to it when there had been usurpation of jurisdiction on the part of the arbitrator.

Strictly speaking, the losing party cannot be heard refusing the execution of the sentence of the arbitrator which it has appointed, because he had committed an usurpation of jurisdiction. The putting forward of this reproach, which could not, in any case, bring about the dropping of the award, does not even place on its adversary the necessity of coming to an agreement with it to organise an instance on this point, in such a fashion that, if it deliberately puts obstacles in the way, the responsibilities would be shifted. No : to such proposals, emanating from the initiative of one party only, no effect can, in any degree, attach : the other party, strictly speaking, can leave them out of account. In order that the Permanent Court, on which the Conference relies, above all others, for regulating the question of nullity (and particularly of usurpation of jurisdiction) may take cognisance of this, without the entirely facultative character of its competence being prejudiced thereby, it is necessary that, once the award has been rendered, the party which profits by it should be *entirely free* to refuse the organisation of a new instance to deal with the usurpation of jurisdiction.

If, then, it accepts it, it is without being bound to do so by any legal right.

Such is the solution of the Hague Convention, brought by the sequence of its contingencies, and, for this very reason, back to the

(41) In this sense, independently of the authors quoted, H. Lammasch, G. Scelle, add Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, 1907, p. 347 ; and *Das Werk vom Haag*, Series 2 ; *Die gerichtlichen Entscheidungen*, Erster Band, dritter Teil, 1914, p. 48 ; Frede Castberg, *La compétence des tribunaux internationaux*, in *Revue de droit international et de législation comparés*, 1925, p. 347.

truth of its formula. A text cannot, without danger, be read isolated, detached from its precedents, its period and its circumstances.

* * * * *

A not less clear application of these very clear principles cannot be long delayed. In 1907 the Second Hague Conference, following the Russo-Japanese War, should have occupied itself with problems of belligerency and neutrality by land and more particularly by sea: it nevertheless attempted, in regard to the *Permanency* as well as in regard to the *Obligation* of the International Law, a double effort which met with a double failure: that of the Court of arbitral justice (by failure to agree as to the manner of appointing the judges) and that of the general treaty of obligatory arbitration. From that time, but little attention has been given to the Rules for arbitral procedure of 1899. The time had not yet come for perfecting it by the examination of the causes of nullity in combination with an instance naturally based on the obligatory jurisdiction of the *permanent Court*, as a court of cassation, or better still, because more clearly judicial of the *Court of arbitral justice*. The construction of this jurisdiction was still too controversial and too difficult for such consequences to be deduced from its organisation which was still doubtful. Also the texts of the Convention revised, of the 18th October, 1907, retained in this respect, although numbered differently, their original phraseology:

Article 37.—Submission to arbitration implies the pledge to submit, in good faith, to the sentence.

Article 73.—The Tribunal is authorised to determine its jurisdiction by interpreting the compromise, as well as the other treaties which may be invoked in the matter and by applying the principles of law.

Article 81.—The arbitral award, duly pronounced and notified to the Agents of the Parties to the dispute, decides the case definitely and without appeal.

Among the signatories of the Convention, which is signed by so many the more States (as at the Second Conference the summoning of Central and South America had increased the number of the nations represented to forty-four), are the United States of America and the United States of Venezuela. Now, against an arbitration, previously carried out between the two States by a mixed Commission, with an outside third chief-umpire (M. Barge, nominated by the Queen of Holland), Venezuela raised the objection of usurpation of jurisdiction of the chief-umpire. How was the incident to be settled? The Chief Umpire was a Dutchman, the two parties were signatories of the Convention of the 18th October, 1907 and had ratified it. The only thing to do was to apply between them the law of The Hague. Venezuela did not allege that the United States were bound by the allegation of usurpation of jurisdiction alone to lose the benefit of the "*chose jugée*": this would be, according to the formula of M. Asser, *arbitrariness*, discarded at once by the Conference. Venezuela did not even claim that the United States were, because of the allegation of excess of powers, under an *obligation* to come to an understanding with Venezuela to give to the dispute as to usurpation of jurisdiction the solution of an arbitral instance: that would have been, according to the formula of M. Asser, the initiative of the losing party, equally discarded by the Conference. The United States,

by an initiative, which does not astonish us on the part of a nation which of its own accord revises judgments given to the benefit of its own nationals (Pelletier affair), out of benevolence granted a new instance to Venezuela. And what instance? The only permanent instance that yet exists. The Court of arbitration of the Hague.

Everything happened therefore in conformity with the solutions previously given.

The authorities did not think that one of them had the right to invoke the Hague Convention in order to evade the execution, purely and simply, by putting forward the objection of usurpation of jurisdiction.

The parties did not think that one of them had the right to impose on the other the formation of an arbitral instance to decide on the usurpation of jurisdiction.

But the two parties came to an understanding to organise this jurisdiction by common agreement.

Three members of the Permanent court of arbitration of The Hague, of which one had taken part in the work of the Conference, namely M. H. Lammasch, were called upon here to take cognisance of the question of the justification for the charge of usurpation of jurisdiction.

In interpreting the compromise, which calls on them to judge, they, at the same time, gave an interpretation of the Convention of the 18th October, 1907, i.e., the interpretation of the law of the Hague by the Court of the Hague.⁽⁴¹⁾

What do they say?

First of all this :

“Whereas it is assuredly in the interests of peace and of the development of the institute of international arbitration, so essential to the well-being of nations, that such a decision should be accepted in principle, respected and executed by the parties without any reserve, as is prescribed in Article 81 of the Convention for the peaceful settlement of international conflicts, dated the 18th October, 1907; whereas, further, no jurisdiction has been instituted for revising similar decisions.”

Thus The Hague Court, in its judgment, lays it down that, according to the law of The Hague, the usurpation of jurisdiction of the award is not a cause of nullity, for, once given, the sentence is final, without any party being able to avail itself of a cause of nullity. It is the principle of respect for the decision, whatever may be its defect, whether it be overstepping, or non-accomplishment—by reason of a wrong interpretation, or failure to apply the compromise—of the powers of the arbitrator. Article 81 is precise. It is a text which, as far as the Court is concerned, leave no room for doubt.

The Court does not invoke the Preliminary Work of the Convention. The Text (article 81) suffices for it, in what it affirms. Incidentally, it does invoke it in denying: “Further (this is here only a

⁽⁴¹⁾ Affair of the *Orinico Steamship Company*, cf. Lammasch, *Die Rechtskraft internationaler Schiedssprüche*, 1913, p. 192. G. Scelle, *Une instance en révision devant la Cour de La Haye. L'affaire de la Orinico-Steamship Company*, *Revue générale de droit international public*, 1911, p. 164. William Cullen Dennis, *The Orinico-Steamship Company Case*, *American Journal of International Law*, V., p. 35.

subsidiary) no jurisdiction has been instituted for revising similar decisions."

No right without action. No nullity without a judge: to this formula, which we have seen develop and in particular affirm itself to its full extent at the Hague Conference of 1899⁽⁴²⁾, the Court of The Hague in 1910 gave its formal adhesion.

Not only then is it not permissible to claim the existence of usurpation of jurisdiction, without offering a new instance, to take cognisance of it, but the other party is not bound to reply to this offer of a tribunal.

This is the law of The Hague: a strict law, but all the more favourable to the development of the permanent Court in that the obligatory jurisdiction of the permanent Court is imposed in view of the necessity for a superior judge at law. Whoever may consider the solution too rigorous, although the parties are definitely responsible for the judges whom they appoint, must not forget that the authors of the text conceived of it as a provisional solution.

It is further always lawful for the parties to come to an understanding for creating a new instance by which alone the first decision can be *revised*, according to the terms of the decree. Until it has been revised, this decision remains valid. But although the fact of invoking a cause of nullity does not confer the right to create this instance, the party benefiting by the decision may be willing to institute it to decide whether the award is not, for reasons of fact and law, vitiated by nullity.

This is precisely the object of the agreement between the United States of America and the United States of Venezuela, dated the 13th February, 1909.

What does the decree say?

"Whereas, in the case, the award having been charged with nullity, *a new compromise was made between the parties under date of the 13th February, 1909*, in accordance with which, without taking into account the final character of the first award, this tribunal is called upon to decide whether the award of the Umpire Barge, is not, in virtue of all the circumstances, and in accordance with the principles of international law, vitiated by nullity, and whether it is to be considered as so conclusive as to exclude any new examination of the merits."

There is more: it is not only the instance which the parties are to create for making nullity possible; it is the cause of nullity formally invoked by one of them, which they must, the one as well as the other, accept in derogation of the Hague Convention which binds them and does not admit it.

The decree specifies:

⁽⁴²⁾ Cf. *supra*, p. 35.

“Whereas by the compromise of the 13th February, 1909, the two parties admit, at least implicitly, usurpation of jurisdiction and essential error as defects involving nullity of an arbitral award.”

Finally, the Court, after having pointed out that the parties here admit usurpation of jurisdiction, analyses its elements as follows: “The usurpation of jurisdiction may consist *not only in deciding a question not submitted to the arbitrators*, but also in misinterpreting the imperative decisions of the compromise with regard to the manner in which they must arrive at their decisions.”

Even when the arbitrators go so far as to decide *a question not submitted to them*, their award, given according to the rules of the Hague, has the force of law unless the parties come to an understanding to create a new instance, and thus soften, by the acceptance of a precise cause of nullity, the rigor of the Hague Convention, which disallows them all by a silence of rejection—a considered, intentional, deliberately eliminatory silence.⁽⁴²⁾

* * * * *

No more precise interpretation could be given. Nor any more authoritative interpretation either.

M. Lammasch, later, had to include it in a book of theory^(42*). The author's book will confirm the decision of the judge.

But the decision of the judge gives to the interpretation which has become a decree of the Court, in motives which are the very foundation of the disposing portion, an authority which none of the Powers signatories, to the Convention of the 18th October, 1907, can henceforward ignore.

Other States are bound, even as the United States and Venezuela, by the Convention of the 18th October, 1907.⁽⁴³⁾

The Hague Court has interpreted it in the sense that the signatory Parties can only have arbitrations arranged for their benefit, attacked on the ground of usurpation of jurisdiction, on condition of waiving the “*chose jugée*” by the arbitral tribunal. This renunciation has for its condition the willing acceptance of a new tribunal. Until the constitution of this new tribunal, in accordance with the Hague Convention, the presumption *res judicata pro veritate habetur*, except in the case of express stipulation, holds good.

Such is the interpretation of the Hague Convention.

Now, the Hague Convention relating to the pacific solution of international conflicts is at present in force between Roumania and

^(42*) Cf. *supra*, p. 43.

⁽⁴³⁾ J. Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907, accompanied by tables of signatures and adhesions of the various Powers and texts of reservations*, New York, 1915, pp. 84 and 85.

Hungary. Roumania has not only signed, but ratified it ⁽⁴⁴⁾. Hungary is here confronted with the rights and obligations of Austria-Hungary, which, formerly, had done the same.⁽⁴⁵⁾

The interpretation of the Convention by the Court of The Hague (Orinico affair) applies to every State bound by this convention, if not with the authority of the "*chose jugée*," since this has no effect with regard to third parties, at least with the authority of an official reading in an authentic document, by recognised authorities.

This interpretation has the more force because the award emanated from judges, of whom two out of three ⁽⁴⁶⁾ had been members of the Conference, whose work had resulted in the Convention, of which the application was in question.

* * * * *

Finally, it is advisable to make some additional comments.

(1) The questions of jurisdiction are not, in accordance with the Conventions, practice and judgment, separable from the merits of the case. In the *Orinico* case usurpation of jurisdiction was only alleged after the decision pronouncing the final condemnation. The Court specified that the question was to determine "whether (the award) should be considered as so conclusive as to exclude any new examination of the merits.

(2) A wrong judgment on the question of jurisdiction must not be confused with usurpation of jurisdiction. This solution arises from Article 73 of the Convention, which is in the following terms: "The Tribunal is authorised to determine its jurisdiction in interpreting the compromise." It may, further, invoke the decision of the 25th October, 1910, in its statement of reasons: "Whereas the appreciation of the facts of the case, and the interpretation of the documents was *within the jurisdiction of the Chief Umpire, and his decisions in so far as they are founded on such interpretation are not subject to revision by this tribunal whose duty is not to say whether the judgment is right or wrong, but whether the judgment should be annulled.*"

(3) Every point on which the Parties plead may be settled by the judge in one sense or the other without usurpation of jurisdiction, since this can only arise at the moment when the judge touches on a point which the party does not propose to discuss before him; in fact, every discussion which may lead to the answer "lack of jurisdiction" has, as its logical corollary, the rejoinder "jurisdiction" whatever may be the previous denial of the party, a unilateral, comminatory denial, irreconcilable with the equality of the claimants and the dignity of the judge.

For all these reasons it can be explained why the partisans of the Roumanian thesis on usurpation of jurisdiction of the 10th January have maintained silence with regard to the law of The Hague.

⁽⁴⁴⁾ 1st March, 1912.

⁽⁴⁵⁾ 27th November, 1909.

⁽⁴⁶⁾ Messrs. H. Lammasch and Beernaert.

Neither the Conferences, nor the Hague Conventions, were favourable to their views. Quite on the contrary, they pronounced formal condemnation of them⁽⁴⁷⁾ in very many respects.

* * * * *

But it is not with any individual question—but with a question of principle—that we are concerned here.

It is on this question of principle that, ignoring the too easy question of particular cases, that an opinion must be pronounced by a conclusion that makes it possible at the end of the third period of the problem—the last before the League of Nations—to take stock of the progress accomplished.

More severe than the Institute of international law, the Hague Conferences only admit very limited causes of nullity. Like the Institute they only accept causes of nullity subject to the reserve of a court. More strict than the Institute, they take it that the losing party has no right, in offering arbitration, to have its claim accepted in proof of usurpation of jurisdiction. Moreover, no more than the Institute, do they admit that the decision on jurisdiction, after discussion of the latter by both parties, can be described as usurpation of jurisdiction, but only as an error of law. No more than the Institute will they tolerate that the error of law on jurisdiction should ever be confused with usurpation of jurisdiction.

In affirming these principles, historical criticism recognises the persistence here, since the end of the XVIIIth century, of three invariable ideas.

The first invariable idea: no interruption of the instance by reason of usurpation of jurisdiction in a preliminary judgment before the procedure has run the whole of its course and reached its term, i.e., the final judgment on the merits.

The second invariable idea: no usurpation of jurisdiction because of a decision on jurisdiction by the application, even incorrect, of the text of the compromise, the error of law being, even when essential, in every case distinct from excess usurpation of jurisdiction.

The third invariable idea: no usurpation of jurisdiction in the answer made, by "yes" or "no," to the question of jurisdiction pleaded before the judge.

(47) M. Georges Scelle, *Une sentence de révision devant la Cour de la Haye, Revue générale internationale public*, XVIII., 1911, p. 186, writes: "The solutions adopted at The Hague in 1899 and 1907 are not those of the majority of the writers." And further, p. 188: "Can it be said that The Hague Convention is really the expression of international law? It seems that it is only a fragment of the expression of it." Between non-signatory Powers this observation may have some value. As between signatory Powers it obviously has none. Mérignac, quoted by the writer, *Traité de l'arbitrage international*, p. 312, writes (1896) before the law of The Hague. He recommends, however, the submission to arbitration of the dispute on the question of nullity: an excellent argument, which he does not fail to develop, in favour of a Permanent Court. Weiss, quoted, same *Revue*, 1910, p. 105 et seq., *L'arbitrage de 1909 entre la Bolivie et le Pérou*, did not think it necessary to make use of the Convention of 1899. From what precedes it would result that certain authors, and certain practices do not interpret the law of The Hague differently from previous laws. This is an error into which M. Scelle is careful not to fall: "It is no longer a question of usurpation of jurisdiction," he says, p. 188. His interpretation of the Law of The Hague agrees, therefore, in all points with that which later the President of the Arbitral Tribunal of 1910 will be found to give very fully in *Rechtskraft*.

To escape this triple result, there is only one way: that used by the Powers in the Alabama affair in respect of the celebrated question of indirect damages, i.e., to discuss the question apart from the judge.⁽⁴⁸⁾

About these three invariable ideas there is, as from now, nothing more to be said.

* * * * *

But, subject to these invariable ideas, which are also subsidiary, there remains the principal question: that of usurpation of jurisdiction properly so-called.

To this question the law before that of The Hague gave as answer what M. Asser called the initiative: in case of obvious usurpation of jurisdiction the liberty for the party pleading to refuse the execution of the award, provided he offers a new arbitration, either on the question of alleged usurpation of jurisdiction, or of the merits, or on both. To this same question the law of The Hague answers by refusing even this faculty. The award, whatever it may be, remains unassailable: respect for arbitration, its pacific virtue which desires that it should be absolute, final and without possibility of return or revision, demands it. But the law of The Hague does not hide the fact that the rigour of this system is only a *pis-aller*, an interim solution in the hope that a Court may possibly be formed which, at least with regard to the question of law, will have a jurisdiction for annulment attributed to it in advance: a pre-established, obligatory jurisdiction.

That which the League of States, delayed by the intransigence of sovereignty to the optional jurisdiction of the permanent Court, could not do, the League of Nations, equipped with greater resources, should, logically, tend to realise.

II.

In the League of Nations.

With the League of Nations, the old problem, almost insoluble in the League of States—that of nullity by reason of usurpation of jurisdiction—may in the future find a solution. When an arbitral tribunal, of whatever nature it may be, finds itself reproached with having committed infractions against the compromise, it is indispensable that a new instance, superior to the first, should be seized in order to take cognisance of the alleged nullity. No nullity without another jurisdiction, which normally should be organised as a superior jurisdiction: that was the conclusion of the Peace Conferences of 1899 and 1907. But in order to fulfil the expectation of the parties affected, such a Court should be to a greater and better extent than the Permanent court of arbitration a Court of law, like that Court of arbitral Justice with which the Powers, at the second Conference, had attempted to supplement the first. Goldschmidt had already pointed it out^(48*). The examination of the cases of nullity, less grave than those of the examination on the merits, could,

⁽⁴⁸⁾ A. de Lapradelle and N. Politis, *Recueil des Arbitrages Internationaux*, vol. II.

^(48*) *Supra*, p. 24.

more easily than the question of the merits, be submitted to obligatory arbitration, always on condition that this examination, which was of an exclusively juridical order, should be the work of a court specialising in law.

An American, Morris⁽⁴⁹⁾, happily remarked, immediately after the Orinico affair, that the examination of an award, from the point of view of nullity, is an essentially jurisdictional act. Donker Curtius, a Dutchman, insisted, immediately after the Second Conference, on the creation of a Court of law, and pushed the idea as far as the hypothesis of an international Court of cessation.⁽⁵⁰⁾

Now, it was just this Court, which is really a Court and really permanent, which was created. Article 14 provided for it. The Council prepared for it, the Assembly voted for it and the Powers accepted it. It was created; it judges; it gives consultative opinions to the Council and, eventually, to the Assembly. Not only does its composition, eminently juridical suit it to take cognisance of causes of nullity, but its jurisdiction, without being obligatory, even in questions of a purely juridical character extends itself, none the less, step by step, to a large number of problems⁽⁵¹⁾, so that the actual progress of arbitration must bestow on it, first of all the optional and then the obligatory cognisance of the causes in nullity. The Court of arbitration of The Hague could not do it; being neither sufficiently *permanent*, nor sufficiently *judicial*, it was born during a period in the history of international arbitration, when the latter could only tend towards permanence without claiming obligatory force. Now the circumstances are entirely different. Even as within this new framework of the League of Nations (where the equality of the members is not in contradiction to the co-existence of the Assembly and of the Council) it became lawful to have Judges elected simultaneously by the Assembly and by the Council, and thus to solve one problem—the nomination of judges—which had remained without solution in the League of States, even as, thanks to the creation of the permanent Court of international Justice, a real Court and really permanent, it is henceforward possible to conceive of an instance dealing with nullity.

Hitherto nothing decisive has been either provided for or asked for in this respect.

But, already, instinctively, a movement is stirring in this direction.

. * * * * *

In 1926, in the question of the Maritza, between Greece and Turkey, the Council of the League of Nations had an opportunity of witnessing it.⁽⁵²⁾

⁽⁴⁹⁾ Robert C. Morris, *International arbitration and procedure*, New-Haven, 1911, p. 156.

⁽⁵⁰⁾ Cf. Donker Curtius, *Revue de Droit International*, 1910, p. 33: "It is not another instance that we wish to introduce into the case; it is an instance that is placed above it. The regularising Court will not decide on the right of the parties; it will decide on objective law with the principal duty of stating the law as it actually is. The cassation of the decree would be the equivalent of a new fact."

⁽⁵¹⁾ With regard to this extension see de Franqueville, *La Cour permanente de justice internationale et son œuvre*, I., Annexes, *Adde, infra*, p. 456.

⁽⁵²⁾ *Société des Nations, Journal officiel*, VIIth year, No. 4, April 1926 (Minutes of the Council), p. 511.

Article 5 of the Treaty of Lausanne of 24th July, 1923, entrusted to a Commission of delimitation the duty of tracing on the spot the frontier described in article 2 of the Treaty. This Commission, composed of the representatives of Greece and Turkey, with one representative for each Power, and a President chosen by them from among the nationals of a third Power, takes binding decisions by a majority of votes. While it was proceeding to its operations, the question arose whether the western arm or the eastern arm of the Maritza, considered as the principal arm, should form the frontier. Greece and Turkey here did not agree. Now, even before the Commission had pronounced judgment, the Hellenic Government, being of opinion that if it were to make the boundary on the western arm, the Commission would exceed its powers, and would thus render itself guilty of a violation of the rights established by the Treaty. Consequently, it brought to the knowledge of the president of the Commission that, in this case it would be obliged to have recourse to the Court to demand the interpretation of the Treaty on the point in dispute. As can be seen in the minutes of the thirty-sixth session of the Commission, the latter decided to suspend its work on the ground to wait for the opinion of the permanent Court. At the same time, the Hellenic Government did not fail to propose to the Turkish Government to defer this question, which is connected with the interpretation of the Treaty of Lausanne, to the permanent Court of The Hague. The Turkish Government declined this proposal.

On 24th February, 1926, the Greek Minister of Foreign Affairs telegraphed to the Council: "If the Commission provided for by article 5 of the Treaty of Lausanne has discretionary power in a matter of delimitation, it is on condition that it operates within the bounds of the Treaty. It cannot, without usurpation of jurisdiction, infringe those provisions. The Government of the Republic, desirous of finding a common ground of agreement, has proposed to the Government of Angola to have their difference which affects a point of interpretation of a treaty, solved by the permanent Court of international justice at the Hague. The proposal having been declined, the Hellenic Government has the honour to seize the Council of the League of Nations of the above-mentioned difference, and begs it to refer the same to the Court of the Hague for a consultative opinion, in conformity with article 14 of the Covenant." On 16th March, 1926, before the Council, the representative of Greece, Mr. Dendramis, developed the Greek point of view. He said in particular: "The delimitation commission can decide authoritatively by a majority only with the limits indicated by the Treaty; it cannot therefore *revise* them arbitrarily; it would commit an *evident usurpation of jurisdiction* and it would *infringe upon the sovereign rights of Greece.*"

Greece was not content with invoking the error in law, but (a) the attack on territorial sovereignty; (b) the contradiction of texts, carried to the point of revising the treaties; (c) the flagrant error: which its representative calls the *evident* usurpation of jurisdiction, which is a hardly noticeable variation of the formula at which, according to Vattel, Mr. Politis stopped short in his *Justice internationale (exces de pouvoir flagrant)*.

Nothing is more significant than this manner of interpreting procedure. On the other hand, Greece does not wait for this "usurpation of jurisdiction" to occur before asking the Commission to suspend its labours. *In contrast to Roumania, which, in our case, having allowed the mixed arbitral tribunal to give judgments, attempts to stop the*

mixed commission before it has declared itself by a formal decision, obligatory binding the parties. In proposing to refer the question of arbitration to the permanent Court at once, she recognises that, the decision once given, she would not be confronted with nothingness (in spite of the *usurpation* of power, a usurpation bordering on the *revision of treaties* which would infringe the sovereign, territorial) rights of Greece. This proposal, previous to the pronouncement of the award, would have been made by Greece after the pronouncement, if it had been what she feared. Hence, for anyone following the course of history, this consequence, which, forming part of the series of historic precedents, the demand of Greece recognises—not only that usurpation of jurisdiction is not to be confused with wrong judgment, especially on a point of jurisdiction, but that no one can claim usurpation of jurisdiction without formulating that which, in our case, Roumania does not do—the proposal for an instance.

A proposal declined by the Turkish Government.

Chukri Kaya bey, the representative of Turkey, declared to the Council: "The Treaty of Peace, having instituted a jurisdiction with the power of taking decisions obligatory to both Parties, these decisions must be observed. . . . The Commission of delimitation being entrusted by article 5 of the Treaty of Peace with the duty of tracing the frontier on the spot, and having the right of taking obligatory decisions, it is obvious that it has to play the role of arbitrator in everything concerning disputes relative to the tracing of the frontier.

"As regards the intervention of the permanent Court of international Justice, I content myself with observing that the creation of a special jurisdiction contemplated above excludes any other contentious methods."

Speaking again, Mr. Dendramis then explained that "the Commission of delimitation does not constitute a jurisdiction, but an organ of execution, composed of technical experts and not of jurists."

Munir bey replied: "The Treaty of Lausanne has instituted a jurisdiction."

Mr. de Mello-Franco, the reporter, proposed to the Council that it should be allowed to obtain the assistance of two or three jurists belonging to various delegations.

"In the opinion of the jurists, it is the function of the Commission itself, under the terms of articles 2, 4, 5, and 6 of the Treaty of Lausanne, to determine the frontier in conformity with the indications of the Treaty. . . . The Commission has power to take its decisions by a majority of votes. It is also its function, as well as that of each one of its members, to assist itself if it judges it necessary for the accomplishment of its mission, by means of the opinions of persons competent for the examination of any special questions which may arise. It is only when, having exhausted all these means of information, the Commission should declare that it has doubts too serious to allow it to pronounce judgment on the questions before it, or when it had committed a *flagrant usurpation of jurisdiction*, that it would be the duty of the parties to seek a way of settlement of these difficulties, in conformity with international law."

Messrs. Botella, Kremar and Rolin detached themselves from this opinion of the jurisconsults called into consultation by the Council, and confirmed a certain number of principles: (1) arbitral jurisdiction is called upon to decide on its own jurisdiction, and its decision, even if erroneous, is binding; (2) From the point of view of the grievance of usurpation of jurisdiction, the examination of a jurisdiction is not a preliminary question to be detached from the whole of the dispute, it can only arise within the limit of the duties of the judge, and in view of a solution on the merits; (3) To attack the decision, neither the error on jurisdiction nor even any kind of usurpation of jurisdiction is sufficient, but, in accordance with the words of the representative of Greece, an *evident usurpation of jurisdiction*, and according to the three jurists of the Council—a still stronger term—a *flagrant usurpation of jurisdiction*.

(4) This flagrant usurpation of jurisdiction could not be abandoned to the discretion of the parties.

This last solution would moreover result from the practice of the Council and the jurisprudence of the permanent Court: both in effect refuse to leave to the parties the exclusive, unilateral definition of the acts to which they claimed to attribute or deny effect.

(5) In the case of a *flagrant usurpation of jurisdiction*, it would be the duty of the parties to seek a *method of settlement*, in conformity with international law.

This last formula is prudent, vague. It affirms that there is not, here, in advance, any pre-constituted jurisdiction.

The permanent Court is naturally called upon to play this part. It has not yet done so.

The law of the Hague remains in force.

It supposes, in such case, a common effort to find a method of settlement.

If not, the decision remains in force.

In this rule the Commissioners neither acquiesce, nor do they contradict it.

They refer it to international law.

The moment has not come, for them, to define it precisely.

But it is one point on which the three jurisconsults, asked for their opinion, speak in formal terms. The institution of the League of Nations must not weaken the force of arbitration.

Greece had believed it possible to beg the Council to ask the opinion of the permanent Court of international justice on the question, not of a possible usurpation of jurisdiction, but of the merits (the two problems, moreover, being in fact connected), that is to say, of choice between the two arms of the Maritza.

Turkey opposed this.

Chukry Kaze Bey: "It will not escape the enlightened attention of the members of the Council that in virtue of the resolution adopted by it on 24th January, 1924, the request of the Hellenic Government should be rejected. In effect, according to this resolution, when a

difference is, contrary to the terms of Article 15, para. 1, brought before the Council at the request of one of the parties, even when this dispute is already the object of arbitral or judicial proceedings of any kind, the Council must refuse to proceed with the examination of the request.

The jurists agree : It is not possible for the Council to consider *at the present moment* the question according to the terms of Article 11, para. 2, of the Covenant.

For this, it is necessary to await the end of the work of the Commission and the flagrant usurpation of jurisdiction.

And the delegate of Greece acquiesced in his turn : " In the case, which is hard to conceive, that the Commission should commit a usurpation of jurisdiction, the Hellenic Government will use the means provided by international law."

But he added : " Among these means appears recourse to the Council of the League of Nations."

* * * * *

What, then, would be the powers of the Council?

Here appears the difference between the League of States and the League of Nations.

In the League of States, it is each one of the disputing States which must assure the execution of the arbitral decision by the means at its own disposal.

In the League of Nations, on the contrary, the formation of a central organ, the Council, makes it possible to give to the execution of the arbitral sentence a character no longer individual, but social, with, consequently, a guarantee of collective action.

Article 13, Section 4, para. 2 : In default of the execution of the sentence, the Council proposes the measures which must ensure its effect.

But, as soon as this question of execution arises, is not the Council called upon to cast an eye on the award, and, naturally, be induced to consider its force? From that moment, there might be temptation to say that in the League of Nations the causes of nullity of the award, and notably usurpation of jurisdiction are assured of finding, by the Council, an instance.

Should it appear to the Council that the usurpation of jurisdiction is flagrant, it would not propose any measure for assuring the effect of the decision.

A dangerous temptation, a grave abuse.

To act in this way would be, on the part of the Council, to constitute itself the judge.

The whole League of Nations is, essentially, based on a fundamental distinction : written in the drafts of the League of Nations, from the *League to enforce peace* to the last official texts, English and American, of the Covenant, the distinction between the judicial and the executive is fundamental. The Council prepares the project of the permanent

Court. The Council and the Assembly, in accordance with the statutes of the Court, appoint the judges. The Council procures the execution of the award. An organiser of justice, it is not the judge; it cannot give judgments.

Is an example desired?

According to the terms of the statute of the permanent Court, this Court, in sovereign fashion, decides (Art. 31 and others of the Statutes of the Court, Geneva, 16th September, 1920).

Now, if the Council, entrusted with the duty of assuring the execution of the decisions of the Court, were able not only to postpone the putting of them into effect for reasons of convenience, but deliberately to prevent their execution by reason of lack of jurisdiction or of usurpation of jurisdiction, the authority of the Court would be subordinated to that of the Council, the judgment of the Court would become assimilated to a simple opinion—a manifestly unacceptable solution and one which could not be discussed.

The solution could not be different in regard to the other arbitral tribunals.

In effect, they derive from their rules the same power of deciding on its jurisdiction which the statutes allow to the Court.

It is particularly so in the case of the mixed arbitral tribunals. According to the terms of their rules, they are the only masters of their jurisdiction, exactly in the same terms as is the permanent Court, according to its statutes. ⁽⁵³⁾

No decision, on the merits, given by them, can, any more than a decision of the Court, be followed, on the grounds of over-stepping of jurisdiction, by a refusal of legal execution on any authority whatsoever.

From the moment when the Council cannot deliberately refuse to execute a decision of the Court (subject to its seeing in what manner, at what moment and by what means to assure it), it can no longer refuse the execution of the decision of a mixed arbitral Tribunal.

What has just been said of mixed arbitral Tribunals should be said also of every arbitral jurisdiction.

What has been said of the cause of nullity on account of lack of jurisdiction ought to be said equally of the cause of nullity for any other motive.

This is the consequence of the great principle of the independence of the judge.

Without doubt, the independence of the judge is only the sovereignty of justice, and this the sovereignty of right and equity.

With doubt this sovereignty is only exercised by the creation of a *chose jugée*, which declares the law, without going as far as the injunction directly addressed by the judge to an authority which makes it effective: the arbitral decision has no executory force.

⁽⁵³⁾ A. de Lapradelle, *Recueil de la jurisprudence des tribunaux arbitraux mixtes*, vol. II., Cpr. Trianon, art. 239 g.

But, as the authority which pronounces the award cannot execute it, nor enjoiner for its execution, there still remains the fact that it exists. The force of a *chose jugée* has its authority independently of the executory formula.

It would be to attack the value of the award to allow the person exercising the power of constraint to arrogate to himself, at the moment of bringing it into execution, a right other than that to verify its authenticity.

It is manifestly contrary to the authority of the *chose jugée* to profit by Art. 13, § 4, in order to give to the Council the incidental right of re-examining the causes.

At most, when there are contradictory motives, conflicting enacting clauses, the question might arise of remitting the matter for interpretation to the judges from whom the award emanates.

At most, again, the Council could, in case of flagrant usurpation of jurisdiction, use its persuasive influence to induce the winning party either to re-examine the evidence of usurpation of jurisdiction or, at least, to come to an understanding with the other party for accepting, on this point, the judge whom the other party must propose, and whom, strictly speaking, the winning party can refuse.

Finally, what is new in regard to usurpation of jurisdiction in the League of Nations is that an executory agent, i.e., the Council, can, before proceeding to act urge on the parties the organisation of a judicial procedure.

In this respect the law of the Covenant is at a certain distance from the law of The Hague. Not only does it create a Court, entirely optional, a judicial Court, to which it is easy for the parties to address themselves, but on the other hand it creates, if occasion arises, a persuasive authority, with a certain power of constraint, since the Council may consider it not advisable to proceed to the execution as long as a serious doubt, not judicially settled, can exist concerning the obligatory force of the award.

According to the Hague Conventions, the signatories have the right to refuse to organise a new instance for the purpose of taking cognisance of the cause of nullity, notably in the case of usurpation of jurisdiction. The Council may, in its capacity of ultimate executant, persuade them to organise arbitration, in notifying to one of the parties, in advance, that, in the contrary case, it would postpone giving satisfaction to its demand of execution.

If, in fact, the parties are bound by the Hague Convention, and cannot, at once, seize the Council of their dispute with regard to the obligatory force of the award, the Council can always, *ex-officio*, seize itself of it, if not directly, at least on the demand of any member of the League, within the meaning of Art. 11, § 2.

It is only by the intervention of a third party that the question could be raised, under this form: the interest which lies in persuading one of them that there is reason to accept the arbitration.

But, in the terms of Art. 13, arbitration being optional, there is no way of imposing it on the parties.

Besides, the Council can undertake nothing against a decision of a Court of Justice.

Respect for the *chose jugée* dominates everything in the League of States, as in the League of Nations.

It is therefore not the institution of the Council, an executive organ, not a judicial one, that can give to the usurpation of jurisdiction the sanction of an effective nullity.

It would be in vain to assert that, in what concerns the mixed arbitral tribunals, the Council has special powers derived from the treaties, according to the terms of which it must in the interests of its mission itself, accomplish certain obligations which are laid down for it.

Thus it is that the Council is called upon to appoint judges to complete the tribunal (Art. 239—Treaty of Trianon).

Can it use this mission to give a sanction to a recognised usurpation of jurisdiction?

Let us take the question in the case of the *Betsey*, or in that of the Roumano-Hungarian affair: one party withdraws its arbitrator; can the Council sanction this act by refusing to appoint a substitute? What the party that opposes the appointment asks from the Council is to act as an instance in the case of usurpation of jurisdiction.

Now, the Council has nothing but the right of nomination of the judge; that is to say, a right to participate in the organisation of the Court. It has not the right to deliberate on the judgments, nor to draw them up, nor to revise them. The judge depends on it for his appointment. The judgment does not depend on it for the drawing up of the award.

The Council cannot deduce the right of revising the judgment from the right of appointment. If, for the purpose of sanctioning a usurpation of jurisdiction, the Council could really refuse to appoint a judge, it would itself commit an abuse of power. The famous theory of abuse of power in French administrative law is well known. It is not possible to use a jurisdiction granted for a certain object in order thereby to satisfy another one, however legitimate it may be. For example, it is not permissible to avail oneself of a police power in the interests of the Exchequer.

The powers of the Council in the matter of completing the mixed arbitral Tribunal are powers of appointment.

The person nominating the judge cannot attach to this appointment any condition to judge in one sense or another.

* * * * *

To a certain number of questions put by the Hungarian Delegation at the Peace Conference, the Allied and Associated Powers replied:—

Article 250.—The various observations presented by the Hungarian Delegation relative to the treatment given by Roumania and Czecho-Slovakia to immovable property constitute a question of an interpretation of the Treaty of Peace which cannot be settled at the moment.

The Allied Powers have, further, no objection against recourse to the Mixed Tribunal proposed by the Hungarian Delegation for the settlement of disputes relating to the restitution to the nationals of the

former Kingdom of Hungary of their property, rights and interests situated in transferred territory, as is provided for by Art. 250 of the Treaty.

In consequence they are in agreement to complete this Article by means of the following words :

“ Complaints which may be introduced by Hungarian nationals in virtue of the present Article shall be arbitrated upon by the mixed arbitral tribunal provided for in Article 239.”

However narrow may be the conception of the maxim *extra compromissum arbiter nil facere potest*, it is clear that the solution of the question put, as to the application of the agrarian reform, constitutes a question of interpretation of Article 250 of the Treaty. It is impossible therefore that there could be the slightest usurpation of jurisdiction in accepting it.

The jurisprudence of another mixed arbitral tribunal, the Hungarian-Czecho-Slovakian Tribunal, the only one which, apart from the Roumano-Hungarian one, can be seized of the same question, has expressly recognised it.

It has done so in characteristic terms.

A Hungarian, suffering from the application of the law on Czecho-Slovakian agrarian reform, asked the Tribunal to take preserving measures for the protection of his rights. The jurisprudence of the mixed arbitral tribunals admits that, without previously pronouncing on the question of jurisdiction, the president and, should the case arise, the tribunal may order all measures of this kind, even when it is not yet itself certain that it has jurisdiction. It is sufficient that the question should be doubtful, but, precisely, as soon as the question is doubtful it becomes part of the compromise without which there would never be according to the saying of Vattel, any arbitration. Such is the solution of President Schreiber (Order of the 17th October, 1927) and of the whole tribunal (judgment of the 28th January, 1928).⁽⁵⁴⁾ The terms of the award of the 28th January are characteristic. Having carefully weighed them, it declares : “ It suffices that the lack of jurisdiction should not be manifest, evident. It is clear that in this case the tribunal cannot discuss the matter, but in this case the tribunal is seized of a demand emanating from persons possessing Hungarian nationality, and based on Art. 250 of the Treaty of Trianon, in which the jurisdiction of the tribunal is expressly laid down.”

In this thesis, there is, moreover, no trace of an opposition, in the form of a dissentient opinion, from the Czecho-Slovakian Arbitrator. There is therefore, in the decision of the 10th January, 1927, no usurpation of jurisdiction even according to statements of another tribunal, implicitly seized with the question.

Besides, how could it have been decided otherwise?

Is it not the members of the Council of the League of Nations themselves who have recognised this in declaring themselves, after the anonymous opinion of eminent jurists, ready to proceed to the appointment of supplementary arbitrators, limiting their jurisdiction, as regards the application of Art. 250 to the cases of agrarian reform, to the search for a differential treatment. To limit this jurisdiction, denied

⁽⁵⁴⁾ Cf. *infra*, p. 459.

by the Roumanian arbitrator in his dissentient opinion, is to recognise it. It is not the function of the Council to give instructions to the judge; still less to subordinate the nomination of arbitrators, in the terms of Art. 239 of the Treaty of Trianon, to instructions which would constitute an indescribable attack on their independence. As soon as the examination of the agrarian reform enters, to whatever extent, in whatever manner, and from whatever point of view, into the jurisdiction of the arbitrator, it is clear that it enters into it absolutely, with regard to the whole, since the restriction proposed by the jurists, whose opinion the Council has followed, not basing itself upon any precise text, can only be the result of the interpretation of Art. 250, that is to say, the work of the judge.

In deciding thus, the members of the Council of the League of Nations have themselves recognised that there was in the decision of the 10th January, 1927, in spite of the Roumanian accusations, no usurpation of jurisdiction.

In delivering judgment on the question which the Allies expressly entrusted to him, and in which, eventually, the Council, except for directing it there—which is inadmissible—supported him, the judge remains within the terms of the compromise.

None the less, it is the fact that, on the occasion of the arbitral decision of the 10th January, 1927, the question of usurpation of jurisdiction was directly put in terms which go beyond the horizon, however wide it may be, of the far-reaching Roumano-Hungarian conflict.

* * * * *

From the manner in which the highest authorities on international law have treated it, it has been possible to see how this question still remains, at the present moment, almost unknown, misunderstood, obscure.

In the League of States, the individual and collective theory of the practice of States, the decision of the great Conferences have laid down principles, which, however, cannot be misunderstood.

I.—First, *the principle that the judge has the jurisdiction of his jurisdiction*, with these three consequences:—

1st. That he remains within the terms of the compromise when, whether *ratione personæ*, or *ratione materiæ*, he rejects the objection formulated by the defending side, when basing himself, in discarding it, on the terms of the compromise (here Article 250 of the Treaty of Trianon);

2nd. That every question pleaded before him, by one side or the other, is by this very fact submitted to his jurisdiction, so that his decision on a question of jurisdiction, is, in advance, accepted in that it affirms, by the very fact that it has been claimed in what it denies: without which there would be neither equality of parties nor independence of the judge;

3rd. That, consequently, every reserve made by the party as to the application of the preceding rule is null, as implying an intolerable pressure on the judge, a pressure which, even in the case of a declaration denying jurisdiction, would raise the question of nullity of the award by reason of moral constraint (more grave and more practical

than corruption), exercised not only on a judge but on a court : usurpation of jurisdiction would then exist, but by the party on trial, not by the judge.

II. Next, the principle that as soon as the judge, or better still, the tribunal, is appointed, in virtue of a compromise, by common agreement, duly made between the parties, all the acts of this judge or of this tribunal, at the seat of its jurisdiction, are official acts which, even in the case where powers are exceeded, are of themselves valid until they are disputed; the right to dispute may, by an understanding between the parties, be expressly denied, in the very interests of arbitral justice, either in virtue of a special convention, or in virtue of a general convention, like that of The Hague (18th October, 1907); but which, if it has not been refused, by a previous agreement, or at least by a subsequent one (in the case of ratification), supposes :—

1st. That the party which raises the cause of nullity finds itself in the presence of an attack, not abstract, but concrete, not hypothetical, eventual, but certain and present on its rights, whence follows the consequence that a preliminary judgment, whatever it may be, and especially on jurisdiction, cannot, subject to a disposition to the contrary in the compromise, be the subject of any appeal;

2nd. That the party which invokes the cause of nullity cannot, without contradiction or arbitrariness, itself so describe this cause and escape, on that ground, the obligatory character of the arbitral award, and is from that moment, bound to offer the other party a new arbitration and *cause it to be accepted by it* (which offer M. Gajzago, the Hungarian representative, made, without being bound to do so, in the best spirit of conciliation, on 7th March, 1927);

3rd. That, in case of doubt, the cause of nullity, in fact or in law, is not presumed.

III. Finally, a third and last principle : to invoke usurpation of jurisdiction, the judge must have gone beyond his mission, not by a simple error, but by a grave, manifest default, in a case on which doubt is not even conceivable, whence these two consequences :—

1st. That there must be, in case of doubt, a presumption in favour of validity, as regards the merits, of the sentence which, in other respects, is valid in its form;

2nd. That, in order to prevent one party from availing itself of the alleged nullity of the sentence, in order, indirectly, to dispute its validity, there must be, according to the saying of Vattel, an abdication by the judge of his quality of judge : that is to say, a professional fault so serious that he can, in any case, no longer judge, whence this application that every demand which leaves expressly to the judge, between the same parties, in other matters, before a mixed Commission or a mixed arbitral tribunal, the power of sitting, is an implicit renunciation of the right to invoke the usurpation of jurisdiction which, by reason of a manifest error, or abdication of the mission, according to Vattel, supposes a grave fault.

Such principles are, and remain, settled.

Certain brief affirmations, such as we recalled at the beginning of this study, cannot shake them.

It none the less remains that, in the present state of positive law, one difficulty persists.

The great rule : " No claim without judgment ; no nullity without an instance " leads to this dilemma :

Either nullity must be renounced, for lack of a previous organisation of the instance, or reliance placed on the goodwill of the parties to organise this instance.

The Hague Conferences chose the first alternative : excessive, heroic, sacrificing the juridical value of the sentence of any arbitral tribunal to the essentially optional character of the permanent Court of arbitration of The Hague.

The practice of the States, before and after The Hague Conferences, showed their preference for the second alternative : less unyielding and more just, better adapted.

But, if the parties were not to come to an understanding, and one of them could not lodge a claim or had seen the application of the law of The Hague refused to it, the situation, in the League of States, would have been without issue. Here, the League of Nations shows its superiority. It exercises a beneficent function.

In a case of disagreement between the parties as to the admission of the cause of nullity, the League of Nations offers in effect two resources :

The one is already open.

It has three branches, or, if one prefers it, three degrees :

1st. The good offices of the Council to help the parties to look for and find their judge (Art. 11 § 2) ;

2nd. In default of success in these steps, the reminder pure and simple, of the existence of the permanent Court of International Justice, following a procedure similar to that which was included in Article 27 of The Hague Convention of 1899 in favour of the Court of arbitration ;

3rd. The spontaneous official consultation of the permanent Court of international justice, in virtue of Article 14 of the Covenant.

The Council, confronted by a usurpation of jurisdiction seriously alleged, could take no other action.

There remains a second resource : it concerns the present less than the future.

The League of Nations, having supplemented the permanent Court, somewhat diplomatic, of Arbitration of The Hague, with a permanent Court, more technically juridical, of international justice, the parties can, with confidence, address themselves to it, as to a Court which, technically, has a tendency to become obligatory. The progresses of its jurisdiction are great. As a Court of law, regulating proceedings and sovereign mistress of jurisdictions⁽⁵⁵⁾, they are unlimited.

⁽⁵⁵⁾ Example of the question of the jurisdiction of a tribunal submitted to the permanent Court of International Justice : the dispute between Bulgaria and Greece on the point of the jurisdiction of an arbitrator appointed in virtue of article 4 of the annex to section IV. of part IX. of the Treaty of Peace of Neuilly of 27th November, 1919, a question settled by the Permanent Court in a chamber of summary procedure on 12th September, 1924.

It is to be recommended to the parties, in their general conventions for arbitration, to provide for the cases of nullity, in accordance with the terms of Article 27 of the Resolution of the Institute of international law, or, better still, of Article 26 of the Russian draft at the first Peace Conference, and to submit them, by obligation, to the arbitration of the Court.

A. de LAPRADELLE.

OSZK

OPINION REGARDING THE RIGHTS OF HUNGARY AND OF CERTAIN HUNGARIAN NATIONALS UNDER THE TREATY OF TRIANON

BY

GEORGE W. WICKERSHAM.

The controversy between Roumania and Hungary respecting the consequences of the expropriation by Roumania of lands belonging to nationals of Hungary situated in territory which by the Peace Treaty of Trianon was added to the Kingdom of Roumania, has been before the Council of the League of Nations in various forms for nearly five years. The fundamental question involved is whether or not, through the exercise of the power of expropriation, in carrying out a plan of so-called Agrarian Reform, Roumania may take the immovable property within her enlarged domain belonging to citizens of Hungary, formerly occupants of the territory now ceded to Roumania, but who have elected to remain Hungarian citizens, making compensation which is so inconsiderable as to be illusory ; or whether these Hungarian citizens are entitled to protection against such confiscation by the terms of the Peace Treaty.

There are a number of subsidiary questions involved, the principal one being the jurisdiction of the Mixed Arbitral Tribunal, created by the Treaty of Trianon, to pass upon the claims of Hungarian optants, and its competence in the first instance to determine the question of its own jurisdiction and the exercise by the Council of the League of Nations of the duty imposed upon it by the Treaty of Trianon to appoint substitutes from whom a vacancy in the Mixed Arbitral Tribunal may be filled ; and the power or the propriety of the Council of the League to make the exercise of this duty depend upon the acceptance by Hungary of principles of construction of the Treaty and of the powers of the Mixed Arbitral Tribunal contrary to those which it accepts.

Without setting forth at length the history of this controversy I may say that I have carefully examined all that appears on the subject in the Journals of the Proceedings of the Council of the League of Nations and the reports made to it by Mr. Adatci and by Sir Austen Chamberlain, as Chairman of the Special Committee. I have also examined the decision of the Mixed Arbitral Tribunal and have carefully studied the provisions of the Treaty of Trianon, and the Minority Treaty of December 9, 1919, and I have read the arguments addressed to the Council by the representatives of Roumania and Hungary, respectively. After careful consideration of all of those matters, my opinion upon what I understand to be the crucial points in the controversy is as follows :

I.

The Provisions of the Treaty of Trianon as well as those of the Minorities Treaty protect from Confiscation by Roumania the immovable Property of Hungarian Nationals who owned such Property in that Part of the former Kingdom of Hungary which was ceded to Roumania and who elect to retain their Hungarian Nationality.

The protection intended to be given by the Treaty of Trianon to nationals of Hungary owning land in Transylvania and other parts of that country, which by the Treaty of Trianon are ceded to Roumania, but who elect to retain their Hungarian citizenship, appears from the text of the treaty itself as well as from the history of its formulation.

Article 232 deals with the rights of the Allied and Associated Powers over property of the nationals of the former Kingdom of Hungary. It stipulates that, subject to any contrary stipulations in the Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property which belonged at the date of the coming in force of the Treaty to nationals of the former Kingdom of Hungary and were within the territories of such powers, including the territories ceded to them by the Treaty, or which were under the control of such Powers, and to apply the proceeds in payment to the nationals of the Allied and Associated Powers, as compensation in respect of damage or injury inflicted upon them during the war. The claims made in this respect by such nationals are to be investigated and the total compensation determined by the Mixed Arbitral Tribunal provided for in Section VI, or by an arbitrator appointed by that Tribunal. In other words, by this Section, all of the property of Hungarian nationals which was found in the territory of any of the Allied or Associated Powers, including that part of the former territory of Hungary which by the Treaty was ceded to Roumania, was in effect confiscated by the victorious power and the owner was obliged to look to his own country to indemnify him for its loss.

Section 250, however, provided that the property, etc., of Hungarian nationals situated in the territories which formed part of the former Austro-Hungarian Monarchy should not be subject to retention or liquidation in accordance with these provisions, but should be restored to their owners freed from any measures of this kind—

“or from any other measure of transfer, compulsory administration or sequestration taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before, the application of the measures in question.”

This provision, read in connection with the provisions of Article 63, giving persons who otherwise would lose their Hungarian nationality under Article 61, the period of one year from the coming into force of the Treaty of Trianon, to opt for the nationality of the state in which they possessed rights of citizenship before acquiring such rights in the territory transferred, with a guaranty that

“they will be entitled to retain their immovable property in the territory of the other state where they had their place of residence before exercising their right to opt”,

was intended to secure to those Hungarian nationals the absolute right to their property, freed from either the exceptional measures of liquidation for the purpose of paying war claims,

“or from any other measure of transfer, compulsory administration or sequestration”,

until one year from the date of the coming into force of the Treaty of Trianon, which was July 26, 1921.

By a further treaty, known as the Minorities Treaty, signed at Paris, December 9, 1919, between the Principal Allied and Associated Powers and Roumania, the latter again repeated the stipulation giving the right to the Austrian and Hungarian nationals, who, by the terms

of the Treaty of Peace, would have become citizens of Roumania *ipso facto*, upon the coming into effect of these treaties, the right to opt for any other nationality which might be open to them, and declared

“ they will be entitled to retain their immovable property in Roumanian territory.”

Roumania further agreed that the stipulations in the Minorities Treaty, so far as they affected persons belonging to racial, religious or linguistic minorities, constituted obligations of international concern, and should be placed under the guarantee of the League of Nations. They should not be modified without the assent of the majority of the League of Nations. Any member of the Council of the League should have the right to bring to the attention of the Council any infraction or any danger of infraction of any of these obligations, and the Council might thereupon take such action and give such direction as it might deem proper and effective in the circumstances.

Roumania further agreed :

“ That any difference of opinion as to questions of law or fact arising out of these articles between the Roumanian Government and any one of the Principal Allied and Associated Powers or any other Power a member of the Council of the League of Nations shall be held to be a dispute of an international character under Article XIV of the Covenant of the League of Nations.”

Roumania especially consented that any such dispute, if the other party thereto should so demand, should be referred to the Permanent Court of International Justice. The decision of the Permanent Court should be final and should have the same force and effect as an award under Article XIII of the Covenant.¹

All of these provisions had for their purpose the protection of the persons and properties of the Hungarian citizens who might continue to reside within the enlarged territories of Roumania—for the period permitted by the Treaties—, from confiscation or destruction, whether in carrying out the measures of liquidation for the purpose of settling the damages of war,

“ or from any other measure of transfer, compulsory administration or sequestration,”

taken between November 3, 1918, and the coming into effect of the Treaty of Trianon.

The provision in Article 250 that

“ claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239,”

was, as has been pointed out, inserted by the representatives of the Allied and Associated Powers engaged in the formulation of the Treaty, in response to the earnest protest of the Hungarian delegation, dated February 9, 1920, that Roumania already was engaged in a process of expropriation, had issued an edict on September 10, 1919, making subject to expropriation all the real estate situated in territories transferred from Hungary to Roumania which belonged to foreign nationals, etc., and by an act passed June 16, 1919, had authorized the confiscation of the real

¹ British and Foreign State Papers, Vol. 112, pp. 538, 543.

estate of the nationals of enemy states without payment of any compensation. The Hungarian delegation pointed out that

“both these laws are really measures against Hungarian nationals, for the latter possess very extensive estates in the territories to be transferred from us, and they may be included among those arbitrary measures by which the states receiving portions of our territory aim at practically dispossessing the Magyars.”

The Hungarian delegates expressed doubt as to whether the provisions of Article 250, as drafted, would afford adequate protection against those of the Roumanian law, which, while providing in general for the expropriation of the property of foreign nationals, was undoubtedly aimed first and foremost at Hungarian nationals, and was evidently to be applied exclusively against them.

The reply of the Allied and Associated Powers, dated May 6, 1920, was to the effect that the observations of the Hungarian delegation “constitute a question of the interpretation of the Treaty of Peace.”

In other words, they interpreted the question so raised in precisely the same sense in which it has been interpreted by the Mixed Arbitral Tribunal, and precisely the way in which the Hungarian Government throughout the negotiations since 1923 has insisted it should be interpreted. The reply of the Allied and Associated Powers, however, added that these Powers

“have no objection to recourse to the Mixed Tribunal proposed by the Hungarian delegation for settling the conflicts relative to the restitution of their property, rights and interests situated on transferred territory to Hungarian nationals as provided by Article 250 of the Treaty.”

They, therefore, agreed to complete that Article by inserting the words, “the claims which may be put forward by Hungarian nationals in virtue of the present Article shall be arbitrated by the Mixed Arbitral Tribunal provided in Article 239.”

This was a distinct recognition on the part of the framers of the Treaty tendered by the victorious Powers to the vanquished, of an intention to provide a means of protecting the nationals of the latter against the confiscation by Roumania, apprehended by Hungary.

A similar question arose respecting the Treaty of Saint-Germain, between Austria and the Allied Powers. Article 49 of that Treaty, as originally proposed, contained provisions similar to those of Section 232 of the Treaty of Trianon. On June 23, 1919, the Austrian delegation made a protest against the proposed provision, asserting that the principal properties of the 6,000,000 Austrian nationals were in territories about to be transferred to the succession states; that such a vast confiscation would impoverish many of them, and that

“no government would have either the right or power to subscribe to stipulations constituting so violent an impairment of the private rights of its citizens, an impairment without precedent in history.

They added that liquidation of the Austro-Hungarian Monarchy, based upon all the property belonging to Austrian citizens in the succession states would constitute a confiscation, and that Austria could not possibly make compensation to its nationals for such confiscation after the loss

of most of its assets, including those of its states abroad. They, therefore, requested that Article 49 be stricken from the Peace Treaty. This protest was heeded.

By a note of July 8, 1919, the Allied Powers advised the Austrian delegation that Article 49 would be modified. It was supplemented by Article 267, which is identical with the first two paragraphs of Article 250 of the Treaty of Trianon, which prohibited the "retention or liquidation" of the property of Austrian citizens by the governments of the succession states, and required the return of all that had been sequestered, seized or controlled between November 1, 1918, and the coming into force of the Peace Treaty.

In a note of September 2, 1919, addressed by the Powers to the Austrian delegation, it was stated that

"the property of Austrian nationals in the territory ceded to the Allied Powers will be returned to its owners; this property will be free from all measures of liquidation or transfer adopted since the Armistice, and a similar exemption from all measures of seizure or liquidation is guaranteed them for the future."

The first two paragraphs of Article 267 of the Treaty of St. Germain are identical with the first two paragraphs of Article 250 of the Treaty of Trianon, and inasmuch as they were drafted by the same body, their interpretation made in the letter of September 2, 1919, by the draftsmen of both, perhaps may be taken as applicable to both. As we have seen, the Hungarian delegation was still fearful of the possible application to their nationals of the provisions in the Treaty of Trianon, and in response to their protest the paragraph above quoted was inserted in the Treaty of Trianon, which is not found in that of St. Germain, giving to the Mixed Arbitral Tribunal jurisdiction of claims made by Hungarian Nationals under Article 250.

In a note addressed by the President of the Peace Conference to the Yugo-Slav delegation on March 1, 1920, it is stated that while the Yugo-Slav state retains the sovereign right to regulate the transmission and enjoyment of property in the territory transferred to it, and is, therefore, free to take the measures which it thinks necessary or useful, nevertheless, this liberty is limited by the provisions of the Treaty, and

"provided naturally that the measures do not result by a disguised confiscation of the property in question in evading the prohibition stipulated in the Treaty."

There would seem to be no possible doubt from this history that the purpose of these provisions was to protect the Hungarian optants in Roumanian territory from spoliation of their property by any measure which, under whatever guise, took their property without just and adequate compensation.

II.

The Sequestration of the immovable Property of the Hungarian Optants by Virtue of the so-called Agrarian Reform Legislation of Roumania, was in Violation of the Protection extended to them by the Treaty of Trianon and the Minorities Treaty.

The Roumanian Land Reform Law, called the Gorofid Law came into force July 30, 1921, four days after the Treaty of Trianon. It modified the previous laws of September 12, 1919, and June 12, 1920, which frankly confiscated under the name of "expropriation," without compensation, the property of all subjects of foreign States, including

inhabitants of the larger Roumania who should opt for another nationality. While the new law in terms purported to apply alike to citizens and foreigners it contained three distinctive provisions which must be considered in determining its effect as an invasion of the Treaty rights secured to Hungarian optants by the Treaty of Trianon.

(1) It provided that the estates of absentees shall be subject to expropriation in their entirety, defining for the purposes of the law an absentee as

“any person who was absent from the country from December 1, 1918, until the date when this law was placed on the table of the Parliament, unless such person was discharging official duties abroad.”

As it was only on July 26, 1921, that Roumania obtained sovereignty over Transylvania, although she previously had occupied the territory with her military forces, this law in effect provided for the expropriation in its entirety of all immovable property owned by an Hungarian national who had been driven out by the war, and who, during the military occupation of the territory by Roumanian troops, had not returned. This in itself was wholly contrary at least to the spirit of the Peace Treaty. It necessarily discriminated against all those Hungarian citizens who had been driven out by the military occupation.

It violated the provision of the Minorities Treaty which purported to secure to the Hungarian optants the right to retain their immovable property in Roumanian territory for one year until one year from the coming in force of the treaty.

(2) The compensation to be paid to the owners of the expropriated land was fixed by the law,

(a) as the sale price of land in the community and district in 1913—eight years previously—irrespective of what was its value at the time of expropriation.

(b) The price was to be calculated in lei, the lei being considered as equal to the crown.

(3) The artificial price thus fixed was provided, by Article 85 of the law, to be payable in cash, that is, in the depreciated lei, or in bonds redeemable in fifty years and bearing interest at 5%, the face value being considered as equal to the market value. Payment on the assessed value of the land in 1913, which was then in gold lei, would now be payable in paper lei, which had a value of about 1/40th or 2½% of the gold lei, and the amount thus due was to be made payable in Roumanian fifty-year bonds, having a market value of from 30% to 40% of their face value; so that the unfortunate owner of the property would receive in actual value about one per cent. of the value of his property in 1913! If this is not confiscation, it comes so near to it that for all intents and purposes it may be considered as such. If upheld, it would render illusory the protection which the provisions of the Treaty of Trianon and the Minorities Treaty were intended to give the Hungarian optants.

Roumania, however, contends that because the property is taken under a scheme of Agrarian reform, which by its terms is applicable alike to Roumanian and Hungarian citizens, the Hungarians are not within the protection of the Treaties. But this is not enough. The expropriation to bind the citizens foreign to Roumania must conform to the principles of international law which require adequate compensation. This principle was recognised by the Permanent Court of International Justice in two judgments (Nos. 6 and 7) rendered by it, concerning certain German

interests in Polish Upper Silesia. The issue in the Polish-German case, with all its incidents, affords a close analogy with the questions involved in the Roumano-Hungarian dispute. Germany contended that a proposed expropriation of certain factories and large rural estates under the Polish law of July 14, 1920, was contrary to designated articles of the Treaty of Versailles, and the Geneva Convention, concluded between Germany and Poland. This Convention provided, in Article 6, that Poland might expropriate in Polish Upper Silesia certain industrial undertakings and large rural estates, subject to the reservations in Articles 7-23 of the Convention. Article 23 provided for the submission to the Permanent Court of disputes arising out of the application of interpretation of Articles 6-23. In accordance with Article 23, Germany asked the Permanent Court to declare that the Polish law of July 14, 1920, constituted a measure of liquidation, and was contrary to the provisions of the Treaty of Versailles and to the Geneva Convention. This was the exact situation in the Roumano-Hungarian dispute, where the claimants before the Mixed Arbitral Tribunal contended that expropriation in accordance with the Roumanian law of July 30, 1921, constitutes a measure of liquidation and was contrary to the Treaty of Trianon. The wording of Article 297 of the Treaty of Versailles and Article 6 of the Geneva Convention is substantially the same as that of Articles 232 and 250 of the Treaty of Trianon. By these articles the property, rights and interests of German and Hungarian nationals, respectively, are safeguarded, and disputes relative to such property, rights and interests made referable to the Permanent Court of International Justice and the Mixed Arbitral Tribunal, respectively. The Polish Government interposed a plea to the jurisdiction of the Permanent Court of International Justice, as the Roumanian Government demurred to the jurisdiction of the Mixed Arbitral Tribunal. Poland alleged that Article 23 of the Geneva Convention limited the jurisdiction of the Court to cases of liquidation—just as Roumania alleged that the Tribunal's jurisdiction is limited by Article 250 of the Treaty of Trianon to cases of retention and liquidation. Nevertheless, the Permanent Court declared its competency, saying :

“ It is clear that the Court's jurisdiction cannot depend solely on the wording of the Application ; *on the other hand it cannot be ousted merely because the respondent Party maintains that the rules of law applicable to the case are not amongst those in regard to which the Court's jurisdiction is recognised* ²

The Court rendered no decision on the merits of the German application, just as the Mixed Arbitral Tribunal reserved judgment on the merits of the Hungarian claims. Neither judgment asserted jurisdiction on the ground that expropriation in accordance with the Polish and Roumanian laws, respectively constituted liquidation within the terms of the corresponding articles of the Treaties and the Geneva Convention. The fact that such expropriation *might* constitute liquidation was considered sufficient both by the Court and by the Tribunal, for the exercise of their jurisdiction, in order to determine whether liquidation had, contrary to the terms of the treaties, in reality taken place.

In the German-Polish case, the first question considered was the meaning of the word “ *expropriation*,” as used in the text of the Geneva Convention. The Court said :

“ Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the regime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorising expropriation, the treatment

² Publications of Permanent Court of International Justice, Series A, No. 6, p. 15.

accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognised by the generally accepted principles of international law."

(Series A, Collection of Judgments, No. 7, Permanent Court of International Justice.)

Referring further to these principles, the Court said :

" Head III " (of the Convention) " only refers to Polish Upper Silesia and established in favour of Poland the right of expropriation which constitutes an exception to the general principles of respect for vested rights . . . Further there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights."

(Id., pp. 21, 22.)

Two other cardinal principles are laid down in this judgment of the Permanent Court :

First : Expropriation, if not in conformity with the agreement upon which it proceeds, or if otherwise overstepping the limits set by international law, is unlawful, regardless of the name—land reform, or anything else—which is given it.

" The legal designation applied by one or other of the interested parties to the act in dispute is irrelevant, if the measure in fact affects German nationals in a manner contrary to the principles enunciated above . . . "

(Id., p. 22.)

Second : Expropriation without compensation cannot be justified by its application to nationals as well as aliens. The Court said :

" Even if it were proved . . . that in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights affected by it in respect to German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention ; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the state applies it to its own nationals."

(Id., p. 33.)

Head III of the Treaty thus referred to is entitled " Expropriation." Article 6 provided :

" Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in this clause the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia."

The Court held that having regard to the context, it was reasonable to suppose that the intention was, bearing in mind the regime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorising expropriation, the treatment to be accorded to German private property, rights and interests in Polish Upper Silesia, is to be the treatment recognised by the generally accepted

principles of international law. The natural inference from this decision is that expropriation without an agreement such as the Geneva Convention, allowing expropriation in specific cases and under specific conditions, or expropriation without a reason recognised by international law, such as public interest or judicial liquidation, is contrary to the generally accepted principles of international law. Bearing in mind that in exercising jurisdiction, the Permanent Court of International Justice applies "international custom as evidence by general practice accepted as law," and "general principles of law recognised by civilised nations,"³ the principles laid down in this judgment may be accepted as generally applicable to similar questions, such as those in the Roumano-Hungarian dispute, and be taken as evidence that as a general principle of international law, the mere fact that a measure affecting foreigners of a character prohibited by international law is applied by a State to its own nationals, is no defence to claims by such foreigners.

It is not necessary to challenge the proposition in the "Memorandum of Conversations at Brussels,"

"that the treaty does not preclude an expropriation of the property of optants for reasons of public welfare, including social requirements of Agrarian reform."

Such expropriation, as a matter of international law, implies adequate compensation. It implies, under the Peace Treaties, the absence of undue discrimination between the nationals of the expropriating State and those of other States parties to the Treaty. Whether as a matter of fact compensation in the given case is illusory; whether as a matter of fact, in the application of the law, actual discrimination is or is not made otherwise, are questions for decision by a court. It is not an answer to the asserted right of an Hungarian optant or of the Government on his behalf, to have recourse to the tribunal provided in the Treaty for his protection, to say that the law by its terms applies to Hungarians and Roumanians alike, and, therefore, the matter is one in which he must seek his only remedy in the courts of Roumania. This would be to reduce the Treaty protection to a shadow without substance.

This principle of compensation was enforced by the British and French Governments in connection with the Treaty of October 28, 1920, recognising the annexation of Bessarabia by Roumania. It was not until Roumania had agreed to pay the nationals of Great Britain and France in Bessarabia whose lands had been expropriated by the Roumanian Agrarian Reform Laws, practically the full value of their land, or about forty times the amount of compensation received by Roumanian citizens that this recognition was conceded. Without contending that the same ratio of compensation should be adopted in view of the Hungarian optants, it is sufficient to point out the enforcement of the principle of compensation by these powers on behalf of their nationals.

³ Statute, Permanent Court of Internationale Justice, Art. 38

III.

The Attempts at Conciliation undertaken by the Council at the instance of Hungary in March, 1923, resulting at first in a Report by Mr. Adatei, the Japanese Representative on the Council, recommending the Submission of the Dispute to the Permanent Court of International Justice, and, when Roumania refused to concur, that the Council should ask for an Advisory Opinion from the Court, finally came to an end with the Adoption by the Council on July 5, 1923, of a Minute approving Mr. Adatei's Report, and expressing the hope that both Governments "will do their utmost to prevent the Question of Hungarian Optants from becoming a disturbing Influence in the Relations between the two Neighbouring Countries."⁴

In this connection reference should be made to the so-called agreement of Brussels, made at Brussels in May, 1923. In the course of the negotiations which were there carried on, and in conformity with common practice, a memorandum was made of various points of difference and agreement between the parties in the effort to reach a basis of final agreement. There is annexed to the report of Mr. Adatei a document entitled :

"Account of the Conversations which took place on May 27, 1923, at the Palace Hotel, Brussels, between Count Csaky and M. Gajzago, representatives of Hungary, and M. Titulesco, representative of Roumania, in the presence of Dr. van Hammel, Director of the Legal Section, M. Mantoux, Director of the Political Section, and M. Ascarate and M. de Montenach, members of the Secretariat of the League of Nations."⁵

A part of the memorandum contains the following paragraph :

"(1) As regards the questions of the discrepancy between the Roumanian law and the provisions of the Treaty which deal with the rights of Hungarian optants, it is admitted—and the Hungarian representatives do not dispute the point—that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including social requirements of Agrarian reform.

It seems that the Hungarian government sensed a danger to its case in this clause, and shortly after the Brussels Conference disavowed the act of its representative in making the concession embodied in it, and there has been a great deal of controversy over that subject. It does not appear to me to be a material point. The proposition in and by itself appears quite unobjectionable. The right of Roumania to enact laws expropriating all immovable property within its jurisdiction for reasons of public welfare, including social requirements of Agrarian reform, can hardly be controverted. The question is whether it can expropriate the immovable property belonging to aliens without being liable under principles of International Law to properly compensate them, and in the case of the Hungarian optants whether it is under an additional obligation to them by virtue of the provisions of the Treaty of Trianon. When Mr. Titulesco later argued to the Council that this provision above quoted was "a judgment signed by the Hungarian representative," basing upon that his claim to exclusion from any liability on the part of

⁴ League of Nations Official Journal, Vol. IV, No. 8, p. 907.

⁵ League of Nations Official Journal, Aug., 1923, p. 1012.

his government to treat the Hungarian optants in any way different from the citizens of Roumania, I think any judicial tribunal would dispose of the contention in the same way in which the Mixed Arbitral Tribunal did when it was brought before it. The concession, made as it was, in the effort to reach an agreement under the conciliatory processes of the Council of the League, was certainly not a judicial judgment such as Mr. Titulesco envisages, and I cannot think that the Brussels episode cuts any material figure in determining rights of the parties under present consideration.

IV.

The Mixed Arbitral Tribunal properly had Jurisdiction to entertain the Complaints of Hungarian Optants against Roumania for the Expropriation of their Property under the Law of July 30, 1921.

What has been previously said anticipates the views entertained respecting the jurisdiction of the Mixed Arbitral Tribunal. That tribunal was confronted with the question of jurisdiction, just as the Permanent Court of International Justice, in the case concerning German citizens in Polish Upper Silesia (No. 6), was confronted with the question of jurisdiction. The reasoning of the majority opinion of the Roumano-Hungarian Mixed Arbitral Tribunal appears conclusive. It appeared from the facts presented in the cases under consideration.

“that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner and without his consent, and this measure constitutes a violation of the general principle of respect for acquired rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Article 250 and is by its very nature to be classed among the measures referred to in the said Article.”

The Court declined, in considering the question of jurisdiction to consider the question whether the expropriations in question in the cases were or were not differential measures, as that concerned essentially the merits of the cases. It was sufficient that the facts presented by the complainant, uncontradicted by any allegations of defence, showed a complete confiscation, without indemnity, of the property of the claimant under the ostensible authority of a measure of expropriation to carry out a general revolutionary scheme of land reform. The Court very properly held that the mere allegation that the law thus applied operated upon nationals and foreigners alike did not deprive it of the jurisdiction conferred upon it by treaty.

An arbitral tribunal must of necessity have jurisdiction, in the first instance at least, to determine its own competency. This is generally recognised throughout the history of arbitral proceedings. More than one hundred years ago the question arose regarding the competence of the Mixed Claims Commissions organised under Article VI and VII of the Treaty of November 19, 1794, between the United States and Great Britain. In the case of *The Betsy*, the British Commissioner demurred to the jurisdiction of the Commission and withdrew therefrom in order to prevent a decision upon that issue. The American Commissioner, Mr. Gore, in his opinion, filed on the question of competence, made the following statement :

“A power to decide whether a claim referred to this Board is within its jurisdiction appears to me inherent in its very constitution and indispensably necessary to the discharge of any of its duties To decide on the justice of a claim it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to

be sought for in the examination. To say that power is given to decide on the justice of a claim and according to the merits of the case and yet no power to decide on examination if that claim has any justice, any merit even, sufficient to be the subject of consideration, is to offer in terms a substance, in truth phantom To my mind there can be no greater absurdity to concede that these two nations appointed commissioners with power to examine and decide claims ; prescribed the rules by which they were to examine them ; authorised them for this purpose to receive books, papers and testimony ; examine persons on oath ; award sums of money, and solemnly pledge their faith to each other that the award should be final and conclusive and yet give them no power to decide whether there was any claim in question⁶

After a series of conversations between the two Governments, Great Britain denounced the withdrawal of its commissioners. Lord Chancellor Loughborough expressed the opinion ;

“ The doubt respecting the authority of the Commission to settle their own jurisdiction was absurd ; and they must necessarily decide upon the cases being within or without their competency.”⁷

These opinions were rendered when arbitration was still in its infancy. Since that time there has been a marked development in the whole process of arbitration. Towards the end of the 19th Century, a controversy arose between the United States of America and Chile as to certain claims which, it was asserted by the Chilean Government, should be barred from the consideration of a Mixed Claims Commission.

Mr. Olney, then Secretary of State of the United States, wrote that :

“ The question whether any particular claim is a proper one for the consideration and decision of the international commission is necessarily one which the commission itself must determine. The conventions under which such commissions are organised usually describe in general terms the class of cases of which the commission is to take jurisdiction and whether any particular case presented to it comes within this class the commission must, of course, determine”⁸

A project for international tribunals and their procedure, presented by Dr. Goldschmidt to the Institut de Droit International, in 1874, averred that arbitral tribunals have jurisdiction to determine their competence.⁹ A similar provision was inserted by Bluntschli in his proposed international code.¹⁰

Fiore, Pasquale ; in *Nouveau Droit International Public*, 2^{me} éd., Paris, 1885, Vol. II, page 641, § 1213, states the rule as follows :

“ Le Tribunal arbitral a le droit de statuer sur sa propre compétence, de la même manière que tout tribunal même d'exception est autorisé à le faire par la nature même de sa mission. C'est, en

⁶ Moore, History and Digest of International Arbitration, Vol. 3, pp. 2278, 2282, 2284.

⁷ Moore, History and Digest of Int. Arbitration, Vol. I, p. 327.

⁸ Moore, Digest of Int. Law, Vol. 7, pp. 34-5.

⁹ See Project in 6 *Revue de Droit International et de Législation comparée* (1874) 421, 440.

¹⁰ Bluntschli, M., *Le Droit International Codifié*, 3rd ed., Paris, 1881, Art. 492 bis.

effet, un attribut naturel de toute autorité que l'affirmation de ses pouvoirs. Il est aussi certain que la règle de droit commun, que le juge de l'action est aussi juge de l'exception, doit être applicable devant le tribunal arbitral. On ne pourrait dès lors pas refuser à ce tribunal la compétence nécessaire pour statuer sur toutes les contestations qui pourraient être soulevées, par l'une ou l'autre des parties, même en ce qui concerne les mesures d'instruction qu'il aurait ordonnées, et exécution de ces mesures . . . ”

Merignhac A., *Traité théorique et pratique de l'arbitrage international*, Paris, 1895, p. 254, § 257, says :

“ Que faut-il penser d'une exception d'incompétence soulevée devant le Tribunal arbitral ? Si, en disant que les arbitres sont juges de leur compétence, on veut entendre qu'ils ont le droit de décider qu'une difficulté que l'on veut soustraire à leur examen, neutre ou non dans les termes du compromis, on émet certainement une vérité incontestable. L'arbitre constitué juge du fond doit en effet, *ipso facto*, être considéré comme investi du droit de déterminer en quoi il consiste ; s'il en était autrement, il serait obligé de se dessaisir dès qu'une partie élèverait la prétention qu'il ne peut connaître d'une question, alors même que celle-ci serait comprise d'une manière évidente dans le traité. L'arbitre a donc le droit de décider quels sont les points qui rentrent ou non dans le compromis et qu'il peut dès lors ou non juger ; ce n'est pas question de compétence, mais question de fond et ceci est vrai devant la juridiction ordinaire comme devant le tribunal international . . . ”

Mr. Lammasch points out in his work on international law¹¹ that a denial of this power would make it possible for either of the parties to obstruct the function of arbitral tribunals whenever a plea to the jurisdiction is filed.

The necessity of granting such powers to international tribunals is even more strongly emphasised by Messrs. De Lapradelle and Politis. In the *note doctrinale* concerning the *Betsy* case, it is pointed out that the renunciation of the power to decide their competence would destroy the independence of judges of international courts ; it would put arbitration under tutelage, with the consequence that incompetence would have to be admitted whenever a plea to the jurisdiction is entered.¹²

The principle that international tribunals have the power to determine their own jurisdiction has been inserted in several statutes establishing such tribunals. The Hague Convention for the Pacific Settlement of International Disputes of July 29, 1899, created the Permanent Court of Arbitration. Article 48 of this Convention, reproduced in Article 73 of the Convention of October 18, 1907, provided that :

“ The Tribunal is authorised to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked and in applying the principles of law.”

¹¹ Lammasch, *Die Rechtskraft Internationaler Rechtspruche*, Kristiania 1913, Sec. 16, p. 67.

¹² A. de Lapradelle-N. Politis, *Recueil des Arbitrages Internationaux*, Vol. 1, Padrone, Paris, 1905, at pp. 103-105 :

“ . . . permettre aux parties d'élever l'exception sans en faire juge le tribunal, c'est leur permettre de s'évader purement et simplement du litige et faire aussi des plaideurs, ou plus exactement de l'un d'eux, le maître souverain des pouvoirs du tribunal . . . Refuser à l'arbitre le droit de statuer sur sa propre compétence, c'est restreindre les arbitres dans leur indépendance et les atteindre dans leur dignité . . . Dire que le juge international ne peut pas statuer sur l'exception d'incompétence, c'est répondre, en définitive, qu'à chaque fois que cette exception se présente, il doit l'admettre. Forcer les juges à renvoyer le litige aux parties, c'est mettre l'arbitrage en tutelle et, de cette tutelle, choisir la partie la pire de toutes : celle des plaideurs . . . ”

Several of the arbitration treaties expressly stipulated that the determination of jurisdiction is reserved to the tribunal itself.¹³

The Mixed Claims Commission, established in pursuance of the agreement of August 10, 1922, between the United States and Germany in its Administrative Decision No. II, sets forth its power to adjudicate its jurisdiction in the following terms :

“ At the threshold of the consideration of each claim is presented the question of jurisdiction, which obviously the commission must determine prior to fixing the amount of Germany's financial obligations, if any, in each case The Commission's task is to apply the terms of the Treaty of Berlin to each case presented, decide those which it holds are within its jurisdiction and dismiss all others.”¹⁴

A similar rule of procedure was adopted by the Tripartite Claims Commission established under the agreement between the United States, Austria and Hungary,¹⁵ under its Administrative Decision No. 1.¹⁶

Finally, it may be pointed out that the Statute of the Permanent Court of International Justice, by Article 36, among other things provides :

“ In the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court.”

All of these provisions referred to, in the different Treaties, are in recognition of the common law of nations as interpreted in the earlier cases, and are merely expressing established international law and practice. If a different rule is to be recognised respecting the operations of the many mixed tribunals created by the various Peace Treaties and the agreements flowing from them, it will introduce a confusion into international law and practice which must have regrettable consequences.

It appears that the objection to the jurisdiction of the Mixed Arbitral Tribunal was argued by learned counsel on both sides for a period of eight days, after which a majority of the Tribunal held that it was possessed of jurisdiction over the cases.

It need not be contended that if such a tribunal should attempt to exercise jurisdiction without any appearance of right, litigants should be compellable to proceed before it or be bound by its judgments ; but where, as in this case, the tribunal is, by a treaty binding upon both parties, given jurisdiction of “ claims made by Hungarian nationals under this article,” *i.e.*, Article 250, of the Treaty of Trianon, and the question is whether acts of the Roumanian Government complained of constitute a violation of that Article or not, it would seem clear that the decision of the Tribunal upholding its jurisdiction must be binding upon both parties, especially in view of the provision in paragraph (g) of Article 239, whereby :

“ the right contracting parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive and to render them binding upon their nationals.”

¹³ See also Special Agreement between the United States and Great Britain of August 18, 1910 (British and Foreign State Papers, Vol. 103, pp. 322, 328).

¹⁴ See Mixed Claims Com., U.S. and Germany, Adm. Decision No. II, Nov. 1, 1923, pp. 6-7.

¹⁵ U.S. Series, Treaty No. 730.

¹⁶ *Id.*

The withdrawal under these conditions by one of the parties of a member of the court nominated by it, by reason of dissatisfaction with the decision of the court, would, under ordinary conditions, merely result in the case proceeding before the remaining arbitrators, and the judgment would be as binding upon the party withdrawing as though it had continued to take part in the proceedings, and had not withdrawn its nominee. But the Treaty makes provision for this case, by providing in the Annex to Section 239 that should one of the members of the Tribunal retire, the same procedure will be followed for filling the vacancy as was followed for appointing him. That procedure is, when in the case of a vacancy a government does not proceed within a period of one month to appoint as provided a member of the Tribunal, such member shall be chosen by the other government from the two persons mentioned above, other than the President, these two persons being provided for in the following language :

“ In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations These persons shall be nationals of Powers that have remained neutral during the war.”

On several occasions the Council has acted, as Hungary has requested it to do, under the Treaty of Trianon pursuant to provisions of the Treaties of Versailles and St. Germain, which are identical with those contained in Article 239 of the Treaty of Trianon.

Thus, on January 28, 1923, Mr. Poincaré, the Prime Minister of France, in a letter addressed to the President of the Council, called attention to the fact that :

“ it is for the Council of the League of Nations to choose for each Mixed Arbitral Tribunal or for each independent division, two persons who may in case of need, take the place of the President or of the National Arbitrator.”¹⁷

Mr. Poincaré's request was referred by the Council to Mr. Blanco (Uruguay) as rapporteur, and upon his report, the Council at its meeting on February 3, 1923, appointed two additional members for each of the four independent sections of the Franco-German Mixed Arbitral Tribunal, as well as for the Franco-Austrian, Franco-Hungarian and Franco-Bulgarian Mixed Arbitral Tribunals.¹⁸ A similar request was addressed to the League by the Belgian Minister of Foreign Affairs on February 28, 1923, and upon the report of Mr. Guaina (Uruguay) the Council proceeded at its meeting of April 17, 1923, to appoint two additional members for each of the Belgo-German, Belgo-Austrian, Belgo-Hungarian and Belgo-Bulgarian Mixed Arbitral Tribunal.¹⁹ After the occupation of the Ruhr Germany recalled her national judges from the Mixed Arbitral Tribunals. The procedure in Article 304 of the Treaty of Versailles (identical with 239 of the Treaty of Trianon) was followed in the Tribunal. One month after the withdrawal of the German member of the Tribunal, the French Government chose from the persons so appointed by the Council of the League a substitute to replace the German member. The action of the Council so recorded, would seem to furnish controlling precedents for the action which could be taken by it in regard to the Roumano-Hungarian treaties.

¹⁷ League of Nations Document C, p. 101, 1923.

¹⁸ League of Nations Official Journal, Vol. 4, No. 3, pp. 242-399.

¹⁹ See League of Nations Official Journal, Vol. 4, No. 6, pp. 555, 599, 629.

V.

The Council is not empowered to give a judicial Interpretation to the Peace Treaties binding upon the Parties to them. That judicial function belongs to the Permanent Court.

While for the purpose of determining the rights of the respective parties and of aiding in the process of attempted conciliation, the Council of the League must necessarily place an interpretation upon the treaties, or any other agreements entering into the controversy, and may present its opinion respecting such interpretation in order to justify its attitude or to influence one or both parties to the controversy, it is a strange doctrine to suggest that the Council may consider and overrule the judgment of a mixed arbitral court established by treaty, in order to constrain a state to accept a different conclusion from that of the Court, as a condition to the exercise by the Council of a duty imposed on it by treaty.

The Committee of Three, in their report to the Council in September, 1927, states that in the development of its problem, it was compelled to consider the question,

“Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals?”

The Committee reports that after examining this question, *and having it examined by eminent legal authorities*, it arrived at conclusions which it announces. Having reached conclusions which they say :

“show that the claim of an Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim arose out of the application of the Roumanian Agrarian Law”—

which is substantially the decision of the Mixed Arbitral Tribunal—the Committee thereupon proceeds to lay down a definition of principles, the acceptance of which, in its opinion, the Treaty of Trianon has made obligatory for Roumania and Hungary, and it requests the two parties to conform to these principles, and suggests resolutions which in effect provide that if Hungary does not conform, the Council will not appoint two deputy members of the Mixed Arbitral Tribunal, in accordance with Article 289 of the Treaty of Trianon.

Thus the suggestion is that the Council, a political body, should reach a legal construction of the rights of parties which are already *in limine* before a duly constituted judicial tribunal ; that this construction should not be based upon a decision of the Permanent Court of International Justice, but upon the opinions of private jurists consulted by its Committee, and based on those views it is proposed to override the decision of the judicial body duly constituted by treaty with jurisdiction to consider the subject, and it is proposed to make the exercise of a duty imposed upon the Council by the peace treaties, dependent upon the acceptance by the litigants of the principles involved in the legal construction thus reached. It is within the power of the Council, as has been pointed out by Lord Robert Cecil and others, to request an advisory opinion of the Permanent Court on these points, which the Government of Hungary has consistently urged it to do. But in view of the attitude of Roumania the Council has been unwilling to take that course. With the greatest

respect for the Council and the Committee dealing with this subject, I cannot but regard the proposals contained in the report of the Committee as at variance with the whole theory of the organisation of the League of Nations under the Covenant, which contemplates the exercise of such powers of interpretation and construction as judicial functions, vested in the Court established pursuant to Article XIV of the Covenant and not exercisable by one of the political organs of the League.

Mr. Titulesco saw clearly the consequence of such position, and met it in his argument before the Council with the proposition that the duties of the Council were fixed by the Covenant of the League of Nations ; that the Treaty of Trianon, except for the first part, is independent of the Covenant, and, therefore, that Article 239 of the Peace Treaty and all similar provisions in other treaties do not impose upon the Council any imperative duty. Upon this basis he sought to justify the Council's refusal to appoint members of the Tribunal, except upon conditions imposed by the Committee of Three.²⁰

Mr. Chamberlain followed Mr. Titulesco by adopting the same thesis.²¹

It is a new suggestion, that although all of the Allied and Associated Powers and Hungary are parties to the Treaty of Trianon, and the same, with various other Powers, are parties to other Peace Treaties, and there are provisions in these treaties whereby the League of Nations, through one of its constituent bodies, is to take action, yet the League is not bound to recognise that obligation, except upon such extraneous conditions as it shall see fit to impose. It is submitted that a conception of this character would go far to destroy the solidarity of the public law of Europe, which it has been supposed was created by the Peace Treaties, to be administered through the League of Nations. Moreover, it is at variance with the practical construction placed by the League itself upon identical provisions in the treaties of Versailles and Trianon above referred to.

Doubtless in endeavouring to bring two states into agreement through the exercise of the conciliation offices of the Council, the expression of opinions as to their respective rights as well as concerning their moral attitude is not only permissible, but may be most desirable or effective.

GEORGE W. WICKERSHAM.

Dated, New York, February 24, 1928.

²⁰ League of Nations Official Journal, Oct. 1927, p. 1392.

²¹ Id. 1396.

THE PRESENT POSITION OF THE HUNGARIAN OPTANTS CASE

BY

ALEXANDER P. FACHIRI, *Barrister-at-Law.*

So much has been written about this dispute and so many complications have been introduced into the discussion that it may be useful to re-state the facts once more, as simply as possible.

The Treaty of Peace between the Allies and Hungary was signed at Trianon on June 4th, 1920, but owing to delays in obtaining the requisite number of ratifications it did not come into force until July 26th, 1921. By Article 63 persons possessing rights of citizenship in territory detached from Hungary by the Treaty were given the right to opt for Hungarian nationality; in other words, the Hungarians of Transylvania (to confine ourselves to the particular territory with which this dispute is concerned) were entitled, if they so desired, to retain their original allegiance instead of acquiring Roumanian nationality. The same Article goes on to provide that the optants must transfer their place of residence to the State for which they have opted, but expressly stipulates that "they will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt."

The Treaty, by Article 232, adopts the general system established by the Treaty of Versailles for the retention and liquidation by the Allied Powers of enemy property situate in their territories, but a special provision is inserted with regard to Hungarian property in territory formerly part of Hungary transferred to the Allies by the Treaty. This is Article 250, which reads as follows:—"Notwithstanding the provisions of Article 232 and the annex to Section IV the property, rights, and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights, and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3rd, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

It will be observed that so far as Hungarian optants are concerned this Article is in harmony with Article 63 and prevents the inconsistency which would, but for it, exist between Article 63 and Article 232.

On July 30th, 1921, four days after the coming into force of the Treaty, the Roumanian Government promulgated a "Law of Agrarian Reform," applicable to the newly acquired territory of Transylvania. This enacted that all rural estates and all landed property *extra muros* exceeding a certain area should be expropriated, subject to the retention of a small maximum holding, the size of which varied according to

certain conditions, some of which depended upon the discretion of the authorities. In the case of "absentees" the whole property was to be taken and "absenteeism" was defined as absence, however short, between December 1st, 1918, and March 23rd, 1921. The compensation payable to the owners of the property taken was based upon the pre-war value, but the figure was reckoned in post-war paper currency at par and paid in bonds redeemable in 50 years, the result being that, in fact, the amount was equivalent to *about 1 per cent.* of the market value of the land.

The following points are to be noted in regard to this law:— On the one hand, it does not on its face contain any provision discriminating between Roumanian and Hungarian nationals, and its declared object was to effect a more equitable distribution of land. On the other hand, the retrospective provision placing "absentees" in a worse position than other landowners was, in fact, almost exclusively applicable to Hungarians, who had been forced to leave their homes during the specified period by the advance of the Roumanian armies. Moreover, the terms of the Agrarian Law of July 30th, 1921, applicable to newly acquired territory where most of the land was held by Hungarians, were distinctly harsher than the corresponding Agrarian Law applicable to the old Kingdom of Roumania. Finally, it was alleged on the Hungarian side, and denied on the Roumanian, that the law was in practice administered so as to discriminate against Hungarians.

The Hungarian Government protested against the application of the law of July 30th to their nationals and endeavoured to enter into direct negotiation with the Roumanian Government on the subject, but without success. They therefore brought the matter to the attention of the League of Nations by a request dated March 15th, 1923,¹ which was considered by the Council in April, 1923,² when the parties were invited to endeavour to reach an agreement. Negotiations took place at Brussels at the instance of M. Adatci, Rapporteur of the Council of the League, and the question was again brought before the Council in July.³ None of these efforts were, however, successful in effecting a settlement of the dispute. The only bearing of this first intervention of the League upon the subsequent history of the matter is that the Roumanian Government suggests that certain admissions were made by the Hungarian representative during the Brussels negotiations which are claimed to be relevant to the questions in issue. An examination of the record relied upon⁴ shows, however, that this contention is wholly untenable. The statement to which the Roumanian Government attach importance is one to the effect that "the Hungarian representative did not dispute that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform," but it is clear that the expression "expropriation for reasons of public welfare" was used in its normal meaning, namely, compulsory acquisition on payment of full compensation. The context makes this quite plain as the record expressly states that "Hungary asked for a full indemnity." Moreover (and this, again, is stated on the face of the document) the negotiations were held for the purpose of reaching a settlement by compromise, and it hardly needs to be pointed out that concessions made in the course of such negotiations can never be regarded as involving admissions as to legal rights.

¹ League of Nations Official Journal, July, 1923, p. 729.

² Ibid, June, 1923, pp. 573, 604.

³ Ibid, August, 1923, pp. 886, 904.

⁴ Ibid, p. 1012.

This first phase of the dispute has been briefly referred to for the sake of completeness, but the starting-point of the present controversy is to be found in the distinct procedure now initiated by the injured individuals themselves for the purpose of obtaining redress. In the latter part of 1923 the dispossessed Hungarians began to submit claims to the Roumano-Hungarian Mixed Arbitral Tribunal under Article 250 of the Treaty, and in due course some 350 of these claims were filed. Almost all the applicants were optants, most of them were "absentees" within the meaning of the Agrarian Law, and a large proportion were small farmers. The claims requested the Tribunal:

1. To declare that the expropriation of the claimant's property is contrary to Article 250.
2. To condemn the Roumanian Government to restore the property in the same condition in which it was before the expropriation.
3. To condemn the Roumanian Government to compensate the claimant for the damage suffered in consequence of the deterioration occasioned by the deprivation of possession.
4. Alternatively to condemn the Roumanian Government to pay to the claimant the replacement value of the property taken in the event of it being proved that it is impossible for the Roumanian Government to return the same, and to compute the amount of the indemnity.

The Roumanian Government filed an objection to the jurisdiction of the Tribunal in each case. In twenty-two cases which were set down for trial the Tribunal, sitting in Paris, after hearing full arguments on behalf of both parties, decided on January 10th, 1927, that it had jurisdiction to entertain the claims, and accordingly reserved them for judgment on the merits. The decision was arrived at by a majority consisting of the President, a distinguished Swedish jurist, and the Hungarian arbitrator. The Roumanian arbitrator dissented.

Shortly after the rendering of this decision the Roumanian Government announced that it would not allow its arbitrator to sit on the Tribunal in any matter relating to the agrarian question, thereby precluding the further consideration of the Hungarian claims, and appealed to the League of Nations. The request was based on Article 11 (2) of the Covenant, and its declared object was to "bring to the knowledge of the Council" the reasons for the Roumanian Government's action in withdrawing its arbitrator.¹ Hungary, on the other hand, denied that Article 11 had any application in the present circumstances and requested the Council to make the necessary appointment to enable the missing arbitrator to be replaced, as provided by Article 239 of the Treaty.²

This, then, was the issue before the Council: the Mixed Arbitral Tribunal set up by the Treaty of Trianon and entrusted by the High Contracting Parties with the task of adjudicating upon claims under Article 250 had decided that it possessed jurisdiction to entertain the claims of the Hungarian optants. The decision did not relate to the merits; it did not declare the Hungarian case to be well founded in fact, or call upon the Roumanian Government to take any remedial action. It dealt exclusively with the preliminary question of jurisdiction. Article 239 (g) of the Treaty provides that the "High Contracting

¹ League of Nations Official Journal, April, 1927, p. 350.

² Ibid, p. 370.

Parties (i.e., Roumania and Hungary, *inter alia*) agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive." Notwithstanding this express stipulation Roumania had repudiated the decision of the Mixed Arbitral Tribunal and paralysed its further action by withdrawing her arbitrator. She asked the Council to justify her conduct, whereas Hungary asked the Council to exercise the power given to it by Article 239 (a) for the purpose of enabling the Tribunal to function.

As a result of the meeting of the Council on March 7th, 1927, a Committee of Three, presided over by Sir Austen Chamberlain, was appointed to study and report upon the question.³ Long discussions and negotiations took place between the Committee and representatives of the two Governments, which, however, failed to bring about any agreement, and the matter came up for consideration by the Council on September 17th, 1927, when the report of the Committee was presented.⁴ After referring to the various unsuccessful efforts made to arrive at a settlement of the whole dispute by conciliation, the report states that the Committee was obliged to seek a solution by other methods, and had accordingly examined, with the assistance of legal experts, the question of the Mixed Arbitral Tribunal's jurisdiction. As a result of this examination the Committee arrived at certain conclusions. It states in the first place (and this conclusion is, of course, unexceptionable) that the Mixed Arbitral Tribunal being an international tribunal established by the Treaty, has no jurisdiction beyond that which the agreement of the contracting parties conferred upon it, and that the limits of this jurisdiction are defined by Article 250. It then proceeds to interpret this provision as follows:—

" If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Article 232 and 250 as a result of the application to the said property of the Roumanian Agrarian Law, and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

" The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless the case mentioned in the preceding paragraph arises. In this latter case, the jurisdiction of the Mixed Arbitral Tribunal would not be ousted on the ground that the application of an agrarian law was involved.

" Since these considerations show that the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim arises out of the application of the Roumanian Agrarian Law, we shall proceed to the definition of the principles which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary.

" 1. *The provisions of the peace settlement effected after the war of 1914-1918 do not exclude the application to Hungarian Nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

³ *Ibid*, p. 372.

⁴ League of Nations Official Journal, October, 1927, p. 1379.

“ Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

“ The question of compensation, whatever its importance from other points of view, does not here come under consideration.

“ 2. There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.

“ Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law.

“ The prohibition against the holding of immovable property by Hungarians in the territories transferred to Roumania, even if applied to all foreigners, would not be in accordance with the obligation which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

“ 3. The words ‘ retention and liquidation ’ mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

“ The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian.”

These conclusions of the Committee of Three call for close consideration. It will be appreciated, first of all, that they are entirely legal in character. It has been repeatedly asserted in the course of the dispute that it should not be envisaged from the narrow standpoint of the lawyer, but so far as this passage of the Committee's report is concerned it is clear that it purports to deal with a purely legal question

in a purely legal way. And it is difficult to understand how any other course was possible. The question which the Committee had undertaken to answer being whether or not the Mixed Arbitral Tribunal was right in asserting that it possessed jurisdiction there were no criteria other than legal ones whereby the point could be determined. The conclusions in question must therefore be judged by legal standards.

The first point to be noticed is that the Committee finds, in the earlier part of the passage cited, that the Tribunal *has* jurisdiction to entertain the Hungarian claims, but that the decision on the merits will depend upon the facts proved at the hearing. The obvious result of this finding is that the Tribunal established for the purpose by the parties should be allowed to hear the evidence and decide the cases. The Committee, however, is not content to stop there, but proceeds to lay down the tests by which the decision on the merits should be governed. This is the fundamental error of the report. Having satisfied itself that the claims were within the Tribunal's jurisdiction, it followed that the interpretation of the Treaty for the purpose of deciding those claims was a matter for the Tribunal and the Tribunal alone. The Committee, nevertheless, takes it upon itself to lay down a detailed interpretation, which is, moreover, intrinsically unsound.

Principle No. 1 set out above is misleading in its enunciation of the general proposition by which it begins, and directly wrong in the sentence with which it ends. This view is not a matter of personal opinion, but follows from legal propositions stated by the Permanent Court of International Justice, which is the supreme authority in international law. The fallacy contained in the Committee's finding consists in segregating the question of compensation from the consideration of the Agrarian Law. It may be true that the provisions of the peace settlement would not exclude the application to Hungarian nationals of a general scheme of agrarian reform *provided that the expropriation involved in such scheme was accompanied by full compensation*, but it results from the principles laid down by the International Court in Judgments No. 7 and 8 that the provisions of the peace settlement *do* exclude the application to Hungarian nationals of a general scheme of agrarian reform which involves expropriation without adequate compensation. In those cases the Court had to construe the following provision in the Geneva Convention between Germany and Poland:—"Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Article 7 to 23 undertakings belonging to the category of major industries, etc. Except as provided in these clauses the property, rights, and interests of German nationals or of companies controlled by German nationals may not be *liquidated* in Polish Upper Silesia." It held that the effect of the second sentence just cited was to preclude any expropriation other than that expressly allowed by the first sentence and subject to this exception to place the property referred to under the regime of general international law (Judgment No. 7, p. 22). The Court expressly stated that seizure without compensation was prohibited (Judgment No. 7, p. 33), and it is clear from the terms of the two Judgments that the Court recognized the principle of respect for the vested rights of foreigners as part of international common law and as precluding the expropriation of their property for any purpose without full compensation.⁵

Principle No. 2 of the Committee's report is correct in itself, but not if it implies that inequality or discrimination is a necessary

⁵ See on this subject my article on "Expropriation and International Law."

condition for relief. It may be noted in passing that the question whether the Agrarian Law was in fact (as the Hungarian Government alleged) applied so as to discriminate against Hungarians was, as the Mixed Tribunal itself observed in its Judgment, essentially one to be decided on the trial of the merits of the claims. But the condition of inequality is not necessary, as shown below. A curious statement is added under this head of the report to the effect that the prohibition against holding immovable property by Hungarians, even if applied to all foreigners, would not be in accordance with the obligation which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property. This refers to Article 63 of the Treaty cited at the beginning of this paper. If the prohibition to hold property is contrary to Article 63 *a fortiori* is the expropriation of property. The report continues "but this is a question which does not come within Article 250." The interpretation implied by this statement is too narrow, for according to the accepted rules of construction, in interpreting Article 250 the other provisions of the Treaty must be taken into account, and it throws the strongest light on the later Article to see that the earlier one expressly guarantees to the optants the right of retaining their immovable property.

Principle No. 3 is the most fallacious of all. The question in its simplest terms is this: Is the test the effect, or the declared purpose, of the measure complained of? Whether a Hungarian's property is taken from him by an agrarian law or an exceptional war measure the result to him is the same. Did the Treaty intend that he should be protected from the one description of dispossession and not from the other? Common sense seems to dictate the answer, but it has the confirmation of judicial authority, for the Permanent Court in Judgment No. 7 deals with the precise point. The Court observes (p. 31) that the Polish Government contended before it that the Polish Law in regard to which the German Government was complaining in that case could not be regarded as a measure of liquidation because it was based on considerations foreign to the conception of liquidation: it applied to certain property, rights, or interests without regard to the nationality of persons, whereas the regime of liquidation only applies to German private property as such. To this contention the Court replies as follows (p. 32): "The Court, though in no way denying that the liquidation regime established by the Treaty of Versailles and the actual measures of expropriation permitted by Head III of the Geneva Convention apply to German private property as such, cannot attach to the fact that Article 2 and 5 of the law of July 14th, 1920 (i.e., the Polish law in question) apply to a certain class of property, no matter what the nationality of the owners may be, the importance and effect which are attributed to that fact by Poland. Even if it were proved . . . that in actual fact the law applies equally to Polish and German Nationals it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals." When it is remembered that "expropriation without indemnity" was contrary to Head III of that Convention because of the provision cited above to the effect that the property of German nationals should not be "liquidated" the precise applicability to the present case of the ruling of the International Court is evident.

Having laid down these principles the Committee took the grave course of recommending that the reconstitution of the Tribunal should be conditional upon their acceptance. If both parties accepted the principles Roumania was to reinstate her judge. If Hungary alone refused them the Council was to decline to reconstitute the Tribunal under Article 239, whereas if Hungary accepted and Roumania refused the Council was to exercise the power conferred by that provision. This proposal meant that if the Tribunal was enabled to function the rules for the determination of the Hungarian claims would be prescribed for it in advance. In other words, instead of the judicial body designated by the Treaty for the purpose adjudicating upon the claims according to its own interpretation of the relevant provisions of the Treaty, it was proposed to make it a condition of its being allowed to function that the interpretation contained in the Committee's report should be the basis of the decision.

Those of us who have the prestige and welfare of the League of Nations at heart were profoundly disturbed by this report, because it seemed to cut at the very root of international arbitration. If the report had become effective a disastrous precedent would have been created. Happily this has been avoided. When the report had been read to the Council a long and lively debate took place. The Hungarian representative (Count Apponyi) refused to accept the principles enunciated by the Committee, because, as he showed in a powerful argument, they were legally unsound. He protested against the course of interfering with a pending arbitration on political grounds, and renewed the offer already made by Hungary, namely, that the question of the jurisdiction of the Mixed Arbitral Tribunal should be referred to the Permanent Court of International Justice. The Roumanian representative (M. Titulesco) accepted the report and refused the Hungarian offer. The other members of the Council took up different attitudes. Some of them accepted the report as it stood. The representatives of Germany, Italy, Holland, and Colombia, on the other hand, expressed doubt on certain points and specifically declined to recognize the correctness of the legal theses contained in the report, whilst other members did not commit themselves one way or the other. The Council as a whole soon realized that it was impossible to force the three principles laid down in the report upon the parties or to carry out the proposal that the reconstitution of the Mixed Arbitral Tribunal should depend upon the acceptance of these principles by them. In view of the divergent views not only of the interested Governments themselves but also among the other members of the Council, it seemed desirable to gain time during which the parties might again reconsider the position and possibly reach an agreement. The Council therefore decided to invite the parties not to give a final answer till the month of December, and in the meanwhile to examine the report in a favourable spirit. The concluding words of the President's proposal as adopted by the Council were these: "I ask my colleagues to join with me in submitting the recommendations contained in the report to the consideration of the Governments interested and to beg them to conform to the principles indicated therein."⁶ The representatives of Roumania and Hungary abstained from voting. It is quite clear that this recommendation was not intended to imply that the Council endorsed the intrinsic correctness of the principles in question, for Dr. Stresemann, MM. Scialoja Urrutia, Loudon and Voionmaa each made an express reservation on this point, and stated that the proposal to which they

⁶ See League of Nations Official Journal, October, 1927, pp. 1383—1414.

adhered was merely that those principles should be used as a basis for discussion between the parties.

In compliance with the suggestion of the Council the Hungarian Government on November 15th, 1927, made an offer, without prejudice to the legal position, for negotiations with a view to arriving at a compromise based on (1) restitution of the lands expropriated, but not utilised for agrarian reform, and (2) an indemnity, below the full value, in the case of property already allocated to new peasants.⁷

No reply had been made to this offer when the Council met for its December session, and consideration of the dispute was adjourned. When the Roumanian Government replied in February, 1928, they demanded as a preliminary condition of negotiation that Hungary should accept the three principles laid down by the Committee of Three. Even upon that condition the only offer made was to renounce certain reparation payments, representing the merest fraction of the value of the expropriated property. In these circumstances the dispute came before the Council again last March. The Roumanian representative again insisted that Hungary must accept the three principles, whereas the representative of Hungary explained once more why his country could not recognize them, and renewed the offer to refer the question of the jurisdiction of the Mixed Arbitral Tribunal to the International Court, an offer which Roumania again refused. The gulf between the two Governments was as wide as ever. M. Titulesco sought with great vehemence to maintain not only that the principles of the Committee's report were correct, but that they had been approved as such by the Council, whereas Count Apponyi showed by reference to the proceedings that they had merely been recommended as a basis for negotiation, and could not be regarded as legal propositions approved by the Council itself.⁸

After hearing all these arguments a new proposal was made by Sir Austen Chamberlain. He suggested that Hungary and Roumania should agree that the Council should name two neutrals to sit with the Mixed Arbitral Tribunal as constituted under the Treaty (i.e., including the Roumanian member who would be restored by his Government) and that this Arbitral Tribunal of five members should adjudicate upon the Hungarian claims. This proposal was discussed and approved by all the members of the Council other than the interested Parties and then submitted to them for consideration.⁹ At the next meeting the Roumanian representative made a long statement in which he insisted that the three principles of the committee's report should be made binding upon the Tribunal, and he only accepted the proposal subject to that condition. He argued that without this condition the new proposal was in contradiction with the Council's September recommendation. The Hungarian representative, after pointing out that this was an amendment, which he could not, of course, accept, declared that his Government gave its complete adherence to the proposal. Sir Austen Chamberlain took note of Hungary's unconditional acceptance, and pointed out that the condition attached to the Roumanian representative's acceptance in fact constituted not an acceptance but a refusal of the Council's recommendation. Sir Austen Chamberlain could not be responsible for making the change proposed. He thought it would be proper as an act of courtesy to the Tribunal to send them the whole

⁷ Hungarian Memoire of November 29th, 1927, p. 35.

⁸ Minutes, 49th Session of Council, 5th and 6th meetings.

⁹ *Ibid.*, 7th meeting, pp. 1-4.

of the minutes of the discussions of the Council on this question. He urgently appealed to M. Titulesco to reconsider his decision and accept the Council's recommendation. The representative of Roumania replied that the question had been so much discussed that his decision was final. Thereupon, M. Briand pressed him to agree, using the argument that the Council's previous resolution would influence the decision of the Tribunal. Dr. Stresemann pointed out that there was no inconsistency between the Council's attitude in September and its present proposal. The September resolution was not the expression by the members of the Council of their conviction on the legal position. They did not discuss the substance of the problem, but offered the Committee's report to the Parties as a basis of discussion. He agreed that the minutes should be sent to the Tribunal so that the character of the resolutions adopted should be clear. After further discussion, in which M. Titulesco maintained his opposition, the Council adopted the following resolution :—

“The Council :

“Considering that the best method of settling the dispute was by friendly negotiation between the two parties, recommended that method to them in September, 1927, and stated three principles which, in its opinion, might serve as an equitable basis for this negotiation.

“Finding, however, that such friendly negotiation has not been possible between the parties, the Council, while considering its recommendations of September 19th, 1927, to be of value, and without modifying its views which are contained in the minutes of its discussions, submits unanimously for the acceptance of the parties the following recommendation :—

“That the Council should name two persons, nationals of States which were neutral in the war, who should be added to the Mixed Arbitral Tribunal as established by Article 239 of the Treaty of Trianon (that is to say, that Tribunal including a Roumanian member, who would be restored to it by his Government), and that to this Arbitral Tribunal of five members there should be submitted the claims which have been filed under Article 250 of the Treaty of Trianon by Hungarian nationals who have been expropriated under the agrarian reform scheme in the territory of the former Austro-Hungarian Monarchy transferred to Roumania.

“The Council requests the representatives of the Hungarian and Roumanian Governments to inform it at its next session of the replies of those Governments, and decides at once to insert the question on the agenda of that session.”

Count Apponyi accepted the resolution, whereas M. Titulesco stated that all his previous declarations remained unchanged and he abstained from voting.¹⁰

That is where matters stand at the present moment. The last resolution of the Council is a step in the right direction inasmuch as it proposes that an Arbitral Tribunal should be set up to deal with the merits of the Hungarian claims. This Tribunal would not be trammelled

¹⁰ Minutes, 49th Session of Council, 8th meeting.

by extraneous rules in giving its decision. No doubt the minutes containing the Council's previous discussions and recommendations would be before the Tribunal, but it would be quite free to appreciate their character for itself, and in view of what has been said above, it is plain that any legal principles referred to in those minutes could not be taken to represent the substantive opinion of the Council.

On the other hand, the proposed Tribunal is not the Mixed Arbitral Tribunal established by the Treaty. The Council does not comply with the Hungarian request to exercise its power of filling a vacancy under Article 239. The resolution requires, in order to become effective, that Roumania should consent to restore her Judge. It is, therefore, a compromise, but a statesmanlike one which does not violate the principles of international arbitration, or prejudice the possibility of future resort to Article 239, if it should prove necessary. Hungary has accepted this compromise, but, as already stated, Roumania has it in her power to make it unworkable, and her representative intimated in the clearest terms that his Government intended to do so. It has been said that each side in this dispute has flouted the authority of the League—Hungary in September, 1927, and Roumania last March—but it is only fair to point out the difference in the two cases. What Hungary did in September was to refuse, quite categorically it is true, to recognize as correct in law the interpretation given by the Committee of Three to Article 250 of the Treaty. But, as we have endeavoured to explain, not only was the opinion of the Hungarian Government in fact right, but the Council itself refrained from endorsing the legal soundness of the Committee's view. With regard to the actual recommendation adopted by the Council, namely, that the parties should endeavour to reach a settlement by negotiation on the basis of the principles laid down by the Committee, Hungary, whilst always maintaining her legal contentions, made an offer for a compromise, which Roumania rejected. M. Titulesco's action in March, 1928, on the other hand, was a direct refusal to comply with the League's proposal that the decision of the dispute should be entrusted to a reconstituted, enlarged and independent Tribunal. It is not immaterial to add that Hungary has over and over again offered to submit either the whole dispute or the question of jurisdiction to the Permanent Court of International Justice, and that Roumania has always declined.

Having outlined the course of this dispute from its inception to the present time, certain general observations fall to be made. What is the real issue? It is whether an international arbitration entered into by the parties shall take its course and the interim decision of the arbitral tribunal be respected, or whether one of the parties may unilaterally paralyse the proceedings and call upon the League of Nations to justify it in so doing. It may be said: You are begging the question in stating the issue in this way, because Roumania claims that the matter submitted to the Tribunal was outside its jurisdiction as defined by the arbitration agreement, namely, Article 250 of the Treaty. The answer is that the Tribunal itself has considered and rejected this plea. It stands to reason that the mere assertion by one party of a preliminary objection to the jurisdiction cannot release it from its obligations under an arbitration agreement. If this were possible, international arbitration would be a farce, and it is comforting to observe that this is the first occasion upon which such a claim has been put forward. There are a few instances in the history of international arbitration of a Government repudiating a final award on the

ground that the tribunal had manifestly exceeded its powers; but there is not a single precedent for the refusal of one party to allow the tribunal to hear the case and render its award. Where a preliminary objection to the jurisdiction is taken the tribunal's decision upon the point binds the parties. This is not only true as a matter of international law,¹ but of good sense. In the present case, however, it is hardly necessary to have recourse to this principle in view of the express stipulation of Article 239 (g) of the Treaty whereby "the High Contracting Parties agree to regard the decision of the Mixed Arbitral Tribunal as final and conclusive." Even if it be conceded that this must be understood as referring only to decisions which are within the Tribunal's jurisdiction, it is impossible to suggest that the decision upon the preliminary objection does not fulfil this condition. There can surely be no question as to the jurisdiction of the Tribunal to decide a point expressly raised by one of the Parties. But there is more. The fact is that it follows from the Roumanian Government's own thesis that the Tribunal possessed jurisdiction, because the question whether the Agrarian Law violates Article 250 of the Treaty admittedly depends upon what its true character and application are proved to be. If, for instance, it were proved at the hearing on the merits that there was discrimination against Hungarians in the application of the law the Roumanian Government itself admits that there would be an infringement of Article 250, and therefore a case where the Mixed Arbitral Tribunal could properly give relief. The Roumanian case is, in effect, that if, as she contends, the Agrarian Law is a general measure of social reform applied equally to Roumanians and foreigners, the Tribunal must reject the Hungarian claims, but if, as Hungary contends, it discriminates between Hungarians and Roumanians the Tribunal can give judgment for the claimants. This is not a plea to the jurisdiction at all, but as the Tribunal states in its preliminary decision, essentially a question of merits, to be dealt with at the trial.

Roumania, having withdrawn her arbitrator from the Tribunal, appealed to the Council of the League of Nations under Article 11, para. 2, of the Covenant, which declares it to be "the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." Hungary concurrently applied to the Council under Article 239 (a) of the Treaty, which provides, in effect, that if there is a vacancy in the Tribunal which one Government declines to fill the Council shall choose two neutrals, of whom the other Government shall appoint one to the vacant place.

What in these circumstances was the League's duty? The first observation to be made is that the League has no appellate powers in regard to courts of arbitration. It has no authority either to review the proceedings of such a Tribunal, or to direct it as to the law, or to release a party to an international arbitration from its obligations. The Covenant, on the contrary, recognizes and is based upon the sanctity of arbitration. It distinguishes clearly between the judicial process represented by arbitration and the political action of the League itself—the two things are separate and independent, the one is alternative and exclusive of the other. Article 13, indeed, provides that the Council

¹ See Lapradelle on "L'excès de pouvoir de l'arbitre" in *Revue de Droit International*, January, 1928.

can be called upon to assist in *enforcing* an arbitral award, but it would take a bold man to suggest that the converse is contemplated. On the other hand, the provisions of Article 11 (2) of the Covenant are very wide. They enable the Council to consider and discuss almost any international question, although, be it noted, they do not empower it to give any decision or take any positive action.

Under Article 239 (a) of the Treaty the Council is charged with an obligatory ministerial duty.

The Council had to take both these provisions into account. It might well have decided that, in the circumstances, its task was limited to performing the ministerial act required by Article 239, but, in the writer's respectful submission, it was also a right and proper view that an endeavour should be made, in the first instance, to bring about by conciliation a voluntary agreement between the parties, without, of course, prejudicing in any way the legal position arising out of the pending arbitration. As soon as it was ascertained that a direct agreement between the parties was impracticable, recourse could and should be had to Article 239. If it is said that the Council was entitled under Article 11 and bound under Article 239 to satisfy itself as to the Tribunal's jurisdiction to entertain the claims, the answer is, as we have endeavoured to explain, that this point was clear beyond the possibility of doubt, and it is to be remembered that jurists consulted by the Committee of the Council answered this question in the affirmative. †

It is not the purpose of the present article to criticise the action of the Council, and it is recognized that it was faced with a delicate task in giving due weight both to Article 11 of the Covenant and Article 239 of the Treaty. But the fundamental factor of the whole case was this: that Hungary relied upon an arbitral agreement and decision, which Roumania repudiated. In these circumstances it is unfortunate that by delay and by some of the proceedings of the Council the impression should have been given that the League can be used as an instrument for evading obligations resulting from a submission to arbitration, or that its intervention can be sought to undermine the authority and independence of an international arbitral tribunal. It is to be hoped that if the latest attempt to arrive at a compromise under Article 11 of the Covenant fails, the Council will, without further delay, perform the duty imposed upon it by Article 239 of the Treaty and thereby enable the Mixed Arbitral Tribunal to function and render its final award. By so doing the sanctity of international arbitration will have been upheld and the Hungarian claimants will have obtained the impartial decision upon their claims to which the Treaty entitles them. If the final award is adverse to them, there will be an end to this dispute. If it is in their favour it may be hoped that the Roumanian Government will reconsider the position and decide to comply. Should it not do so the League of Nations might be called upon again to deal with the matter, but it would do so in full possession of the facts judicially investigated and of the Tribunal's final decision, with a better prospect of success.

One word in conclusion. It has been said, on the Roumanian side, that this is a case in which the law may be doubtful, as shown by the conflicting legal opinions obtained, but that what is described as

† See pp. 6, 8 *Supra*.

“equity” supports the Roumanian contentions. This point of view is entirely unfounded. In the first place there is, in fact, no conflict between law and “equity”—by which is meant in this connection substantial, or natural, justice. “Equity,” no less than law, requires that the independent tribunal provided for by Article 250 should be allowed to decide whether or not the expropriation of the Hungarian claimants was contrary to the Treaty. What the Roumanian Government really relies upon and has appealed to throughout this dispute are political considerations, and the issue stripped of all technicalities is simply this: Whether political considerations are to override the legal obligations arising out of the submission to arbitration? The principle involved extends far beyond the interests immediately concerned, and is vital to the League of Nations and the future of international relations, but it is entirely free from difficulty and no amount of legal subtlety can render the answer doubtful. The only legal question of a technical kind in this case is that of the jurisdiction of the Mixed Arbitral Tribunal under the Treaty to entertain the Hungarian claims, and most of the lawyers referred to by the Roumanian Government refrain from dealing with this point on its merits, because the negative view is unarguable. It is idle to suggest that this is an open question admitting of conflicting opinions. If the facts are truly stated only one answer is possible as a matter of law, and once this point is established the other conclusions inevitably follow.

ALEXANDER P. FACHIRI.

Temple, May, 1928.

Translated from the Italian.

THE POWERS OF THE COUNCIL OF THE LEAGUE OF NATIONS IN THE APPOINTMENT OF MEMBERS OF THE MIXED ARBITRAL TRIBUNALS.

(In connection with the Controversy on the application of the Roumanian Agrarian Reform to the Hungarian Optants in Transylvania.)

OPINION

of MANLIO UDINA,

Professor of International Law at the Royal University of Trieste.

The application on the part of Roumania of the Agrarian Law of the 30th July, 1921, in the territory of Hungary, ceded to her by the Treaty of Trianon, which came into force on the 26th June of the same year, has given rise to a controversy between the two states, which has been dragging on already for several years, and will, without doubt, remain memorable in the history of international relations.

The subject and the development of the controversy are too well known to tempt us even to give only a summary of them, and still less to study them as a whole on our own account, in spite of the abundant literature to which they have given rise. Here we shall rather limit ourselves to some short observations on certain of their aspects in the most recent phase, and, above all, in relation to the jurisdiction of the Council of the League of Nations with regard to the appointment of Members of the Mixed Arbitral Tribunals.

I

Article 304 (a) of the Treaty of Versailles and the corresponding articles in the other Treaties of Peace¹ govern the method of constituting such tribunals, which are entrusted with the duty of deciding questions relating especially to private property, rights and interests, which have been referred to them by the Treaties themselves.

“ Within three months from the date of the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may, in case of need, take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustave Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.

If any Government does not proceed within a period of one month, in case there is a vacancy, to appoint a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above, other than the President.”

And paragraph 1 of the Annex to Article 304 adds: “ Should one of the members of the Tribunal either die, retire, or be unable for

¹ Art. 256 (a) Tr. St. Germain, 239 (a) Tr. Trianon, and 188 (a) Tr. Neuilly, which are textual reproductions of it; and Art. 92 Tr. Lausanne, with some variations.

any reason whatever to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him."

The co-operation of the Council of the League of Nations in the appointment of individual Arbitrators or in the constitution of Arbitral Tribunals and International Commissions is a sufficiently common case with regard to the recent treaties of peace,² nor need this fact cause astonishment when we think of the principal object of the League, which is to facilitate a peaceful life as between states: among the general attributions of the League connected with this object may certainly be accounted this kind of co-operation, or better, help in favour of third parties. It is certain, at all events, that, among all the cases in question, that of Article 304a is perhaps the most important, in view of the large number of organs for the functioning of which the League may be bound actually to provide, and in view of their most important attributions.

II

In order to define the character of such co-operation of the Council of the League of Nations in the constitution of Mixed Arbitral Tribunals, it is necessary to distinguish well the various hypotheses which may arise. These may be:—

1. (a) The nomination of the President of the Tribunal in case of disagreement between the parties which have constituted it.
- (b) The nomination of two eventual substitutes for the President, and for the members not appointed by the interested Government itself within a month of the occurrence of the vacancy, when the case above mentioned occurs simultaneously.
2. The nomination of two eventual substitutes for the President and for the members, when the case referred to in 1 (a) does not occur, before the occurrence of the vacancy.
3. The nomination of substitute members as such vacancy occurs.

In reality the nomination by the Council takes place directly only in the cases referred to in 1 (a). In other cases it takes place only indirectly, intermediately, because the party that selects between the two members named by the Council, and therefore in reality appoints, is the state to which the member remaining in function belongs, if it is a case of providing for the nomination in the place of one member respectively belonging to the two interested states.³ In practice the

² See List of these in Schuecking-Wehberg, *Die Satzung des Voelkerbundes*, Second Edition, Berlin 1924, pp. 321-322.

³ On the other hand, by the Treaty of Lausanne, the appointment of the President is made, in case of disagreement between the two parties, by the President of the Permanent Court of International Justice of The Hague (Article 92, par. III), while the national member, who has not been appointed within two months of the coming into force of the Treaty, is appointed by the Council of the League of Nations (par. IV). The same rule holds for the member who is deceased or has resigned, or who for any other reason whatever cannot discharge his functions. The time begins to run from the day of the decease, resignation, or inability to act duly established (par. V).

cases which may arise are various, and it cannot be said on this point that the text of Article 304a is a model of lucidity: in fact, it provides expressly only for the nomination of the President and of the two substitutes, when there is a disagreement as to the nomination of the first. The other cases are ruled by the general provisions of paragraph 1 of the Annex, according to which the same procedure is always to be observed for filling the vacancy as was followed for the appointment of the missing member. On the other hand, it emerges from the whole tenor of the provisions, that, in any case, the vacancy, granted certain premises, must be provided for by the nomination of persons chosen by the Council. Thus it happened that the Council was called upon to exercise its function, precisely in connection with the hypothesis, not expressly, but only indirectly provided: (a) the nomination of substitute arbitrators to fill a vacancy which has occurred—excluding the President⁴; (b) the previous appointment of substitute arbitrators, excluding the President.⁵ Setting aside other doubts which might arise with regard to § 1 of the Annex, it is clear that when the Tribunal is not in a position to function owing to defect in its composition, the Council must provide for putting it into a position to fulfil its office.

Now, it is evident that, in the various cases foreseen, the function of the Council may be regarded in different ways. But it is always an administrative function sometimes after an attempt to effect an amicable settlement by reciprocal agreement between the parties.⁶

III

One Preliminary question: What is the value of these dispositions of the treaties of peace concerning the attributions of the Council of the League of Nations in respect of the composition of the Mixed Arbitral Tribunals?

Before all, there is no doubt that they have a full force of obligation for the states which, two by two, have materially constituted the Mixed Arbitral Tribunals. Neither the one nor the other of the two states, and not even the two together, could evade observation of the rules in question. It is true that these dispositions can be, essentially, considered as the "compromise," on the basis

⁴ The appointment of two substitute members for each of the sections of the Franco-German Mixed Arbitral Tribunal and for the Belgo-German Mixed Arbitral Tribunal, which took place at the meetings mentioned (see Note 2), in consequence of vacancies which had occurred, owing to the non-participation of the German arbitrators in the work of the two Tribunals in consequence of the occupation of the Ruhr district; and now the request for appointment on the part of the Hungarian Government, by a letter directed to the Secretary-General of the League of Nations on May 17th, 1927 (*Doc. C. 195, 1927*), in consequence of the withdrawal of the Roumanian Arbitrator for the well-known judgment on the jurisdiction of the Roumanian-Hungarian Mixed Arbitral Tribunal in connection with the application of the Agrarian Reform in Transylvania.

⁵ The appointment of two substitute arbitrators for each of the Mixed Arbitral Tribunals: Franco-Austrian, Franco-Bulgarian, Franco-Hungarian, Belgo-Austrian, Belgo-Bulgarian, and Belgo-Hungarian, which took place at the meetings of the 3rd February and the 17th April, 1923 (See *Official Journal of the League of Nations, 1923*, pp. 249, 555 and 599).

⁶ *Dupuis, Le différend roumano-hongrois au Conseil de la Société des Nations en septembre 1927*, extract from *La Revue de Droit International, 1927*, pp. 19-20, speaks of a "supplementary rôle of organisation," likening it, in a not too exact comparison, to the function which would devolve on the Minister of Justice in the internal rules in respect of judicial organisation.

of which the arbitral organ has been constituted (it might even be more accurate to say that the true compromise is stipulated later, when the Tribunal is actually constituted between the parties, while the relative rules of the Treaty are only its premises), but it would be a question of a very special compromise; more exactly, there would be a collective treaty which could be regarded as consisting, theoretically, in so many individual compromises between the states, which, two by two, constitute the organ, but which, in any case, could not be changed by the single states without the complete agreement of all the other contracting parties.⁷ Hence, the states, which have constituted the tribunal, must, as a matter of obligation, adhere to the dispositions of the Treaty in all that concerns its composition.

Can the same be said with regard to the Council of the League of Nations? Here the answer cannot be categorical to the same extent, but in any case we believe that it should be affirmative. In particular, in respect of the Roumano-Hungarian controversy, the doubt has been recently raised by an able writer⁸ whether Article 304 of the Treaty of Versailles does not confer on the Council of the League of Nations a right rather than an obligation. According to him, from the point of view of the League of Nations, subject to law, a treaty in force between the other subjects to law, and especially the Treaty of Trianon, is a *res inter alios acta*, and it would always depend on the free-will of the League to accept or not the offer to appoint arbitrators. The argument cannot be exhausted in a few words, and involves the solution of the more general question concerning the relations between the Covenant of the League of Nations and the Treaties of Peace, in which it was included.⁹ But we do not believe, however, that there is a purely external relation between the other parts of the Treaties of Peace and the Covenant, which nevertheless is an integral part of them. The Treaties of Peace constitute in effect the birth certificate of the new subject of international law; they

⁷ On this point somebody has been able to attach the bold thesis that the dispositions of the Treaty could not be changed by the States because they deal with guaranteeing individual rights, establishing a valuable precedent in the evolution of International Law, leading to the admission of the capacity of the individual to establish his rights directly before the true and proper International Courts (Scelle, *L'arrêt du 10 janvier 1927 du Tribunal arbitral mixte roumano-hongrois dans les affaires dites "agraires" et le droit international*, in "La Revue générale de droit international public," 1927, p. 424). Certainly the position of the individual in the case of the Mixed Arbitral Tribunal deserves attentive study. But nothing even here prevents us from holding that the matter is, always and solely, one of reciprocal pledges between the States, directed to allow their respective citizens the exercise of certain rights, which, for this reason, will never be directly founded on the Treaties but on internal Laws, which put them into force; and this apart from the consideration that, as common organs, the Mixed Arbitral Tribunals could have, for private persons, the character even of special internal jurisdictions.

⁸ Strupp, *Le litige roumano-hongrois concernant les optants hongrois en territoire roumain*, Paris, 1927, p. 12 sqq. Cf. also the Speech of M. Titulesco, the Roumanian Delegate, at the Afternoon Sitting of the Council of the League of Nations, of the 17th September, 1927 (*Official Journal*, 1927, p. 1392).

⁹ With regard to this argument, see, among others: Meurer, *Die Grundlügen des Versailler Friedens und der Völkerbund*, Berlin, 1919, p. 105; Krauss, *Der Völkerbund und die Friedensverträge*, Berlin, 1920, p. 22; Scelle in Munch, *Les origines et l'œuvre de la Société des Nations*, vol. I, Copenhagen, 1923, p. 85 dqq.; Schücking-Wehberg, *op. cit.* p. 27 sqq.; Liszt Fleischmann, *Völkerrecht*, 12th Ed., Berlin, 1925, pp. 391-392; and also Strupp, *Eléments du droit international public universel, européen et américain*, Paris, 1927, p. 288, which, however, here propounds the slightly different thesis, which is without doubt erroneous in the view of anyone who considers the League of Nations as a subject of law, that the other dispositions of the Treaties of Peace, except the Covenant, do not bind also the members of the League who have not signed them.

represent its constituent covenant, and as they confer on it the various rights with which it will be invested when they enter into force, so they impose on it the duties, without it being possible to draw a distinction, according to that part of the treaty in which the rights and duties of the League are conspicuously placed.¹⁰ Certainly, an objection might be raised: this new subject could not have arisen four times, *i.e.*, at the coming into force of all four Treaties of Peace, in which the Covenant of the League of Nations is included, but—if ever—once only, *i.e.*, on the 10th January, 1920, the date of the coming into force of the first among them; that of Versailles in relation to which the Treaties successive to its birth would really be *res inter alios actæ*. This line of argument, however, valid with regard to all the other Treaties succeeding the constitution of the League of Nations, could not be accepted without reserve in respect of the Treaties of Peace of the years 1919-1920, which aimed at creating, and, in fact, have created one single system (as is proved by the very inclusion among them of the Covenant), which, for purely contingent reasons, could not be brought into being on the same day: while it was evidently the intention of the creators of the League of Nations that all the rights and obligations—in any case almost all analagous in respect of their contents, as they are in our case—figuring in the other Treaties of Peace, should have the same validity for them; and it is specifically the Council itself that is bound in this case, to the exclusion of any other organ of the League.

On the strength of these considerations, it does not seem to us even necessary to find support in the literal argument invoked by others:¹ while with regard to M. Gustave Ador, on whom was conferred the appointment of the members of the tribunal up to the moment in which the League should commence to function, there are added the words: "if he is willing"—and rightly so, because on him, a private person, a third party stranger to the Treaty, the dispositions could have no obligatory force—with regard to the Council of the League of Nations it is simply said that the said members "shall be chosen" by it, and that is enough.

IV.

Having thus established the obligatory nature of the rules inserted in the Treaties of Peace on the composition of the Mixed Arbitral Tribunals, whether by the pairs of states which, together, have constituted them, or by the Council of the League of Nations, it remains for us to see in what way the interested parties should remedy, by new appointments, the defects of composition of the Mixed Arbitral Tribunals.

First of all, must the Council of the League of Nations provide, officially, for the appointment of the President and the substitutes, or should a request be made to it? The Text of the Treaty does not exclude that both cases may arise. In practice, however, it is natural that the Council should proceed at the instance of the states directly interested; but, the hypothesis **annot** be excluded that the Council

¹⁰ Cf. also Dupuis, *op. cit.* pp. 48-49, and Verdross, *Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte und Gerichte über ihre Zuständigkeit*, extract from "Zeitschrift f. öff. Recht," 1928, pp. 10-11. For other numerous examples of the duties imposed on the League in other parts of the Treaties of Peace, see: Schücking-Wehberg, *op. cit.*, p. 35 sqq.

¹ Dupuis, *op. cit.*, p. 19; Verdross, *op. cit.*, p. 10.

may be invited to avail itself of its rights and at the same time to fulfil its duties, even by third states, signatories of the Treaty, who might have a reason for desiring that the Mixed Arbitral Tribunals, created in consequence of the common Covenant, should function. When the appointment of the President is in question, it is obvious that it will be the Governments of the two states in disagreement, or even only one of them, which might cause the Council to intervene. If, on the other hand, it is a question of the appointment of the substitute judges, it might be thought that the duty of invoking the intervention of the Council would devolve upon the President of the Tribunal when this is in office. *Vice versa*, from the spirit of the dispositions of the Treaty on this point and from the practice that has obtained up to now, the opinion would seem more acceptable that such a duty devolves, indifferently, upon the Government of that state that is interested in filling the vacancy, when it occurs, or in preventing it.²

Seized with the demand to take steps for the constitution of the Mixed Arbitral Tribunal, or having decided of its own initiative to take steps therefor, what procedure should the Council follow in the appointment? Here, too, we must distinguish between the various hypotheses which may arise. The simplest case is that of the appointment of the President. Here the Council will have to establish only that it is a case of a Mixed Arbitral Tribunal, the constitution of which has been begun within the meaning of the dispositions concerning the same in the Treaties of Peace, and that there is a disagreement between the parties. Its right of choice has, however, limits. It must be exercised only within the number of persons belonging to states which remained neutral during the war (in addition, be it understood, to having the qualifications for exercising its office according to principles, which, being implied in every stipulation relating to the constitution of arbitral organs, had no need to be expressed in the Treaty). And again, the choice might fall on persons regarding whom the states had at first been in disagreement, even if it is likely that the Council would consider it to be an elementary rule of correctness to let the choice fall upon others. From all this it results that the function of the Council has not the character of being purely and simply automatic, as has been objected by several.³ As it is thus manifestly a question of a "*décision concernant des personnes*"⁴ it is clear that, either for the appointment of the President, or for that of the substitute members, it is sufficient for the Council to decide by an absolute majority of votes. Only, however, in regard to the first appointment of the President are we confronted with a unilateral and direct act of the Council. In every other case the appointments of the President and of the members are complex actions, consisting of the designation of the substitutes by the Council itself and of the choice made between them on the part of the two Governments of the states which have constituted the Tribunal, if it is a question of substituting the President, or on the part of

² Thus in Art. 92 of the Treaty of Lausanne it is clearly laid down that the appointments are made "*à la demande d'un des Gouvernements intéressés*," when it is a question of the President, or "*à la demande de l'autre Gouvernement intéressé*," when one of the two States has not taken steps for the appointment of its own arbitrator within the period fixed.

³ For example, among others, by Prudhomme, *Rôle et pouvoir du Conseil de la Société des Nations dans le différend roumano-hongrois*, in "*Journal du droit international*," 1927, pp. 861, 863. See also speech of Titulesco, *loc. cit.*

⁴ Cf. Art. 9 of the "*Règlement intérieur du Conseil de la Société des Nations*," passed at the sitting of the Council at Rome, 17th May, 1920 (*Official Journal*, 1920, p. 274).

the Government which keeps its arbitrator in office, when providing for another arbitrator in consequence of a vacancy. To provide against the occurrence of both hypotheses, in fact, the Council is obliged, when it has appointed a President because of disagreement between the parties, to designate also two substitutes.

This seems to be true also in the case in which the Council has not previously appointed the two substitute judges—not having been obliged to appoint the President—but has been called upon to provide for a vacancy which had occurred in the normal composition of the Tribunal. In such a case, even if it is not said expressly and by analogy with what has been laid down in the hypothesis of the appointment of the President, it must be considered that the Council will, appoint two substitutes as well,⁵ from among whom, then, it will always be possible for the Government of that state which has maintained its arbitrator in office to make, in conformity with the spirit of the dispositions of the Treaty relating thereto, its free selection. Thus, in conformity with this spirit of the Treaty, the conclusion would be reached, logically, that, no sooner has one of the two substitutes been appointed to the vacant post by the Government interested, than the Council should be invited to appoint another, in order to preserve the liberty of choice for that one among the two Governments which in future might be interested in providing for a new vacancy.

But rather, doubt may arise regarding the request for the designation of two substitute members when the vacancy does not occur. In the strict sense of the word, no obligation to do so devolves on the Council, which can, at its discretion, decide to accede, or not, to the request until the vacancy has occurred.⁶ It is, nevertheless, comprehensible that the Council, here also, as it has before done,⁷ might at once accede to the request by proceeding to the designation, which in such a case may offer still better guarantees of impartiality, and may spare the Tribunal the interruptions of its functions, which, otherwise, would be inevitable, when the designation is made only after the occurrence of the vacancy. As a corollary, we may add that

⁵ This happened in the cases quoted of the Franco-German and Belgo-German Mixed Arbitral Tribunals, and it was asked for by the Hungarian Government to complete the Roumano-Hungarian Mixed Arbitral Tribunal (*Doc. cit.* and following note).

⁶ For this reason the interpretation given by President Poincaré of Art. 304 (a) of the Treaty of Versailles and the corresponding Articles of the Treaties of Peace seems inaccurate: letter directed on the 28th January, 1923, to the President of the Council of the League of Nations to obtain the appointment of substitutes in the tribunals in which France was to participate: "Aux termes de ces articles, il appartient au Conseil de la Société des Nations de choisir pour chaque Tribunal arbitral mixte ou pour chaque Section autonome deux personnes susceptibles, en cas de besoin, de remplacer le Président ou, le cas échéant, un Arbitre national. Messieurs les Présidents des Tribunaux arbitraux mixtes ayant constaté l'omission de cette désignation, etc." (*Doc. C. 101, 1923*). See also letter of the 26th February, 1923, directed to the President of the Council by the Belgian Minister of Foreign Affairs for the designation of the other substitute arbitrators for the Mixed Arbitral Tribunals, in which Belgium was to participate (*Doc. C. 197, 1923 V*). And the same is said in the Reports: Blanco (*Official Journal, 1923, p. 399, An. 476 Doc. C. 128, 1923*) and Guani (*Official Journal, 1923, p. 629, An. 482 Doc. C., 1923*), submitted to the Council on the 3rd February and the 17th April, 1923, respectively, in which the designations in question are proposed: "Pour le choix des présidents des Tribunaux arbitraux mixtes, on n'a pas eu besoin de recourir à l'intervention de la Société des Nations. Il reste toutefois à pourvoir au choix des suppléants prévus par les Tribunaux. Il appartient au Conseil de dresser les listes des personnes parmi lesquelles ce choix devrait éventuellement se faire."

⁷ The above cited case of the Franco-German and Belgo-German Mixed Arbitral Tribunals.

the Council has no obligation to verify the vacancy, when it decides to proceed to make the requested appointment, it being sufficient to state that the Mixed Arbitral Tribunal does not yet comprise the sufficient number (two) of substitute members previously designated by the Council itself; whereas such obligation does exist, even when it is not willing to consent to the appointment asked for, because once the vacancy has been confirmed, the appointment becomes obligatory. And, for a vacancy to exist, it is sufficient that one arbitrator is unable or unwilling to take part in the discussion of even one matter only, in this way hampering the functioning of the Tribunal with regard to this case during a certain period. It is not in the least necessary that the impossibility of functioning should effect all the cases, pending or to be brought before the Tribunal itself in the future.⁸ It is naturally understood, that, in such cases, it will always be the Government interested in which will allege, or not allege, the vacancy with a view to the requested designation of the substitutes.

V.

Everything that has been written above may apply well in the majority of cases, but perhaps not always. There is no doubt that when proceeding to the appointment of the President of the Mixed Arbitral Tribunal in the case of a disagreement between the parties, and of two substitute members, or only of these two (before the occurrence of the vacancy), the Council of the League of Nations only has to examine its own jurisdiction on the basis of the text of the Treaty. The same may be said when, in normal circumstances, the appointment of substitute members has been asked for to provide for a vacancy already confirmed. But when, in this last case, one state raises an objection to the request of the other, must the Council decide on the appointment only, or also give judgment on the objection? As has been brilliantly argued by Bruns,⁹ we believe that the Council must pronounce judgment on the objection also. This might concern the jurisdiction of the Council itself, especially as it is not itself responsible for examining into the case, and it might concern the cause for which the request for the appointment of the arbitrator has been made. It is admitted that, in the first case, the Council should forthwith give judgment on the specific ground of lack of jurisdiction alleged by the state interested. In the second case, the cause, for which the one State asks for the designation of the arbitrator, may be claimed by the other to be inadmissible. Inadmissible, for example, in so far as, in consequence of the appointment of the arbitrator, an activity, not permissible under International Law, might be conferred on the Tribunal and indirectly on one of the states to the detriment of the other. Hence the necessity for the Council—which would run the risk, through its decision, of authorising and causing to be done illicit acts—to give a judgment, in the first instance, on the existence of the illegality ascribed to the demand of the state making the request. In any case, however, it would be the existence of the illegality which

⁸ This results in a more striking way, when the dispositions of Art. 304 (a), together with those of § 1 of its Annex are considered together. Similarly, Dupuis, "*Observations sur la séance du Conseil de la Société des Nations du 7 mars 1927 et sur les thèses roumaine et hongroise*", Paris, 1927, pp. 29-32. The Roumanian Delegate, M. Titulesco, seems, however, to pronounce in a contrary sense in his speech cited above (*Official Journal*, 1927, p. 1391).

⁹ Bruns, *Gutachten über die Fragen der Ernennung der Ersatzrichter zum ungarisch-rumanischen Schiedsgericht durch den Völkerbundsrat*, Berlin, 1928, pp. 4-5.

would have to be proved and not its non-existence, because the illegality could not be presumed.¹

In the case that arose in concrete form before the Council of the League of Nations, in consequence of the Hungarian request, formally put forward on the 21st May, 1927,² that the Council should at its sitting of June, proceed to the appointment of two substitute arbitrators, in accordance with Art. 239 (a) of the Treaty of Trianon, Roumania actually invited the Council not to proceed to the designation, alleging usurpation of jurisdiction to have been committed by the Roumano-Hungarian Mixed Arbitral Tribunal on the 10th Jan., 1927, in the judgment in which it admitted its own jurisdiction to pronounce on the expropriations decreed by the Roumanian Agrarian Reform, even in respect of the Hungarian optants of Transylvania, decisions, in consequence of which the Roumanian Arbitrator had been withdrawn. If this had been proved, the Council, by proceeding nevertheless to the designation would have found itself in the position of helping the Tribunal to commit, in a later judgment on the merits (as much vitiated as that on the point of jurisdiction), an internationally illegal act to the damage of Roumania. The Council could not have wished this, and therefore a pronouncement on the objection advanced by the latter State would become necessary. But it will be said: as the act of the Tribunal, inadmissible in International Law, is a consequence of the usurpation of jurisdiction, committed in the judgment on jurisdiction, you have the necessity of a pronouncement even on it; you have the Council, which by its nature cannot be a judicial instance, becoming one! This does not seem right. First of all, there is no juridical impossibility that the Council of the League of Nations could assume arbitral or judicial functions: there are already sufficiently numerous cases, in which it functions truly and actually as an arbitral organ in a number of controversies referred to its eventual decision in various dispositions of "the recent international treaties"³; and it is always possible that the parties that constitute an arbitral tribunal should decide on a compromise to entrust it with the function of an organ of revision and appeal from judgments in question. The separation of powers, as can never be completely brought about in the internal laws of the various States, could so much the less be invoked, as has been done⁴ in the sphere of international law, to deduce from it the impossibility of the Council of the League of Nations exercising judicial or arbitral functions.⁵ It is a fact nevertheless that Art. 239 of

¹ It is doubtful whether the two cases presented could, or could not be considered as preliminary questions to those considered to be of procedure, and whether the Council should give judgment by a simple absolute majority, or should not rather be subject to the rule of unanimity (on this point, see Article 5, paragraph 1, of the Covenant of the League of Nations, and Article 8, paragraph 1, of the Internal Rules of the Council of the League of Nations). Cf. in a different sense, Bruns, *op. cit.*, pp. 6-7, and Schuecking-Wehberg, *op. cit.*, pp. 336-337.

² *Doc. C. 195, 1927*. See, however, the proposal for a resolution that the Hungarian Delegate Gajzágó brought forward at the afternoon sitting of the Council of the League of Nations of the 7th March, 1927 (*Official Journal, 1927*, pp. 369-370).

³ See the examples in Schuecking-Wehberg, *op. cit.*, pp. 320-321.

⁴ Speech of the Hungarian Delegate Apponyi at the afternoon sitting of the Council of the League of Nations of the 17th September, 1927 (*Official Journal, 1927*, p. 1387).

⁵ But there is a great difference between this and admitting certain theories, more or less emphatic, on the omnipotence of the Council of the League of Nations (as, for example, those of Politis, *La Société des Nations et les Tribunaux arbitraux mixtes*, in the "*Revue bleu*," 19th November, 1927; those of Prudhomme, *op. cit.*, p. 865 sqq., of Wahl, *La question des optants hongrois et la Société des Nations*, in "*Revue pol. et parlementaire*," 10th November, 1927, or of Titulesco, in his previously mentioned speech, p. 1390), in view of the maintenance of peace.

the Treaty of Trianon and the corresponding Articles of the other treaties of peace do not contemplate, absolutely, the possibility of such jurisdiction of the Council of the League of Nations, and even exclude it in silence, because in order to affirm it, it should have been expressly established.⁶ But, in reality, the Council of the League of Nations, in the case under examination, would not, in effect, pronounce judgment on the sentence of the Mixed Arbitral Tribunal as such; it would not, in fact, set itself up as a court of appeal for it. It would make pronouncements only on the motive of nullity alleged by Roumania, not in order to declare the nullity of the sentence, which would remain definite in accordance with the dispositions of Article 239 (g), and on the intrinsic justice of which no pronouncement would be possible, but to decide whether to nominate the substitute member or not, because in order to nominate him, it must convince itself of the non-existence of the motive which would render internationally inadmissible the judgment on the merits, which presumably would be delivered following upon the judgment on jurisdiction. Let it be said "presumably" because the sentence on jurisdiction may well constitute a presumption upon the matters of fact which might form the subject of the judgment on the merits on the part of the Tribunal as newly constituted.

Therefore, according to the Roumanian thesis, the Tribunal would have committed that which, in accordance with the formula current to-day, is called "usurpation of jurisdiction," in spite of the impropriety of the expression, and in spite of the diverse meanings which it assumes in the various national legislations.⁷ Thus, for example, to limit ourselves to the legislation, with which we are most intimately acquainted—the Italian—the lack of jurisdiction of the judge is, according to the generally accepted distinction in theory, the usurpation of the attributions of an organ of the same order; and usurpation of jurisdiction in a jurisdictional act is the usurpation of the attributions of an organ of another order¹; or, in other words, by lack of jurisdiction we must understand the exercise of a jurisdictional function by a jurisdictional authority, different from that confided to it, and by usurpation of jurisdiction, the exercise of a jurisdictional function by a non-jurisdictional authority.² In International Law there is no doubt that what Verdross has described as a "formal" usurpation of jurisdiction, in contradistinction to a material usurpation of jurisdiction, must first be dealt with.³ In order to be held to be vitiated by usurpa-

⁶ And it is useless to add, as Bruns does, *op. cit.*, pp. 3-4, that in the opposite case one would have the absurdity of one person such as M. Gustav Ador, being made an organ of revision of the sentence of a court: the case would be singular, indeed, but not altogether absurd.

⁷ On the idea of "Excess of Powers" in French Law, see: *Fleischmann, Zum ungarisch-rumänischen Optantstreit*, in "Zeitschrift für Ostrecht," 1928, pp. 279-280, and for German legislation: W. Jellinek, *Verwaltungsrecht*, 1928, p. 237 and p. 261 sqq. On the general question see further the extensive work of Lapradelle, *L'excès de pouvoir de l'arbitre*, in "Revue de droit international," pp. 5-64.

¹ Chiofenda, *Principi di diritto processuale civile*, 3rd Ed., Naples, 1923, p. 371.

² Romano, *Le giurisdizioni speciali amministrative* (in Orlando, *Primo trattato completo di diritto amministrativo italiano*, Vol. III), Milan, 1901, p. 1248.

³ Verdross, *op. cit.*, pp. 6-7. See further the observations of Anzilotti, *Corso di diritto internazionale*, Vol. III, Rome, 1915, pp. 129-131.

tion of jurisdiction and therefore void or non-existent—or, perhaps, more exactly, for the agreement which settles the controversy to be held to be void and non-existent⁴—the sentence of the arbitrator must constitute a true and actual exceeding of the limits of the compromise. Without a doubt, the Roumanian-Hungarian Mixed Arbitral Tribunal had—as, generally speaking, have all Arbitral Tribunals—the jurisdiction to give judgment on its own competence.⁵ It would have done this, if it had strictly adhered to the dispositions of the Treaty, interpreting the disposition invoked by private parties (Art. 250 of the Treaty of Trianon), a disposition which indeed attributed a jurisdiction to the tribunal itself: hence, no formal usurpation of jurisdiction. But let us admit that it is possible also to consider even material usurpation of jurisdiction. Now the Tribunal in the judgment on jurisdiction was bound to consider, simply, whether the measures taken in consequence of the Agrarian Reform with regard to the landed property of the optants could be included among the liquidations referred to in Article 250 of the Treaty of Trianon, not whether they were included in it without further ado.⁶ This could be said only in the judgment on the merits of the case, which might also lead to different conclusions. From this point of view the sentence seems to us to be irreproachable. If there is usurpation of jurisdiction it should be—according to the overwhelming majority of writers—manifest, evident, flagrant, indubitable, etc.⁷ And here this is not absolutely the case, but this naturally still does not prejudice the question of the merits.⁸ But, this once established, it only remains for the Council of

⁴ For a clear distinction between the two and the Arbitral Code, see Anzilotti, *op. cit.*, p. 110 *et seq.*

⁵ And also when Zitelmann, *Zwischenstaatliche Gerichtsbarkeit und die Gemischten Schiedsgerichtshoefe des Versailler Vertrags*, in the *Niemeyers Zeitschrift fuer internationales Recht*, Vol. XXX, 1923, p. 318 *et seq.*, denies that these have "jurisdiction-jurisdiction," and only refers to the case in which the determination of jurisdiction is vitiated by formal usurpation of jurisdiction, i.e., it exceeds the limits laid down in the compromise. Therefore, strictly speaking, the Franco-German Mixed Arbitral Tribunal in Art. 87 of its Rules for Procedure of the 20th April, 1920 (*Official Journal*, 14th January, 1921), and following its example almost all the other Mixed Arbitral Tribunals, was able to establish that "*le tribunal détermine sa compétence en interprétant le Traité*," not only that, but the Italo-Austrian Mixed Arbitral Tribunal and the others in which Italy participates, establishing in Art. 2 of its Rules of Procedure of the 1st January, 1922, revised in 1924 (*Gazz. Uff.*, 15th May, 1924) that "the Tribunal has jurisdiction to judge the controversies which are referred to it under the terms of the Treaty," was able to add, with far greater force, that "it is the only judge of its own jurisdiction, which also it examines officially."

⁶ And that the expropriations, in consequence of the Agrarian Reform, could be included among the provisions for liquidation, of which Art. 250 speaks, is admitted in the Report of Chamberlain, presented to the Council of the League of Nations at the morning sitting of the 17th September, 1927 (*Official Journal*, 1927, p. 1382, and Soc. C. 489, 1927, VII).

⁷ For the rest, the Council expressed itself already in this sense also in the question of the Greco-Turkish frontiers along the Maritza (*Official Journal*, 1926, p. 530).

⁸ And that is to say: Are, or are not, the expropriations on the strength of the Agrarian Laws included in the liquidations which are referred to in Art. 250? And in the affirmative case, must the expropriated lands be restored or is a fair indemnity necessary in their case, and, if so, to what extent? Further, this is without prejudice to the other very grave questions which may arise in case of a negative answer in the judgment on the merits: if the restitution or the fair indemnity in the cases thus provided for, is not governed by Art. 250, has the Mixed Arbitral Tribunal jurisdiction—which we believe it has—to judge according to the principles of Common International Law? And do these principles of Common International Law guarantee—as we believe—a minimum of rights to foreigners, even when this minimum is exceeded for the nationals?

the League of Nations to proceed to the appointment of the two substitute members, so as to permit the Tribunal to function.

VI

The procedure for the appointment of the substitute judges in the case of the Roumano-Hungarian controversy is, however, singularly complicated by the parallel development of another procedure: that which was caused by Roumania herself, on the basis of Art. II, para. 2 of the Covenant of the League of Nations, giving notice to the Council of the communication addressed on the 24th February, 1927, to the President of the Mixed Arbitral Tribunal for the withdrawal of the Roumanian Arbitrator. In consequence of this request, the Council was in a position to exercise its offices as mediator to solve, in a friendly manner, and extra-judicially, the dispute under examination. The one procedure, brought forward on the basis of the proper and special attributions of the Council, did not exclude the other, presented on the basis of the concurrent and general attributions of the Council of the Assembly; but, if anything, the first would have excluded the second, and not vice versa, as has been maintained by some.⁹ Their exercise could have been simultaneous or successive, but, in any case, it should have been kept distinct, contrary to what actually happened, with the consequence that political elements have frequently intruded on the juridical debate and vice-versa. It is thus, for example, that at a certain point the Council considered itself almost authorised to dictate a law, which should have been applied by the tribunal, following upon that Chamberlain Report, which, if accepted in its integrity, would have constituted a judicial monstrosity. The appointment of the arbitrator, which was to be made unconditionally, when the Council had established its own competence and the baselessness of the accusation against the claimant of the other states, would, on the other hand, have been subordinated to the acceptance on the part of the two states and, indirectly, on the part of the Mixed Arbitral Tribunal—which, vice versa, would not, in any case, have involved the obligation to accept, even when the parties had been in agreement about it—of the Law applicable to the cases under discussion on the strength of a presumed interpretation of the Treaty, for which the Council itself had no jurisdiction.¹ But it is very true that then, the sanctioning part not having been accepted, the Council transformed the propositions of the Report into a simple basis of agreement for the parties.²

The last proposals of the Council, made in the usual form of a recommendation not binding on the parties, at the sitting of the 9th March, 1928, are: "That the Council should name two persons,

⁹ Capitant et Troabas, *L'excès de pouvoir du Tribunal arbitral mixte et la compétence du Conseil de la Société des Nations dans l'affaire des optants hongrois*, in "*Revue gén. de droit international public*," 1928, pp. 47-48.

¹ In fact, such a task would finally have devolved on the collectivity of the States signatories of the Treaty of Trianon, in which the League of Nations and a large number of its members did not participate.

² This, above all, in consequence of the declarations of some of the Members of the Council (Stresemann, Scialoja, Loudon, Urrutia, Voionmaa), tacitly accepted by the others in the afternoon sitting of the 19th September, 1927 (cf. *Official Journal*, 1927, pp. 1410-1413). Some time later, i.e., at the 49th sitting of the Council, which took place in March, 1928, someone (Briand) expressed the opinion, rejected by others (Stresemann) that the three principles laid down in the Chamberlain Report represented that which, according to the conviction of the Council—not binding, however, for others—should be the interpretation of the relative provisions of the Treaty of Trianon. But that they were not anything other than: "principes susceptibles, à son avis, de servir de base équitable à une négociation amicale entre les deux Parties," was confirmed by the Council itself in the Preamble to the Recommendations, for which see Text (Minutes, *cit. infra.*, pp. 26, 24-25, 26-27, 33).

nationals of States which were neutral in the war, who should be added to the Mixed Arbitral Tribunal as established by Article 239 of the Treaty of Trianon—that is to say, that Tribunal including the Roumanian member, who would be restored to it by his Government—and that to this Arbitral Tribunal of five members there should be submitted the claims which have been filed under Article 250 of the Treaty of Trianon by Hungarian nationals who have been expropriated under the agrarian reform scheme in the territory of the former Austro-Hungarian Monarchy transferred to Roumania.”³ There is nothing to object to in such a procedure, only we must be quite certain that, even in making such proposals, the Council is acting under the authority of a mediator, seized with the question on the strength of Art. 11, § 2 of the Covenant, and that, where, in consequence of the agreement between the parties, the tribunal of the Five were to come into being, there would be no reference to the Mixed Arbitral Tribunal, instituted in virtue of the Treaty of Peace, and of which the composition could not be changed by the unilateral will of the Council or of the parties, but only by the will of all the signatories of the Treaty itself. It would be a question in any case of another Arbitral organ, partly composed, materially, of the same persons, who constitute the Mixed Arbitral Tribunal, and having an almost identical organisation, but a jurisdiction restricted to the questions which have been brought before the Roumano-Hungarian Mixed Arbitral Tribunal in virtue of Art. 250 of the Treaty of Trianon, by the Hungarian nationals expropriated in consequence of the Agrarian Reform in the territories ceded by Hungary to Roumania. And, if at the next Session of the Council, both the interested States should not be in agreement about accepting the proposal of the Council, or the new organ thus constituted, should not be able to come to a decision, the Council, its function of mediator in virtue of Art. 11, § 2, having been exhausted, could do nothing but proceed on the basis of Article 239 of the Treaty itself and nominate the substitute judges, thus giving effect to the provisions of Article 13, last paragraph, of the Covenant.⁴ The arbitrator, being once reinstated, the Council would have no duty but to bear in mind what it had decided itself at the sitting of the 12th December, 1927, accepting the Reports of the Jurists on the Powers of the Council of the League of Nations in respect of the interpretation of the Treaties of Peace: “It will not be contested that as a general principle and in the absence of some special attribution of competence, the Council should not intervene in a question pending before another international organ such as a Mixed Arbitral Tribunal when (a) the request for the Council’s intervention is made by only one of the parties, and (b) the case is being dealt with by that international organ with the consent of both parties and is regarded by it as within its competence. If this rule were not followed as a general principle, the position of all international tribunals would be prejudiced and an intolerable burden would be imposed on the Council of the League of Nations.”⁵

MANLIO UDINA,

Professor of International Law at the
University of Trieste.

27th April, 1928

³ Comp. 49th Sitting, Minutes (*Official Journal*, 1928, pp. 426, 427).

⁴ “Faute d’exécution de la sentence, le Conseil propose les mesures qui doivent en assurer l’effet.”

⁵ *Official Journal*, 1928, p. 179.

Translated from the Italian.

The functions of the Council of the League of Nations in the controversy between Hungary and Roumania.

OPINION

OF

TOMASO PERASSI,

*Professor in Ordinary of International Law at the
Royal University of Rome.*

Rome, 28th April, 1928.

The present state of the controversy between Hungary and Roumania on the question of the Hungarian optants is as follows:—

The Council of the League of Nations, which had been seized of the question by Roumania on the basis of Article 11, Sec. 2, of the Covenant of the League of Nations, at its meeting of March, 1928, had adopted some recommendations and invited the parties to acquaint it, before its meeting of June next, with their decision concerning the acceptance of the proposals made by the Council for the settlement of the controversy.

The representative of Hungary, at the same meeting in which the Council adopted its Resolution containing the proposal for the settlement of this dispute, declared in the name of his Government that Hungary for her part accepted the said proposals. The representative of Roumania reserved to himself the right of communicating the decision of his Government. Up to the present there are no circumstances that can authorize us to anticipate that the Roumanian Government is disposed to declare that it will give its assent to the proposals recommended by the Council.

In these circumstances, supposing that the Roumanian Government refuses to accept the said proposals, we are faced in the first place by a particularly important and vital question which has, among the many and interesting problems raised by the Hungaro-Roumanian controversy, given rise, as the others have, to differences of views: I refer to the question concerning the task which falls to the Council of the League of Nations on the basis of Article 239 of the Treaty of Versailles, relying on which Hungary had asked the Council to proceed to the appointment of two substitute arbitrators for the Roumano-Hungarian Mixed Tribunal.

This question must be examined, in the first place taking into consideration Article 239 of the Treaty of Trianon by itself, leaving on one side the eventual influences on the working of this Article, of the attributions of the Council in virtue of Article 11, Sec. 2, of the Covenant, which have been invoked in consequence of the request of the Roumanian Government. It may seem that the examination of the question from this first point of view has no practical interest because of the fact that in this way the question is not submitted to examination just as it is raised in the circumstances of the present dispute. I am of opinion, on the contrary, that such an examination is necessary for the finding of a correct answer to the question as it presents itself in fact, *i.e.*, in connection with the exercise by the Council of the powers which are attributed to it by Article 11, Sec. 2, of the Covenant.

(1) The first aspect of the question is to state the precise definition of the character of the provisions of Article 239 of the Treaty

of Trianon, and in particular to ascertain whether the appointment of substitute arbitrators in the cases prescribed by the said Article and by Article 1 of the Annex is an obligatory or optional duty for the Council, the exercise of which may be legitimately subordinated by the Council to a discretionary appreciation and under certain definite conditions.

Within the Council the representative of the Roumanian Government maintained the thesis that Article 239 of the Treaty of Trianon had not imposed on the Council the duty of proceeding to the appointment of the substitute arbitrators. ". . . le traité," said M. Titulesco at the meeting of the Council of the 17th September, 1927 (*J.O.d.S.d.N.*, 1927, page 1392), "n' a pu créer un devoir impératif en vertu de l'article 239. En effet, les caractères du Conseil ont été fixés par le Traité de Trianon, ni par aucun autre Traité de paix indépendant du Pacte. Le Conseil est l'organe de la Société des Nations. Les nombreux Etats membres de la Société ne sont pas liés par le Traité de Trianon, ni par aucun autre Traité de paix Ce que les Traités de paix ont pu vouloir, c'est demander aux Etats membres du Conseil d'envisager la désignation de juges suppléants. Il appartient donc au Conseil d'apprécier, en toute liberté, une telle demande, de l'accueillir favorablement si elle lui convient: mais le Conseil reste libre de l'accueillir ou non pour tels motifs qu'il apprécie librement."

According to the opinion of some authors, the meaning of Article 239 of the Treaty of Trianon would be to attribute to the Council a power of control over the functioning of the Mixed Tribunals, and therefore the Council would have, in all that concerns the appointment of substitute arbitrators, the right of subordinating their appointment to opinions regarding the functioning of the Tribunal in the exercise of its powers. "En d'autres termes," wrote M. Prudhomme, "les traités de paix ont remis l'organisation des Tribunaux arbitraux mixtes aux mains du Conseil de la Société des Nations: c'est à cet organe qu'il appartient d'en assurer l'existence. De ce principe découlent alors le droit et le devoir, pour le Conseil de la Société des Nations, de résoudre les difficultés auxquelles peut donner lieu la composition et le fonctionnement du Tribunal arbitral mixte (*Journal de droit international*, 1927, page 867).

These theses are without foundation.

The fact that Article 239 of the Treaty of Trianon is no part of the Covenant of the League of Nations is not, by itself, sufficient to exclude the obligatory character for the Council of the functions attributed to it by the article in question. The Covenant itself, in its fifth article, expressly records that there are some attributions of the Council, as an organ of the League of Nations, which are established by articles of the treaties of peace which are not included in the Covenant of the League. Articles of this category are numerous. Enumeration would be superfluous. No State which has joined the League of Nations without being a signatory of any one of the treaties of peace, has ever raised any doubt that the attributions conferred by the treaties of peace on the organs of the League of Nations were obligatory, on the ground that they were not provided for by articles of the Covenant. Through the historical circumstances in which it was formed, the League of Nations includes among its attributions as an institution also those which refer to the execution of the treaties of peace, which are expressly confided to it by the Clauses of the treaties themselves. The States which have become members of the League of Nations, by adhesion or admission have implicitly, but of necessity, recognised this state of affairs.

The Council of the League of Nations has, nevertheless, no power to decline the attribution which has been conferred on it by Article 239 of the Treaty of Trianon, any more than it could, for instance, decline the attribution which the same Treaty confers on it regarding all that concerns the basin of the Sarre.

On the other hand, there is equally no foundation for the thesis that Article 239 of the Treaty confers on the Council a jurisdiction which invests the Council with a power of control over the functioning of the Mixed Arbitral Tribunals, or leaves to the Council the liberty of deciding, at its own discretion, whether or no it is advisable to act in response to the demand of the State interested and appoint the substitute arbitrators.

Article 239 of the Treaty of Peace attributes to the Council, exclusively, the function of naming definite persons to be the substitute arbitrators. The power of the Council is discretionary only in as far as regards the liberty of choice of the persons, this choice being limited only by the condition that the persons chosen should belong to neutral States; in other words, the Council has a power of choice in making its appointments, but has the obligation to appoint the substitute arbitrators in order to place the Tribunal in a position to function. The fulfilment of this obligation cannot be subordinated on the part of the Council to an opinion regarding the method in which the Arbitral Tribunal should function.

That this is the only correct interpretation of Article 239 is re-confirmed by the following consideration:—

Article 239 of the Treaty of Trianon establishes, as do the identically corresponding articles of the other treaties of peace, that the appointment of substitute arbitrators is made by the Council of the League of Nations, and, "jusqu' au moment où il sera constitué par M. Gustave Ador, s'il y consent." It follows from this article that the function conferred by it on the Council of the League of Nations is, with respect to its extent, the same as that which was attributed to M. Gustave Ador. Now, no one would dare to maintain that, in virtue of Article 239, M. Gustave Ador, having accepted the functions attributed to him by this Article, would have had a power of control over the functioning of the Mixed Arbitral Tribunals, or would have had the power of subordinating in any way whatever the appointments of the substitute arbitrators to conditions concerning in any way the exercise of the jurisdiction of the Mixed Arbitral Tribunals, as fixed by the treaties of peace. The Council of the League of Nations does not receive any different attribution from Article 239. The fact that the competence to appoint substitute arbitrators in conformity with Article 239 is transferred to the Council of the League of Nations does not mean that the extent of its competence is modified. As it is manifestly beside the mark to recall that M. Ador would have had a power of control over the functions of the Mixed Arbitral Tribunals, so also is the idea untenable that such a power belongs to the Council of the League of Nations. Article 239 of the Treaty of Trianon and the corresponding articles in the other treaties of peace are of the same type as the provisions, so frequently found in international practice, which establish that the nomination of arbitrators, in the case of failure of agreement between the interested Governments, is made by a certain Government, or by a person appointed, or by an international organ. All these provisions attribute exclusively the function of nomination. They leave liberty of choice in the proceedings leading up to the

nomination in question, but in no case do they mean a power of subordinating the nomination of the arbitrators to conditions relating to the judgment which these are called upon to give.

For the purpose of correctly defining the character of the jurisdiction which Article 239 of the Treaty of Trianon attributes to the Council, it is well to add the following complementary observations:—

(a) The deliberation of the Council to proceed to the appointments provided for in Article 239, does not require unanimous voting.

(b) The nomination of substitute arbitrators, in execution of Article 239, is not a question for which, in conformity with Article 5 of the Covenant, the interested States must be invited to have themselves represented at the session of the Council in which this nomination takes place. In 1923, in fact, when, on the demand of the French and Belgian Governments, the Council proceeded to the appointment of substitute arbitrators to the Mixed Franco-Austrian, Franco-Hungarian, Franco-Bulgarian, Belgo-German, Belgo-Austrian, Belgo-Hungarian, and Belgo-Bulgarian Tribunals, the appointments were made by the Council without Austria, Bulgaria and Hungary having been invited to take part in the meeting of the Council.

(c) The attribution conferred on the Council by Article 239 of the Treaty of Trianon, finally, is a jurisdiction, independent of the fact that Hungary and Roumania are members of the League of Nations. Such an attribution was, in fact, conferred on the Council of the League of Nations by a disposition of the Treaty of Peace previous to the admission of Hungary to the League of Nations, and would remain confided to the Council, even if Hungary or Roumania, or both these States should cease to be members of the League of Nations.

II. The second aspect of the question which we are examining, presents itself in the following terms: *What influence can the attributions, belonging to the Council in virtue of Article 11, Sec. 2, of the Covenant of the League of Nations, have on the execution on the part of the Council of the functions conferred on it by Article 239 of the Treaty of Trianon?*

The Roumanian Government, by the fact that it had exercised as a member of the League of Nations the option, accorded to it by Article 11, Sec. 2, of the Covenant of the League of Nations, to call the attention of the Council to the question which had arisen with Hungary with regard to the jurisdiction of the Mixed Arbitral Tribunal in connection with the demands of the Hungarian optants, maintained that the Council could not separate Article 239 of the Treaty of Trianon from Article 11 of the Covenant, that is to say, it must subordinate the execution of Article 239, as far as concerns the appointment of substitute arbitrators, to the powers which Article 11, Sec. 2, of the Covenant confers on it.

This thesis was stoutly maintained by the representative of the Roumanian Government at the meeting of the Council of the League of Nations.

“ Le Conseil, dans l'exercice de la compétence exceptionnelle que lui confère l'article 239 du Traité de Trianon, ne saurait méconnaître sa tâche essentielle conférée par l'article 11. Organe politique, il ne saurait négliger les contingences politiques. Il doit avoir le droit de refuser une désignation qui lui paraît inopportune ou de nature à nuire à son propre fonctionnement. Contester au Conseil ce droit d'appréciation, conférée par l'article 11, signifierait assimiler à un simple automate un

corps investi de la plus haute et de la plus délicate mission politique." (*J.O. de la S.d.N.*, 1927, page 1392).

The Roumanian thesis, therefore, is the following: The Council being seized with the question, in accordance with Article 11, Sec. 2, of the Covenant, has the right, in virtue of the powers which it derives from that article, to refuse to proceed purely and simply to the appointment of the substitute arbitrators asked for by the Hungarian Government on the basis of Article 239 of the Treaty of Trianon.

Is this connection, or—more correctly—this confusion, between the attributions which belong to the Council in virtue of Article 11 of the Covenant, and those conferred on it by Article 239 of the Treaty of Trianon, admissible?

The answer to this question cannot be given without first recalling what are the powers that belong to the Council of the League of Nations in virtue of Article 11, Sec. 2, of the Covenant.

According to this Clause of the Covenant: "Tout membre de la Société a le droit, à titre amical, d'appeler l'attention de l'Assemblée ou du Conseil sur toute circonstance de nature à affecter les relations internationales et qui menace par suite de troubler la paix ou la bonne entente entre nations, dont la paix dépend."

Article 11 does not define precisely the action which the Assembly or the Council is called upon to display, when a member of the League avails himself of the right laid down in this article. Nor are precise details in this respect to be found in other Articles of the Covenant. Bearing in mind the general principles, by which the constitution of the League of Nations is inspired, this lack of precise dispositions of the Covenant suffices to exclude the possibility of the Council or the Assembly having the power, in virtue of Article 11, Sec. 2, of taking decisions which have, either directly or indirectly, a binding effect on one or the other interested State.

The Council, like the Assembly, when once its "attention" has been called by one member to a certain question in conformity with Article 11, Sec. 2, can exercise only the function of a conciliating mediator. Here a mediator is intended, whose moral authority would have the greatest chances of succeeding in smoothing away the difficulties of the dispute, to which its attention has been called, but in any case nothing more than a mediator. Its powers are limited to those which are proper to a mediator. The Council, on the strength of Article 11, Sec. 2, can recommend to the interested States the proposals which, in its opinion, are likely to smooth away the difficulties to which its attention has been drawn: but it cannot take resolutions which have a binding effect on either one or the other, or on both, of the two interested States. No doubt is possible on this point. We confine ourselves to quoting, by reason of its authority, the following passage from the Report of M. Politis on the project of the Protocol on the Peaceful Settlement of International Disputes, adopted by the League of Nations at the meeting of 1924: "L'art. 11. . . ne confère nullement au Conseil ou à l'Assemblée le droit d'imposer aux Parties, sans leur consentement, une solution du différend. L'action, en vertu de cet article, du Conseil ou de l'Assemblée, ne peut être obligatoire pour les Parties, dans le sens où les recommandations le sont aux termes de l'article 15, à moins qu'elles n'y aient consenti."

Now, the task which the Council had the duty to fulfil in consequence of the request of the Roumanian Government, based on Article 11, Sec. 2, was completed when the Council in the course of the session of March, 1928, after having vainly attempted to obtain an understanding between the interested parties, adopted some proposals recommending them to the acceptance of the two Governments.

If the Roumanian Government does not accept the proposals recommended by the Council, the task of the Council in virtue of Article 11, Sec. 2, will be finished. In particular, the Council, in virtue of Article 11 of the Covenant, will not be able to refuse to proceed to the appointment of substitute arbitrators in fulfilment of Article 239 of the Treaty of Trianon.

The Roumanian request, having previously put in motion the action of the Council, in conformity with Article 11, Sec. 2, of the Covenant, authorised the Council temporarily to suspend the appointment of the substitute arbitrators, when the Hungarian Government, relying upon Article 239 of the Treaty of Trianon, appealed to the Council to that effect; but this does not mean that the Council, in the exercise of the attributions conferred on it by the Covenant in virtue of Article 11, Sec. 2, could avail itself of Article 11 of the Covenant to refuse to execute its duty of appointing the substitute arbitrators in conformity with Article 239 of the Treaty of Trianon, or to subordinate this appointment to conditions affecting the interpretation of the jurisdiction of the Mixed Arbitral Tribunal.

The Report of the Committee of Three, presented to the Council of the League of Nations at the meeting of the 17th September, 1927, after having formulated some proposals for the solution of the difficulty, had deemed that it could suggest to the Council, if the latter had adopted the Report of the Committee of Three, the measures to be taken in the case that one or the other, or both, of the parties should refuse to accept those proposals. The Report of the Committee concluded in the following words:—

“ En cas de refus de la Hongrie, le Comité estime que le Conseil ne serait pas justifié de procéder à la nomination des deux membres suppléants, conformément à l'article 239 du Traité de Trianon.

“ En cas de refus de la Roumanie, malgré l'acceptation par la Hongrie des propositions ci-dessus, le Comité estime que le Conseil serait justifié à prendre les mesures nécessaires pour assurer en tout cas le fonctionnement du Tribunal arbitral mixte.

“ Dans le cas du rejet par les deux parties à la fois des recommandations ci-dessus, le Comité croit que le Conseil aura épuisé le rôle qui lui incombe en vertu de l'article 11 du Pacte.”

This part of the Report of the Committee of Three did not fail to call forth within the Council itself certain explicit reserves, which excluded the possibility of the Council adopting the measures proposed by the Committee of Three. Signor Scialoja, with the judicial spirit characteristic of him, pointed out that “ dans les propositions qui nous ont été faites par le Comité de Trois, on dépasse peut-être un peu les bornes de l'article 11 en proposant également des sanctions d'ordre juridique.” Herr Stresemann declared in terms still more emphatic his disagreement with that which concerned the proposals of the Committee of Three. “ D'après ces recommandations, la désignation des juges

suppléants doit dépendre de la question de savoir si la Hongrie accepte ou non les thèses juridiques du rapport. Cette condition péremptoire ne me semble pas justifiée d'après les clauses du Traité de Trianon. Je crois que le comte Apponyi n'a pas tort de faire observer que le fait d'imposer de telles conditions constitue un mélange dangereux de questions politiques et de questions juridiques. Il est tout à fait vrai que le Conseil peut se prononcer sur la situation juridique et recommander aux parties l'acceptation de son opinion : *mais il ne peut pas imposer et faire que l'accomplissement d'une demande juridique en dépende.*"

These observations go to the central point of the question as it appears even in the present state of affairs. The Council, in virtue of Article 11, has only the function of a conciliator. It can make proposals for solutions and recommend them to the acceptance of the parties. It has in this respect a liberty of judgment, to which Article 11 does not put precise limits, but it can do nothing more than make recommendations which the parties are free to accept or not to accept. The Council has no power, in virtue of Article 11, either of making decisions with force binding on the parties, or of establishing sanctions in case that one or the other of the parties, or both, availing themselves of the liberty which they enjoy, should not see fit to accept the proposals recommended by the Council. Now, what would be the effect of a refusal of the Council to proceed to the appointment of substitute arbitrators in the case that one of the parties, or both of them, did not accept its recommendations? Such a refusal would be, on the part of the Council, the adoption of a measure which imposes juridical consequences on one of the parties. This exceeds the powers which belong to the Council, acting in virtue and within the limits of Article 11 of the Covenant. The proof of this usurpation of jurisdiction is in this: The Council could not put forward its refusal to proceed to the appointment of substitute arbitrators as a threat if Article 239, which attributes to the Council itself the function of nominating the substitute arbitrators, did not exist, or if this function were attributed to others. From this it follows that the refusal to nominate the substitute arbitrators is a measure which, in virtue of Article 11 of the Covenant, the Council would not have the possibility of taking. The Council cannot avail itself of Article 239 of the Treaty of Trianon to take, in virtue of Article 11 of the Covenant, the decision to refuse to proceed to the appointment of arbitrators. Article 239 of the Treaty of Trianon, as we have seen, is independent of Article 11 of the Covenant. The Council, acting in virtue of Article 11, cannot whittle away Article 239, and, in particular, cannot transform the obligation to appoint, which is imposed on it by that Article, into a discretionary power which permits it to make of the refusal to appoint the arbitrators a juridical sanction for the case that its recommendations are not accepted. The refusal to nominate is a negative measure, which, however, has a juridical effect in so far as it deprives one of the parties of the right to obtain the placing of the Mixed Arbitral Tribunal in a position to function in conformity with the dispositions of the Treaty of Peace. The adoption of a measure which involves a similar juridical effect exceeds the exclusively mediatory powers which belong to the Council, in virtue of Article 11 of the Covenant.

The Council, availing itself of its powers for the purpose of conciliatory action, provided for in Article 11 of the Covenant, made certain recommendations, suspending in the meantime its assent to the demand of Hungary that it should proceed to the appointment of the arbitrators.

This conciliatory action was exhausted. The Council, acting in virtue of Article 11, has made its proposals. Hungary has declared herself disposed to accept them; Roumania refuses. In these circumstances, the task of the Council in virtue of Article 11 being completed, there is no reason any longer to keep in suspense the execution of Article 239 of the Treaty of Trianon. The Council has no other duty than that of appointing the substitute arbitrators.

The refusal to proceed to the appointment of the substitute arbitrators would be absolutely unjustifiable in law as an usurpatory exercise of the powers of the Council, even though Hungary had declared that she could not accept the proposals contained in the Report of the Committee of Three. Such a refusal would appear to be not only unjustified in law but contrary to juridical good sense, if it took place after Hungary had declared herself disposed to accept the proposals recommended by the Council in its meeting of March, 1928.

It is hardly worth pointing out that the appointment of the substitute arbitrators, in accordance with Article 239 of the Treaty of Trianon, would not imply on the part of the Council any opinion on the merits of the question of the jurisdiction of the Mixed Arbitral Tribunal. The Council, proceeding to the appointments, would only be giving effect to an obligation which is laid upon it by Article 239 of the Treaty of Peace, an obligation which does not mean for the Council any power of interpretation of the limits of the jurisdiction of the Mixed Tribunal, or the functioning of this latter.

One may observe that by acting thus, the Council would fulfil the duty imposed on it by Article 239 of the Treaty of Trianon, but with the appointment of the substitute arbitrators the controversy between Hungary and Roumania would, as regards the merits of the case, still remain open.

No one will contest the accuracy of this observation, but the fact that the controversy remains open until the two parties have come to an agreement to settle it, directly or by arbitration, depends on the principles on which the Covenant of the League of Nations has been built up. Neither the Council, nor the Assembly, can impose the solution of a dispute. Every conflict, in which the interested parties do not accept the proposal of the Council or of the Assembly, remains open. But this does not authorise the Council, in the case of the present controversy between Hungary and Roumania, to refuse to carry out its obligation to appoint the substitute arbitrators, especially because, in virtue of the Covenant as it stands, it is not invested with powers which allow it to impose obligatory measures, such as would be the taking away from Hungary the right that the Mixed Arbitral Tribunal shall be placed in a position to function.

Rome, 28th April, 1928.

(Signed) TOMASO PERASSI,

Professor in Ordinary of International Law,
Joint Editor of the "Rivista di diritto
internazionale."

Translated from the Italian.

OPINION

On the Obligatory Force of the decision of 10 January, 1927, of the Roumano-Hungarian Mixed Arbitral Tribunal concerning the claims arising out of the Agrarian Expropriations in Transylvania.

BY

BRUNO BRESCHI,

Professor in Ordinary at the Royal University of Perugia.

By a decision taken at Paris on 10th January, 1927, the Roumano-Hungarian Mixed Arbitral Tribunal declared its own jurisdiction in respect of a claim presented by Hungarian subjects against measures adopted by the Roumanian Government in Transylvania for the expropriation of their property.

In consequence of this decision the Roumanian Government, through its own representatives, declared that it would abstain from taking any further part in the matter pending before the Mixed Arbitral Tribunal, and that it would not consent that its own arbitrator should continue to be a member of such Tribunal for dealing with the questions concerning the agrarian reform. Further, Roumania brought the question before the Council of the League of Nations, justifying her own attitude with the allegation of a usurpation of jurisdiction on the part of the Mixed Arbitral Tribunal.

The thesis that the Mixed Arbitral Tribunal had, in the judgment recalled above, exceeded the limits of its powers, by usurping jurisdiction which did not pertain to it, was emphatically developed by the Roumanian representative before the Council of the League of Nations, and the opinions of some authoritative jurists were invoked in its support.

In the present opinion, I propose to examine whether the affirmation of a usurpation of jurisdiction on the part of the Mixed Arbitral Tribunal can be considered as having a foundation in law; and whether the allegation of such a defect in the judgment can authorise the Roumanian Government to refuse obedience to the decision.

* * * * *

To understand exactly the terms of the question, it is first of all necessary to consider the reason and the contents of the rules of the Treaty of Trianon, which refer to it; and then the facts which have given rise to the complaints in question.

It is well known that, in the Treaty of Peace with Germany, the Allied Powers reserved to themselves the right to appropriate and to liquidate all the property belonging to the Germans which, at the date of the entry into force of the Treaty, were within their territory, including the territories ceded to them in virtue of the Treaty itself.

An analogous proposition was inserted in the project of the Treaty with Austria, elaborated by the Conference of Peace. But, consequent on a protest of the Austrian delegation against the extension of the regime of liquidation to the property situated in the former Austro-Hungarian Empire, the Allied Powers consented to modify the rule under discussion, and to recognise respect for private property of the Austrian nationals within the boundaries of the former Monarchy.

And since, already during the Armistice, in some of the Austro-Hungarian territory occupied by the Allied States, restrictive measures against the property of the enemy subjects had been adopted, provision was made, with a special disposition, to establish that the properties in question should be restored to their respective owners, free from all measure of expropriation or of sequestration, and returned in the state in which they had been previously. These dispositions formed the first two paragraphs of Article 267 of the Treaty of St. Germain; and were reproduced, in favour of the Hungarian citizens, in Article 250 of the Treaty of Trianon, in which they are formulated as follows:—

“Notwithstanding the provisions of Article 232 and the Annex to Section IV, the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.”

“Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any measure of transfer, compulsory administration or sequestration, taken since 3rd November, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.”

The scope of these provisions is illustrated in a note of 2nd September, 1919, addressed by the Allied Powers to the Austrian delegation. In this Note it was declared: “*Les biens des ressortissants autrichiens dans les territoires cédés aux Puissances alliées seront rendus à leurs propriétaires; ces biens seront libres de toute mesure de liquidation ou de transfert prise depuis l’armistice, et une exemption semblable de toute mesure de saisie ou de liquidation leur est garantie pour l’avenir.*”

These declarations, made with regard to the Treaty of St. Germain (Art. 267), cannot but be valid also for the corresponding rules of the Treaty of Trianon (Art. 250).

Nevertheless, the Hungarian delegates did not appear entirely satisfied by these dispositions, for fear that they might not offer an adequate defence against measures having a character of apparent generality, and in particular against a recent Roumanian law which established the expropriation of all immovable property, belonging to foreigners or to persons residing abroad, and situated in the territories ceded by Hungary. To the demand for more effective guarantees, made by the Hungarian delegation, the Allied Powers replied that, being questions concerning the interpretation of the Treaty of Peace, they could not be disposed of immediately; anyhow, the Powers agreed to the proposal to permit recourse to the Mixed Arbitral Tribunal “for settling the conflicts relative to the restitution of their property, rights and interests situated on transferred territory to Hungarian nationals as provided by Article 250 of the Treaty.”

Therefore, it was decided to add to Article 250 a new paragraph in the following terms:—

“Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239.”

In this way, while it was recognised explicitly that the provisions denounced by the Hungarian delegation could render dubious the observance of the rules contained in the Treaty, the jurisdiction to give

judgment on the objections raised against such provisions was attributed to the Mixed Arbitral Tribunal.

Finally, in confirmation of the conditions which it was desired to impose on the property of the Hungarian subjects, it is worth remembering that Article 3 of the Treaty with Roumania for the protection of the minorities, of 20th December, 1919, establishes that any Austrians and Hungarians who might opt for Austrian or Hungarian nationality would be authorised to retain their immovable property situated in Roumanian territory. (Compare Art. 63, para. 4 of the Treaty of Trianon.)

* * * * *

On the basis of the protection accorded to them by these rules of the Treaties, and in particular of the Treaty of Trianon, several Hungarian subjects laid a complaint before the Roumano-Hungarian Mixed Arbitral Tribunal against measures for the expropriation of their agrarian property, adopted in the territories ceded to Roumania.

The facts on which such complaints were founded are too well known for it to be necessary to set them out again. The Roumanian Government, after having, by successive decrees on 12th September, 1919, and 12th June, 1920, predisposed the expropriation of the immovable property belonging to foreign subjects in Transylvania, by a law of 30th July, 1921, regulated and enforced the above-mentioned agrarian reform in Transylvania.

In accordance with the dispositions of this law, the agrarian properties of the absent owners were to be expropriated in their entirety; and to the effect, every person who had been absent from the country between 1st December, 1918, and 23rd March, 1921, unless such person were charged with an official mission abroad, was described as "absent."

In this law, to the criterion of foreign nationality, adopted in the preceding decrees—a criterion which now appeared too evidently in contradiction with the dispositions of the treaties stipulated by Roumania, was substituted the criterion of absenteeism, determined for a period coinciding with the occupation of Transylvania by the Roumanian troops after the armistice.

It seems that this criterion was applied in the most rigorous manner, because, according to the instructions of the Roumanian Government, anyone was to be considered "absent" who could not show that he had remained in the country during the *whole* of the aforesaid period. And since, especially in that period, a large number of Hungarian proprietors of Transylvania had fled before the Roumanian troops, without further ado the expropriation of all their property was inflicted upon them.

If it is remembered that the lands of Transylvania, for the greater part, were the property of Hungarians, it becomes evident that the Roumanian Law of 1921, although in appearance it had the semblance of generality, nevertheless, in its effects, proved itself to be aimed, essentially, at the expropriation of the property of the above-mentioned Hungarians.

In such circumstances can the jurisdiction of the Roumano-Hungarian Mixed Arbitral Tribunal to take cognisance of the complaints presented by Hungarian subjects in respect of the provisions referred to, be regarded as well founded?

It seems to me that an impartial examination of the provisions of the Treaty of Trianon and of the facts now recalled must lead to the acceptance of an affirmative reply. The facts, with which the Mixed Arbitral Tribunal was called upon to occupy itself, are of such a nature that, if they are duly verified, they place in question, essentially, the principle of respect for the private property of Hungarian citizens in the ceded territories, solemnly proclaimed by the Treaty of Trianon. Now, as has been seen, precisely as a guarantee for the observation of such principle on the part of Roumania, as of the other Succession States, the jurisdiction governed by Article 250 of the Treaty of Trianon, was attributed to the Mixed Arbitral Tribunal.

No subtle disquisition on the terms adopted in the Treaty and on the articles of the Roumanian law can succeed in destroying these fundamental data: that the measures taken in Transylvania by the Roumanian Government have deprived a large number of Hungarian owners in this region of their property, whereas the Treaty of Trianon imposed respect for such property. Therefore it cannot be seriously argued that the Mixed Arbitral Tribunal had the right and the duty of declaring its own jurisdiction to take cognisance of the complaints brought before it under this head.

The objection of lack of jurisdiction raised by the Roumanian Government rests on a very insecure basis. The principal argument adopted on this head is that the provisions complained of by the Hungarian subjects were adopted in consequence of the Agrarian Reform which was stated to have been applied to all owners, independently of their nationality; that, further, an indemnity for expropriation would be paid to all the owners involved; and that, therefore, such provisions could not be considered as measures of confiscation and liquidation, in the terms of Article 250 of the Treaty of Trianon.

But, with regard to the first point, it should be observed that, even admitting the alleged equality of treatment of nationals and foreigners by the Roumanian Law of Agrarian Reform, it does not follow automatically therefrom that the dispositions of this law are, in all respects, in agreement with International Law. The most authoritative teaching is in agreement on this point: that equality of treatment of nationals and foreigners, while it is not imposed by the general principles of International Law, does not suffice, on the other hand, to legalise, internationally, any provision which a State may adopt with regard to foreigners. Among the many authors who express themselves in this sense, I will confine myself to recalling the eminent authority of Professor *Anzilotti*, who has written: "If it should happen, exceptionally, that the State takes (with regard to foreigners) measures incompatible with that minimum which International Law imposes on it, the fact that they affect, indiscriminately, nationals and foreigners is not sufficient to make them legitimate." (*Rivista di diritto internazionale*, XIV, p. 176 and foll. Note.)

With regard to international jurisprudence, leaving aside older judgments, we should bear in mind the notable declarations contained in the sentence of the Permanent Court of International Justice of the 25th May, 1926, on the question of certain German interests in Upper Silesia (Decision No. 7): i.e., that "a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals."

Then, as far as regards the allegation of the Roumanian defence that a just indemnity was given to the persons affected by expropriation,

this is a point which affects the merits of the complaints, and for the establishing of which the Roumanian Government had no better method than of not opposing any objection of lack of jurisdiction.

* * * * *

The considerations that I have briefly set out seem to me sufficient to prove that the Mixed Arbitral Tribunal has not fallen into error in retaining its own jurisdiction with regard to the complaints of the Hungarian nationals.

In connection with a question of the interpretation of the rules of a treaty there certainly can be some difference of opinion with regard to such interpretation and therefore concerning the accuracy of the thesis indicated above; in particular, it is intelligible that the representatives of the Roumanian Government should have attempted to prove the opposite thesis before the Mixed Arbitral Tribunal.

But the decision of the Mixed Arbitral Tribunal, which defined the preliminary question raised in the matter of jurisdiction, once pronounced, was it in the power of the Roumanian Government to take its stand on a difference of opinion on the interpretation of the Treaty, to refuse to accede to such a decision and to seek to make impossible the further functioning of the Mixed Arbitral Tribunal with regard to the questions under consideration?

To answer such an inquiry, it is advisable, first of all, to recall the doctrinal precedents and the rules of the treaties, which, in one way or another, refer to the problem of the obligatory force of the arbitral decisions.

The doctrine of international law, from the oldest authors onwards, has affirmed the principle that the decision of arbitrators automatically binds the parties. It is true that, beginning from *Vattel*, various authors have believed that the scope of this principle should be limited, by excepting from it some cases, and particularly those in which the sentence was manifestly unjust, or should base itself on a compromise that was void, or should manifestly exceed the terms of the compromise.

But this tendency of doctrine, of which the manifestations are, for the most part, anterior to the Conference of the Hague, was in clear but unconscious antithesis to the very essence of the institution of arbitration, which is directed to defining, and not perpetuating controversies. It is thus, that, when the problem of a positive and systematic regulation of international arbitration began to find its place in the doctrine, the necessity for a different orientation showed itself.

Already the Institute of International Law, in drawing up a scheme of rules for international arbitral procedure, had to affirm the final character, as between the parties, of the arbitral decision duly pronounced; and circumscribed the motives of nullity to the case of a void compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error (Articles 25 and 27 of the draft). It is important also to notice that, according to the formula proposed by *Mancini*, in order that the nullity might be established, the compromise would have to be determined by the competent instance (a single person, a Faculty of Law, or a constituted Court), and the time within which appeals on grounds of nullity should be lodged.

In the first Peace Conference of 1899, the problem of the obligatory force of arbitral judgments was discussed at length and with spirit. Between the two opposite tendencies, that which tended to affirm the definitive character of the arbitral award, and that which strove to render possible a form of revision of the judgment, the first clearly prevailed, it being held that the institution of arbitration would fail in its function if it did not lead to a definite solution of international controversies. The abstract desirability of a system which offered the means for a revision of arbitral decisions, came into conflict with the consideration of the present state of international justice, which lacked a supreme instance to which the duty of revision could be entrusted. On the other hand, it was felt that there was a sufficient guarantee of justice for the parties in the power of selection of the judges called upon to constitute the arbitral tribunal.

Consequently, the Conference, having laid down the principle that recourse to the arbitral tribunal implies the pledge to observe the decision loyally (Article 18 of the first Convention of 1899), clearly established the rule that an award, duly pronounced and notified to the parties, decides the controversy definitely and without appeal (Article 54).

The Conference, on the other hand, rejected the proposal contained in the Russian draft (Article 26) which, in less ample terms, introduced the rule already formulated by the Institute of International Law with regard to the nullity of the award. This proposal was in the following form: "The arbitral award is null in case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators."

The rejection of this proposal by the Conference was specially determined by the consideration of the difficulty "of foreseeing cases of nullity without determining at the same time who shall be the judge to consider these cases." (Report of *Descamps, Conférence internationale, 1899, I. p. 139*).

One special procedure only for revision was admitted for the hypothesis that the parties had expressly reserved it, to be duly submitted to the same Tribunal which had pronounced the award, and only on the strength of the discovery of a new fact, which might form a decisive element in the judgment (Article 55 of the 1st Convention of 1899). The very fact of having brought this means into the rules and of not having foreseen any other, confirms the principle of the definitive character of the arbitral award.

The second Peace Conference confirmed the rules already laid down with regard to the obligatory force and the definitive character of arbitral decisions (Articles 37 and 81 of the Convention of 1907), and with regard to the special procedure of revision (Article 83).

Article 81 of the Convention of 1907 declares: "The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal."

Consequently, the rules of the Hague Conventions, illustrated also by an examination of the discussions which took place at the first Conference, agree in confirming that, from the system of arbitration regulated by these conventions, is excluded not only any appeal from the arbitral award, on account of wrongful appreciation of the facts or error in the application of the law, but also every action of nullity

for defects inherent in the procedure. (Compare *Lammasch, Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, Stuttgart, 1914, p. 216-217).

It should be noted that Roumania ratified the Convention of 1907 on 1st March, 1912, making reservations only concerning the principle of obligatory arbitration. (Compare *The Hague Conventions and Declarations of 1899 and 1907, etc.*, edited by J. B. Scott, New York, 1915, pp. 82 and 85).—These reserves, which concern only the obligatory nature, or the contrary, of the recourse to the arbitral procedure in general, detract in no way from the value, even for Roumania, of the rules which govern the institution of arbitration, when, in virtue of particular treaties, it has been seized with a given controversy.

With regard to Hungary, it is scarcely worth pointing out that the above-named Convention, which was ratified by Austria-Hungary on 27th November, 1909, is binding on her also.

Finally, it is opportune to recall the dispositions of two, more recent, international acts which, directly or indirectly, are connected with the principles indicated above.

Above all, Article 13 of the Covenant of the League of Nations which, in para. 4, provides that the members of the League shall pledge themselves to the execution in good faith of the arbitral awards rendered in controversies to which they are parties.

Further, the Statutes of the Permanent Court of International Justice, in which, in Article 60, the definitive character of judgments pronounced by the Court is declared: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

Therefore, it may safely be considered that, on the basis of existing international law, the rule of the obligatory force of the decision of the international tribunal has an absolute character, and that such decisions cannot be impugned either for error in the judgment or for defect in the procedure.

* * * * *

The rule thus enunciated, being in fact general, without a doubt also includes the pronouncement of the arbitral tribunal on its own jurisdiction. It would be superfluous to insist on this point if it had not been a special subject of discussion in the present case.

It may be observed that in general, even in internal legislation, every tribunal has the power to decide the preliminary question of its own jurisdiction. This principle is intimately connected with the nature of the jurisdictional function. If the judge could not give a decision on the objections raised with regard to his own jurisdiction, he would often find it impossible to decide on the merits of a case, and thus to fulfil his proper function. In any case, in the judicial systems of the individual States, in view of the allocation of attributions among the various tribunals, the questions of jurisdiction may be reserved for a special tribunal, or brought by way of appeal or revision before a superior tribunal.

In international legislation it is generally recognised that every arbitral tribunal has the power of deciding as to its own jurisdiction. As there does not exist, up to the present moment, a hierarchy pre-established as an institution of international tribunals, it is necessary to admit that the same tribunal called upon to settle certain disputes, can, and must, pronounce also on any possible objections raised on the point of jurisdiction. If it were not so, the absurdity would result that every time that an objection of lack of jurisdiction is raised, the tribunal would be forced to admit it. (cfr. Lapradelle and Politis, *Recueil des arbitrages internationaux*, I, p. 105; and also Lammasch, *op. cit.*, p. 166.)

The jurisprudence of international tribunals has already, and for a long time past, expressed itself in this sense. We may recall the judgment given in the affair of the *Betsey* between the United States and Great Britain, in which Commissioner Gore had to declare: "The power of deciding whether an appeal submitted to this Commission comes within its jurisdiction seems to me to be inherent in its very constitution, and absolutely necessary for fulfilling every one of its duties. . . . To decide on the justice of an appeal it is absolutely indispensable to decide whether a case provided for in the Treaty is concerned; and that is the first point to settle in a judgment." (Moore, *International Arbitration*, 2278.)

At the First Conference of The Hague there was agreement on the necessity of allowing to the arbitral tribunal the right of defining the extent of its powers by means of the interpretation of the compromise and of the other Treaties in force between the parties. This rule was established in Article 48 of the Convention of 1899, and was confirmed in Article 73 of the Convention of 1907, which is formulated as follows:—

"The Tribunal is authorised to declare its jurisdiction in interpreting the compromise, as well as the other papers and documents which may be invoked, and in applying the principles of law."

The same principle is established in the Statute of the Permanent Court of International Justice (Article 36, last paragraph):—

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." (Cf. Article 53.)

From this rule it must be deduced not only that the arbitral tribunal (or the Court of Justice) has the power to decide on its own jurisdiction, but also that its decision on the point of jurisdiction is invested with the same obligatory force as any other arbitral decision (or sentence of the Court).

If it has been sought to introduce a distinction on this point, deducing it from the expressions used in Article 73 of the Convention of 1907, according to which the examination into the jurisdiction must be conducted on the basis of the compromise and of the other acts and documents which may be invoked in the matter. And it has been said that, when a declaration of jurisdiction on the part of an arbitral tribunal is not based on the interpretation of the compromise, or on any contractual declaration between the parties, there would be a usurpation of jurisdiction in the formal sense, which could be established on the basis of the Convention (Verdross, *Le caractère obligatoire des décisions des Tribunaux internationaux et autres tribunaux concernant*

leur compétence, in La Réformé agraire Roumanie en Transylvanie devant la justice internationale, etc., Autres Opinions, Paris, 1928, p. 145 seq).

This construction is certainly ingenious and makes it possible to take into account, within certain limits, the tendency marked in certain of the oldest writers in respect of the nullity of manifestly unjust awards. In any case, I doubt very much if it can be considered accurate in view of the rules of the Hague Convention, not only because the amplitude of the terms used in Article 73 does not seem to give it an adequate basis, but also, and above all, for the same general reasons for which any action for nullity of the award must be considered as being excluded. On the other hand, in the case of the Roumano-Hungarian Mixed Arbitral Tribunal it cannot be seriously objected that it had established its own jurisdiction by interpreting the rules of the Treaty of Trianon which refer to the controversy under examination. (cf. Verdross, *ibidem*, p. 153 seq.).

The necessary conclusion, therefore, seems to be that such a decision has the same obligatory force as any arbitral decision, and, further, cannot be invalidated under the pretext of a usurpation of jurisdiction.

In confirmation of this we may point also to the same obvious inconsistency of the arguments adduced in favour of the thesis of usurpation of jurisdiction. Thus, for the purpose of supporting this thesis, recourse was had to the idea that the Mixed Arbitral Tribunal is a jurisdiction of exceptional character and with the nature of compromise, and as such cannot be considered as "juge souverain de sa propre compétence, etc." (A. Prudhomme, in *Journal du droit international*, 1927, p. 862 seq.)

Apart from a minute analysis with regard to the accuracy of the method with which it was thought possible to define the character of mixed arbitral tribunals, it seems that such definitions should be understood only in this sense: that mixed arbitral tribunals derive their powers from the treaty of peace which has instituted them and must exercise their jurisdiction on the basis of such treaty and of the other obligatory conventions between the parties. Now, these ideas can be stated, in general, in regard to every international arbitral tribunal, and it cannot be seen what is gained by denying to the Mixed Arbitral Tribunals this power of deciding as their own jurisdiction which is recognised by the rules in force for every international tribunal.

* * * * *

The considerations set out permit the conclusion that the Roumano-Hungarian Mixed Arbitral Tribunal's decision of the 10th January, 1927, must be considered binding on the parties, and that the Roumanian State cannot escape its observance without violation of faith to the treaties which it has ratified.

An action directed to declaring the nullity of such a decision does not seem to be allowed by the rules in force for international arbitration. In any case, there is no doubt that, when a dispute arises on the point whether the decision of an arbitral tribunal has exceeded the limits of its powers, the parties can by common agreement refer to a new jurisdiction the duty of giving judgment on the point in dispute. The consenting to such a reference to a new instance is, as a matter of principle, optional for the parties. But if one of them claims to maintain

the nullity of the decision on account of the defect of usurpation of jurisdiction, it seems that it cannot escape the obligation of proposing or accepting that the judgment of revision be brought before an appropriate tribunal.

An application of such criteria has taken place already in a case which occurred a little after the Second Conference of The Hague between the United States and Venezuela, both of which had ratified the Convention of 1907. The question of usurpation of jurisdiction having arisen with regard to an arbitral award already delivered between the two States, they agreed to refer this question to the Court of Arbitration of The Hague. The Court, by its judgment of the 25th October, 1910 (*The Orinoco Steamship Co.* affair) first of all confirmed, as a matter of principle, the obligatory and definitive character of the arbitral decisions; then, considering that the parties had agreed to consent to a revision of the award already pronounced, it proceeded to an examination of the dispute.

If such a procedure already presented itself as advisable for the States adherent to The Hague Conventions, *a fortiori*, it seems that an analogous procedure should be observed in the relations between the States which have ratified the Convention of the League of Nations and the Statute of the Permanent Court of International Justice. The fact that the jurisdiction attributed to that Court is in general of an optional nature does not prevent it from being formally recognised as the highest instance for the establishment of rights in the relations between States which are members of the League.

On the other hand, as is recorded above, the Covenant of the League of Nations (Article 13) formally declares the obligation of the member States to carry out in complete good faith the award pronounced in controversies to which they are parties. From these dispositions the deduction must be that a State, a Member of the League of Nations, cannot, purely and simply, withdraw from the observance of an arbitral decision by alleging the supposed nullity. But, in order to establish this pretension, it must have recourse to a new judgment, and by preference that of the Permanent Court instituted expressly for the purpose of the declaration of rights as between the members of the League.

It is not within the scope of the present Opinion to examine the attitude of the organs of the League of Nations towards the controversy between Roumania and Hungary in consequence of the decision of the Mixed Arbitral Tribunal. But, in order to complete the analysis of the obligatory force of such decision, I cannot refrain from pointing out that, according to Article 13 of the Covenant, not only is the obligation of the member States of the League of Nations, to carry out arbitral decisions in good faith, recognised, but the duty of the Council, in cases of non-observance of an arbitral award, by the adoption of suitable measures for ensuring its realisation, is sanctioned. Thus, the obligatory force of arbitral decisions, even when derived from individual agreements between separate member States, is assumed in the very constitution of the League of Nations, and is made the basis of a specific duty of the member States and of an ex-officio attribution of the Council of the League.

Given this dependence of the arbitral decisions concerning the member States upon the constitution of the League, the obligation to

observe such decisions cannot be eliminated, either unilaterally by one of the parties, nor by an authoritative act of the Council of the League of Nations, but, at the most, by the finding of a tribunal recognised as the jurisdictional institution appertaining to the League of Nations—that is, by a judgment of the Permanent Court of International Justice.

Therefore, I believe that, as long as the Roumanian State persists in its refusal to submit to the jurisdiction of the Mixed Arbitral Tribunal, there remains for this State no other juridical solution except that of proposing or accepting reference to the Permanent Court of The Hague; and that, in any case, the Council of the League of Nations, if it does not regard it as its duty to restore, officially and immediately, the composition of the Mixed Arbitral Tribunal, should recommend Roumania and Hungary to have recourse to The Hague Court for a juridical settlement of such case.

(Signed) BRUNO BRESCHI,
 Professor in Ordinary of International
 Law at the Royal University
 of Perugia.

Perugia, April, 1928.

OSZK

Országos Széchényi Könyvtár

HOUSE OF LORDS,

Monday, 25th June, 1928. [*Extract from Official Report*].

Hungarian claims against Rumania.

LORD NEWTON rose to ask whether it is considered by the Council of the League of Nations that it has discharged its functions under the Treaty of Trianon by making ineffectual efforts to bring Hungary and Rumania to an agreement in reference to the claims of Hungarians whose property in the territories ceded to Rumania under the Treaty has been taken away from them under the provisions of an Agrarian Reform Law ; whether it has decided not to comply with the articles of the Treaty which provide for the replacement of the Rumanian arbitrator who has been withdrawn from the Mixed Arbitral Tribunal ; and whether the President was correct in stating that by the resolution of the Council, passed on June 8, the question of the Hungarian optants is now closed as far as the Council is concerned.

The noble Lord said : My Lords, this is a question which long ago lost the charm of novelty. There are very few persons in this country who are interested in it, and nearly everybody is sick of the whole thing, more especially, I should say, Sir Austen Chamberlain himself. The question is surrounded by technicalities and irrelevancies, concerned mainly with the provisions of the Trianon Treaty, with which I do not propose to deal this afternoon. But fundamentally the matter is simple enough. The simple question is whether a Government—in this case the Rumanian Government—is to be allowed openly to defy Treaty obligations, and whether the Council of the League of Nations is justified in counselling, if not abetting, this action on the part of the Rumanian Government. The original question, as the House is well aware, concerns the grievances of certain Hungarian landowners in Transylvania, known as the Hungarian optants, and their case was specially provided for in the Trianon Treaty. It was laid down in that Treaty that Arbitral Tribunals were to be set up for the express purpose of dealing with these questions, and under Article 239, which is the important Article in question, it was specially stipulated that, if a Government were dissatisfied with the Tribunal and withdrew its members, then substitutes should be found by the Council of the League of Nations.

To do the Rumanians justice—and I am quite ready to do justice even to the Rumanians—they have made it perfectly plain from the very start that they never had the smallest intention of complying with the terms of the Treaty. In the first instance they asserted that these Tribunals were not competent to try these cases ; and, when that question had been decided against them, they announced quite openly in Parliament by, I think, the mouth of their Foreign Secretary, that they still had not the smallest intention of carrying out the Articles of the Treaty. Then they proceeded to argue that, as they had passed an Agrarian Reform Law, that law superseded all Treaty obligations. They further refused to allow the question of the competence of the Tribunal to be referred to the International Court of Justice at the Hague, and they invoked Article 11 of the Covenant, which really had no bearing upon the question at all, being the Article which concerns the danger of creating a state of war. Any Government which felt itself aggrieved by the stipulations of any Treaty would be equally justified in invoking this particular Article in order not to carry out their duty. Finally they withdrew their representative from the Tribunal.

In March of last year the matter came before the Council, and the Hungarians naturally asked, as they were clearly entitled to do, that the Council should appoint substitute arbitrators. The Council, instead of complying with this request and doing their obvious duty, proceeded to appoint a Committee, of which Sir Austen Chamberlain became the Chairman or, in League language, the *rappporteur*, and this Committee presented a report in September, 1927, in which it was recommended that the Hungarians should be given the judge for whom they asked, but only on condition that they accepted the Rumanian contention that their domestic law overrode the provisions of the Treaty. In other words, to put it quite plainly, Sir Austen Chamberlain gave them their judge on the condition that judgment went against them. That being so, it was not surprising that this offer was rejected by the Hungarian Government. In December of last year the matter came up again and it was adjourned in the hope that both parties would agree. In March of this year, no agreement having been reached, the Council urged unanimously that the tribunal should be increased from three members to five. This proposal was immediately rejected by the Rumanians. Accordingly we have arrived at the position that the Committee of which Sir Austen Chamberlain was the head has made two proposals, one on each side, and that both have been rejected. He met with refusals on both sides.

When the question came up again this month, on June 8, the President of the Council actually had the face to declare that the incident was closed so far as the Council was concerned and that the League washed its hands of the whole question. It ought to be apparent to everybody that this really creates a very serious situation with regard to the League itself, and I am very much astonished to find that the chief protagonists of the League in this country—for instance, the noble Viscount, Lord Grey of Fallodon, and the noble Viscount, Lord Cecil of Chelwood—have not been moved to intervene in consequence of the situation in which the League finds itself. I take it for granted that every person in this country who has any sense in his head wishes well to the League of Nations. We may criticise it, we may find fault with it and we may even ridicule it, but everybody ought to be able to see that machinery of this kind, ineffective and clumsy though it may be, is better than another European war. But in this case the League has not only lost prestige and authority but it has made itself look supremely ridiculous.

Consider the position. Here are these Ministers, the Foreign Ministers of the Great Powers of Europe, who proceed periodically to Geneva in all the pomp and circumstances of peace, attended by their secretaries and their acolytes, their jurists and their experts, and they make long and eloquent speeches to each other, which I will not characterise as pompous and which are glorified in the Press, in which they tell the world in so many words that the new era is at hand and that everything is for the best in the best of worlds. And yet, when these illustrious people are called upon to decide what ought to be a mere trumpety dispute between two small nations, they openly admit that they cannot do it and say that the parties must settle it somehow amongst themselves. What would be thought of a Court of Justice in this country if the Judge were to say that he was quite incapable of giving a decision and were to leave it to the parties to fight it out themselves? I do not see my noble friend Lord Birkenhead, who is going to answer this Question, adopting such an attitude. What would be thought even of a Committee of this House if, after hearing the contending parties, they were to say: "We are not clever enough to decide this. You must fight it out and decide it yourselves"?

What, however, is more serious than bringing ridicule upon themselves, is that several vicious principles have, so to speak, been established. One is the principle—and a very dangerous principle—that arbitration has received a rude shock, and it is a shock which will be felt in ever widening circles. If I am not mistaken the Rumanians are being paid out in their own coin, because they are engaged in a dispute with the Turkish Government over some trumpety question and the Turkish Government, following the Rumanian example, have withdrawn their representative. It remains to be seen how the League of Nations will deal with that question. The Council have tamely accepted the principle that arbitration is to go by the board, and they have also tamely accepted the principle that domestic legislation is to be permitted to override international Treaties, but what is the most serious point of all is that by the action of the Council they have undoubtedly caused doubts to be felt throughout Europe as to the complete impartiality of the League itself.

I can very well understand that the Hungarians may, in the eyes of the League Council, be very obnoxious people. When people who are poor and friendless do not get on with their neighbours and persist in standing up for their rights, they are universally unpopular, but is it surprising that the Hungarian nation felt that it was being badly treated? Here is the case. No doubt a Treaty of almost unparalleled severity was forced upon a defeated nation. The terms of that Treaty have been inexorably carried out, but there happens to be one article, amongst others, which may to some extent mitigate the hardships to which that country is exposed. When they come to the League of Nations and ask that this particular article shall be interpreted as they think it should be, they only meet with resistance and find that the League is to all appearances inclined to side with their adversaries. I cannot help feeling that this will have a most sinister influence upon all smaller States who are likely to invoke the assistance of the League. Nothing is more calculated to destroy their confidence than action of this character. I also think that one of the inevitable results of the procedure of the League in this case is that the Council will sooner or later be itself split up. Already it is fairly easy for anybody to prophesy on what side nations will be found in connection with questions of this kind. The result will be that you will split the Council and the League into two or three camps like the *blocs* or alliances which existed before the War and we shall return to the position which existed before 1914.

I do not wish to appear in this connection merely as a destructive critic and I desire with all modesty to offer two alternatives. The first suggestion which I have to make is that Sir Austen Chamberlain should admit that for once in a way he has committed an error of judgment. It is very rare for a Minister to admit that he has made a mistake, but after all it has been done in the case of a bigger man than Sir Austen. The late Lord Salisbury, I remember, admitted that we had "backed the wrong horse" on his own advice and responsibility. I suppose it is too much to hope that Sir Austen Chamberlain will openly avow that he has made a mistake and I do not entertain much hopes that he will adopt this alternative. But I have another to suggest, which is more in the nature of a compromise, and which I think he might consider favourably. It is that when the matter comes up again he should recommend that the question of the competence of the Tribunal should be referred to the International Court of Justice at The Hague. That has already been asked for and refused, and I presume that the answer to my suggestion will be that we cannot do that because Rumania objects. It is little short of a scandal, and in fact it is a scandal, that a country like Rumania should be in a position to block the way. I am perfectly certain that there are means within the powers of the Council by which Rumania can be brought into line and this course adopted.

On the two previous occasions when I brought forward this question, I was met with the usual reply that it was not opportune, and I was further told that it was *sub judice*. This argument will not avail now. There is nothing in the Notice Paper which justifies a reply of that kind. The Notice Paper merely contains questions as to the facts, which can perfectly well be answered, and I hope that when my noble friend Lord Birkenhead replies he will be able to make out a better case for the League than appears from an impartial examination of its recent action with regard to this particular question.

LORD THOMSON : My Lords, I am only intervening in this debate because I happen to have a certain amount of local knowledge and, I hope, no bias. The noble Lord has presented the facts of the case, and certainly in the first part of his speech, with his accustomed accuracy and humour. The facts I do dispute, but the deductions which he makes from those facts seem to me to be very much more disputable. He denounced the League of Nations in general, and the Committee appointed by the League in particular, for certain decisions it has reached in regard to this dispute between Hungary and Rumania. He did not tell you what those decisions were. With the permission of the House I would like to read what is their effect. This Committee, consisting of three very eminent and experienced men, the Foreign Secretary of Great Britain and the Ambassadors of Chile and Japan, who had at their disposal expert legal opinion, with all the facts before them and considerable experience of such matters, reported that the provisions of the peace settlement effected after the War, 1914-1918, do not exclude the application to Hungarian nationals, including those who have opted for Hungarian nationality, of the general scheme of agrarian reform, and that the question of compensation does not here come under consideration.

If your Lordships will bear with me I would like to put to you some points with regard to agrarian reform in Rumania. Great play was made by some speakers in past debates, and by some writers—I except Lord Newton—with the fact that this Agrarian Reform Law was promulgated after the signature of the Treaty of Trianon. That is perfectly true. It was signed some three days later. The circumstances in which agrarian reform was introduced into Rumania were wholly different. When I first went to that country in 1912 it was recovering from an appalling *jacquerie* and terrible punishment had been meted out to the peasants. The late Prime Minister came into office pledged to introduce agrarian reform into Rumania. The War came and postponed it. During the War, in order to get the Rumanian peasants to fight, they were again promised this agrarian reform; that is to say, they were to become landowners if they fought on the side of the Allies. That was the second renewal of the promise. Then again, at the end of the War came the Russian Revolution, and in fear that the Rumanian peasants might be infected with Bolshevism they were again assured that this agrarian reform measure would be introduced in order to keep them satisfied. Therefore Rumania was pledged to the hilt to introduce agrarian reform, and early steps were taken to put that into practice.

The obstruction, I need hardly say, was considerable. Every big landowner in Rumania fought tooth and nail against this reform. Eventually it was carried but so late that it could only be promulgated three days after the signature of the Treaty of Trianon. Now I submit that for a Rumanian—and the noble Lord said he wished to do justice even to Rumanians—this is a major question, and the only question which now arises is whether Rumania was justified in applying that agrarian reform measure to Transylvania, part of her conquered territory.

On that, Article 250 of the Treaty was invoked, but on that also this same Committee, consisting of Sir Austen Chamberlain and two Ambassadors of great experience, said as follows :

“ There must be no inequality between the Rumanians and the Hungarians, either in the terms of the agrarian law or in the way in which it is enforced.”

We are dealing here with two questions, the competence of the Mixed Arbitral Tribunal, and the interpretation of Article 250 of the Treaty of Trianon.

Eminent legal opinion has been given on both sides. I am aware that there is a great combination of noble and learned Lords in this House against the interpretation given by Sir Austen Chamberlain and his colleagues, but I am sure that none of them will deny that against them there is a considerable body of legal opinion, and I submit that it is not so much here a question of abstract law, but a question of applying the spirit rather than the letter of the law, and also—I am not ashamed to say so—of expediency. Expediency must count in these matters. In the name of abstract law to do what is inexpedient is often to commit a great injustice. I will say this also, I do not believe that any victorious belligerent State after the War would have signed a Treaty like the Treaty of Trianon if the interpretation of Article 250 now given to it had existed in their minds as a possibility. No State would have accepted it because every Rumanian Delegate at the Peace Conference, including the Prime Minister, knew exactly what was going on in his own country and knew what a burning question it was for most of the peasants.

I have talked about expediency. I will put this case to you. Supposing this law were reversed. Supposing Article 250 were given the interpretation suggested by the Noble Lord, Lord Newton. That would mean that inequality of treatment would be meted out to Hungarians and to Rumanians, that Hungarian landlords would receive far better treatment than any Rumanian landlord, far better treatment than the late King of Rumania received, who himself was one of the principal sufferers under this law. Then again, you have to consider the attitude of the peasants. The Rumanian peasants have been settled on these lands. No one denies that a very big proportion of the peasants in Transylvania are Rumanian. What would their feelings be if they were once more put under Hungarian landlords, to escape the service of whom they had fought in the War, or at any rate their sympathies were enlisted in the War. If these estates were to be returned to the Hungarian landlords there would be every prospect of serious trouble in Rumania. That is why I mentioned expediency, and it applies not only in Rumania but in many other countries, where agrarian laws have also been put in force.

The Committee of which Sir Austen Chamberlain was Chairman said that they were not concerned with the question of compensation in money. I dare say they were right, but as it seems to me to be a practical impossibility to restore these lands, the question of compensation must some time or other arise, and I gather that the compensation demanded by these Hungarian optants would, if paid in full, amount to two-and-a-half times the total Budget of Rumania for a year. I believe that they are asking to be paid in gold. The Rumanian landlords are not being paid in gold. The effect of that decision would be that a Hungarian, because he was a Hungarian, because he had opted not to be a Rumanian citizen after the signature of the Treaty of Trianon, would receive twenty-six times the compensation for his land that any Rumanian landlord had

received. Is that the way to create peaceful contented conditions in a country? I certainly had never read these decisions until I came to study the question, and I reached the same conclusion as Sir Austen Chamberlain and his colleagues in entire ignorance of the conclusions which they had themselves reached. I will read out the effect of the third decision of this Committee, which runs as follows :

“The words ‘retention’ and ‘liquidation’ mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territory and in so far as such owner is a Hungarian national.”

Now, as I understand that phraseology, it means that Article 250 does not apply in the case of these lands except in so far as action is concerned which discriminates in their territory against a Hungarian because he is a Hungarian. I am delighted to be able to agree with the noble Lord, Lord Newton, on at least one important subject. He suggested two alternatives. He said that he hoped—he did not expect—that Sir Austen Chamberlain would admit that for once he had been in the wrong. Personally, as I have tried to explain, I do not think Sir Austen Chamberlain was in the wrong, and that alternative does not arise for me. But I cordially endorse his suggestion that this question of the competence of the Mixed Arbitral Tribunal should be referred, whether Rumania likes it or not, to the Permanent Court at The Hague. I say that because I think that Rumania has an uncommonly good case. I never agreed with the later recommendation of this Committee, that two further neutral members should be appointed to the Committee, and I think I am correct in saying that Rumania rejected that, and I am not at all sure that Hungary also did not reject it.

LORD NEWTON : No, Hungary accepted it.

LORD THOMSON : But I am satisfied that Rumania has a very strong case for the reasons I have tried to explain. It seems to me that Rumania made a very grave mistake by refusing that reference. But it must be apparent, I think, to all your Lordships that the only body that has yet declared the competence of the Mixed Arbitral Tribunal to deal with this very big question so far as Rumania is concerned—a question affecting Rumania’s national sovereignty and interfering in a very grave internal matter—is that Tribunal itself. If they are not satisfied of their competence, who would be? It would be surprising if they were not satisfied of their competence. I should very much like to have heard the other day, and I hope to hear to-day from eminent legal authorities in this country, some remarks on the competence of the Mixed Arbitral Tribunal. I wonder what this country would say if a Mixed Arbitral Tribunal asserted its competence to deal with some of our affairs—affairs nothing like so important to us as a nation in these islands as the question of agrarian reform is to every single Rumanian wherever he may be.

In conclusion, I should like to say that I always have an uneasy feeling when these questions arise that there is some sort of indirect action in the direction of a revision of the Treaty. I certainly do not accuse the noble Lord, Lord Newton, of that ; but the coincidence is somewhat sinister. The question of the revision of Treaties always coincides with propaganda on the subject of Rumania and Hungary. We may be interested in the question of abstract justice. If we are, and if we throw our eyes over the map of Europe we can find many cases of far greater injustice in other parts of Europe than we will find in the case of the Hungarian optants. To talk of revision at this moment is, as far as I can see, to play with fire.

LORD PHILLIMORE: My Lords, when I came down to your Lordships' House I was regretting that we had not, as in times past, the Foreign Secretary as a member of your Lordships' House, for I felt that if I could get him face to face and put before him the case as I understand it he would either be able to tell me something that has happened that I do not know, or he would be bound to admit that the case made by the noble Lord, Lord Newton, was right. I am extremely glad that as we are not to have the Foreign Secretary here we are to have the noble Earl the Secretary of State for India, for I could not have a better person to whom to apply in the matter. In particular, I shall ask him if he will be good enough in the course of his speech to decide between the noble Lord who has just spoken and myself with regard to a great part of the noble Lord's speech. There is one conclusion in his speech with which I entirely agree—namely, that this matter should be sent to the Permanent Court of International Justice. But with regard to the rest of the speech I hope to show your Lordships, with all respect to him, that he has misunderstood the point in question and has asked you to construe Article 250 when it is a question of construing Article 236, and that he has substituted a decision upon the merits for a decision upon the question of jurisdiction.

This matter has been before your Lordships' House on two previous occasions. On May 25 of last year the noble Lord, Lord Newton, asked a question and was requested to postpone it because it was premature. In the debate on November 19, he was again told that it was *sub judice* and we were not to be allowed to express our opinion for fear that Sir Austen Chamberlain should be considered to be prejudiced. The result is, of course, that now the matter has gone very nearly past praying for before your Lordships have been able to express your opinion. What is the point? It is quite simple. Part of the Treaty of Trianon provided that if the Hungarian optants thought they had claims they should be able to bring them before the Mixed Arbitral Tribunal consisting of one Hungarian, one Rumanian and one independent neutral. There was a provision made that if in any event some member of the Tribunal failed two people should be nominated by the Council of the League, one of whom should be chosen to take the place of the failing man. Hungary brought their case before the Tribunal. The Rumanians said that the Tribunal had no jurisdiction. The Tribunal did not hear the case; but they heard the arguments on jurisdiction. Having heard the arguments on jurisdiction the neutral and the Hungarian, by a majority, decided that they had jurisdiction. They did not decide anything more. They decided no question under Article 250. They did not purport to decide the point; they had not got to it, and they have never been allowed to get to it and to decide the real point which was to come before them.

Thereupon the Rumanians withdrew their arbitrator, and as the Tribunal could not go on unless there were three, application was made to the Council of the League in the terms of the Treaty of Trianon to appoint two people of whom one could be chosen. I agree that the Council of the League, as such, was not bound by the Treaty of Trianon; the League was not a party. If the noble Lord (Lord Thomson) and I agree that a third noble Lord shall appoint an umpire between us in case of difference, that third noble Lord may say: "I do not want to be troubled with anything of the kind. I have not agreed to do it." But if there is a bargain made between three people, who are all parties to it, by which it is agreed that if A and B disagree C, the third party, shall appoint an umpire, then C has agreed to do so and must carry out what he has promised. But the Council of the League again did not agree. The League had hardly begun at that time. But France, Great Britain, Japan, Italy and many other nations all signed the Treaty of Trianon and agreed that

if there was such a dispute the Council of the League should decide it, and everyone of those States who are on the Council of the League ought to vote that the Council of the League should so decide.

It may be—I am not sure ; I have looked and I cannot make up my mind—that it may be said that this is a case in which the Council must be unanimous. If so, and any one country stands out, Cuba or Czecho-Slovakia or any other, the Council cannot act. I do not know whether that is so or not, but at any rate Great Britain, Italy, Japan and France—especially Great Britain—ought to come forward and say : “ That is what you, the Council, should do,” because as Members they have signed the Treaty of Trianon and have agreed that the Council shall do it. When it is referred specially to a Committee of which Sir Austen Chamberlain is *rappporteur*, it is, I respectfully say, the duty of Sir Austen Chamberlain to say to the Council : “ You ought to carry out that which as individuals the greater number of you have promised you would do—namely, to appoint judges in case of a vacancy.”

The noble Lord who speaks from the Front Opposition Benches talks about their referring something to a Committee and the Committee advising. The Committee, as the noble Lord expresses it, decided the question. The application being made to the Council of the League to appoint a judge, according to the noble Lord, instead of appointing a judge they sent it to a tribunal of their own and that tribunal decided that the Hungarian optants had no case. They had no more business to send it to a tribunal of their own than they had to send it to your Lordships' House. Their duty was a perfectly plain one—to nominate two people from whom an arbitrator could be chosen. Then they suggested terms. If you promise a man to do a thing and then say : “ I will only do it if you do something else,” you have broken your promise ; you have imposed a condition you had no business to impose. They had no business to impose any of those conditions. However, the Hungarians accepted some of them ; but the Rumanians would not accept them and so the matter has been brought to this impasse. It has nothing to do, with all respect to the noble Lord who spoke before me, with the question of whether the Agrarian Law is good or bad, or whether Hungarian landlords will get good compensation or not. We have not reached that stage. The Rumanians have not allowed the Court to be created which is provided for in the Treaty and which has to reach that stage before it can function.

The noble Lord has had dust thrown in his eyes by those advocates of Rumania who told him about Article 250. This is not a question of Article 250, but it is a question of Article 236 which says how the Court is to be supplemented in case of failure. I cannot conceive anything more detrimental to the strength of the League than the line which unfortunately has been hitherto taken—I hope not irretrievably taken—by the leading members of the Council, under, I am afraid, the guidance of the member for Great Britain. Really that is the case. Every sort of attempt has been made, as I pointed out on a previous occasion, to mix it up with other matters. The plain simple question is this. A Tribunal was created by the Treaty to which Rumania was a party. That Tribunal has purported to say what is its jurisdiction and the Rumanians have destroyed the Tribunal by taking away their member and they will not allow that member's position to be filled. The people to decide that in the first instance are the members of the Mixed Arbitral Tribunal appointed for that purpose. Mixed Arbitral Tribunals have been appointed all over Europe since the war. We have had our own most respected Mixed Arbitral Tribunal, who have not hesitated to decide against the British Government when there has been a case against them, and Great Britain has never

objected or complained that it is not the Tribunal to decide. But if you think that Tribunal has no competence to decide, then send the matter to the Permanent Court of International Justice and for heaven's sake do not send it to a body which, instead of deciding that, purports to decide the case for itself.

LORD CHARNWOOD: My Lords, what we say in this debate is going to receive the closest attention not only here but in some other places of Europe, and I therefore should like to be allowed to begin with two or three remarks which otherwise your Lordships might think were unnecessary. My noble friend Lord Newton has on this and several other occasions claimed the attention of your Lordships' House and the country upon this matter not in the least because he is in any sense a partisan of Hungary, any more than he is of any other small country, but simply because he is a pertinacious and humorous champion of fair play in many fields. He has raised this question affecting Hungary not in the least from any sympathy, such as I think was suggested by the noble Lord who spoke before me, with the agitation for a revision of the Treaty of Trianon. On the contrary, he has simply demanded that effect should be given to the Treaty of Trianon, that the nations who get the benefit of that Treaty when it is in their favour should also submit to it when it is not in their favour.

I say that because the noble Lord below me (Lord Thomson) has remarked that there has been something in the newspapers of this country about a general upsetting of the Treaty of Trianon and that the fact that attention has been drawn to that subject here has had great effect on the mind of some people. If the people of Hungary imagine that the people of this country are likely to stir themselves in upsetting the Treaty of Trianon they are preparing themselves for a great disappointment. The great hardships which undoubtedly were inflicted by the settlement of the frontiers of Hungary are hardships for which the only remedy, it seems to me, is an agreement between Hungary and her immediate neighbours and it is not, in spite of what the noble Lord, Lord Thomson, says, in any spirit of desiring to advocate the revision of the Treaty of Trianon that Lord Newton or anybody else in this House raises the claim that the right of Hungary should be faithfully respected. Your Lordships are aware that the noble Viscount, Lord Rothermere, a member of this House, who may or may not be present, has been identified with the agitation to which the noble Lord, Lord Thomson, referred. When that noble Viscount comes into this House and from his place here advocates the opinions which he holds, then and then only will there be some chance that public interest will be aroused. I am sorry to make these personal references, but the reason is that I think it is desirable that those of us here who have friends in Hungary should plainly dissociate the question which we are raising from that agitation of which I have spoken and to which the noble Lord, Lord Thomson, I think somewhat unfairly, referred.

There are two points which have to be kept in mind by those who are not legally trained people, like myself, both in this country and also, unfortunately, in a good many other countries, and those two points are these. Certain Hungarians who have got into Transylvania have a right under the Treaty of Trianon that a certain claim of theirs shall be heard by a Court appointed for that purpose. The second point is that through the action, or inaction, of the Council of the League of Nations, that Treaty right of theirs has been frustrated. If we are wrong in this impression it is an impression which has been widely produced in the minds of men who have watched this matter with close interest. In regard to the first point let me say only this. There is, I understand, some question

raised as to the competence of the Arbitral Tribunal itself, and it has been suggested to me, though I have not heard it said in this House, that in some way or other the original rights of those Hungarians under the Treaty may have been forfeited or compromised. Those are legal points and they present themselves to lay people everywhere as points on which we want the decision of the Court which exists to decide such questions, the Hague Tribunal, and as points upon which the opinion of a body like the Council of the League of Nations, even with eminent jurists advising them, is of no account whatsoever.

As to the second point, that this alleged Treaty right of certain Hungarians is being frustrated by the inaction of the League, I am perfectly aware that the Council of the League have made them a certain offer and that Rumania has accepted it. That offer is that they shall be allowed to have their case heard by the Court at the Hague if they will previously subscribe to certain principles in accordance with which the question is to be judged. Now in regard to those principles this, I think, is plain: either they are involved in the actual provisions of the Treaty of Trianon, in which case it is utterly superfluous to set them out, or they vary and depart from the conditions of the Treaty, in which case the putting before the Hungarian people of this offer, which has been put before them by the Council of the League, is equivalent to saying quite plainly and quite cynically: "Your rights under the Treaty are what we are not going to allow you to get." I sincerely hope that there may be some very convincing answer to what has been said by myself and by noble Lords who have preceded me upon that point. I listened with great interest to what Lord Thomson has said about the original merits of the dispute from which this whole affair arises. I may be right or I may be wrong, but I note chiefly about the speech this, that he, too, with the sympathetic view which he has taken of the Rumanian side of this question, concludes by demanding that the legal question which has arisen should go before a Tribunal competent to decide it.

I want to say in conclusion, if I may detain your Lordships for a further moment, that whether the 300 or so Hungarian landowners, most of whom I suppose have been out of the enjoyment of their property for ten years now, are objects for wide and deep sympathy, I do not know at all. What is likely to come out of these proceedings as an object for a considerable amount of pity is the League of Nations itself. Nothing can induce me to believe that the noble and learned Earl who is going to reply for the Government has read the recent pronouncements of the League of Nations upon this subject with any sort of admiration at all. I can with difficulty believe that they are satisfactory to the British Government or to the British representative on the Council, Sir Austen Chamberlain. I do not know what the explanation may be, whether it is simply that the Council here is bound to act unanimously, if at all, and that unanimity cannot be secured. If that is the explanation, if the Council is powerless unless unanimous and there is divergence upon the Council, would it not be much better, much more helpful to the League that that fact should be plainly stated? Nothing, it seems to me, can be more injurious to the reputation of the League than to put forward at this stage a suggested compromise which bears futility written upon the very face of it. How can Hungary be asked to go before the Court upon condition that it has previously accepted certain principles adverse to the contention which, at the outset, it wished to put before that Court?

I believe that the British Foreign Office is the best friend that the League of Nations has had in the world. The Foreign Secretary and the

Government have often told us that the League of Nations, though a very promising infant, is still an infant, and have begged that unduly heavy burdens shall not at this stage of its growth be put upon its back. My interest in this question is simply this: no more grievous burden could be put upon the back of that otherwise promising infant than the sort of reputation for political immorality which is all that it stands to get out of the intensely unpopular decision to which it lately seems to have come.

THE SECRETARY OF STATE FOR INDIA (THE EARL OF BIRKENHEAD): My Lords, I shall be very willing to hear the views of any other noble Lord in order that I may have the advantage of replying on behalf of the Government upon the whole debate. If any noble Lord has anything to say I shall be pleased to hear it.

LORD PARMOOR: My Lords, I have certain views which in those circumstances I should like to put before the noble and learned Earl. It seems to me that this question is one of the greatest importance to the reputation of the League of Nations itself, and also, so far as justice is concerned, it must be of the first moment to the Hungarian optants. When I was at Geneva in 1924 we had an almost similar question which was raised between the German optants on the one side and the Polish Government on the other. On that occasion the suggestion which Lord Newton has made and which was so ably supported by Lord Thomson, was at once followed. The legal question involved was submitted to the International Court at The Hague, and, as I think, Lord Phillimore stated on a subsequent occasion when he represented us on the Council of the League—I was not able to go again—the whole matter was finally settled, as I believe, to the satisfaction of both parties. I have never heard from that day any complaint on either side and I think that the noble Lord, Lord Phillimore, will agree with me that the settlement was complete, decisive and final and satisfactory to the parties.

LORD PHILLIMORE: Hear, hear.

LORD PARMOOR: I am bound to say that my own view of the present position is that we are not here in any way concerned with the question of merits. It would be very unfortunate to suppose that this House could by any possibility deal with the question of merits on an occasion of this sort. All we are engaged upon here is the question of jurisdiction, and I should have thought that it was a very simple matter. There is no doubt that this question was to be submitted, under the Treaty of Trianon, to what was called a Mixed Arbitral Tribunal. That Tribunal had a question raised before it as to its own jurisdiction, and it decided by a majority—this had nothing to do with the merits of the case—that it had jurisdiction to entertain the matter.

I do not want to cross-examine the noble and learned Earl, but I will put one question to him. I have never heard any one suggest that it was the duty, in the first instance, of any Arbitral Tribunal to decide whether it had jurisdiction or not. When that decision was made, the Rumanians withdrew their arbitrator from the Tribunal, as they were entitled to do. That has been done in many cases. It was done notably in the course of the discussions on the Ruhr between France and Germany. The matter came before a Mixed Arbitral Tribunal, the Germans withdrew their arbitrator, application was made to the Council and two neutral arbitrators were appointed in their place. This is merely a method of making a Tribunal effective. If at any time in arbitration proceedings you could make them nugatory by the withdrawal of your own arbitrator, then the constitution of a Tribunal for the decision of a matter in dispute

would become a mere fiction. In this case the matter in dispute—I mention it only in relation to the question of jurisdiction—is not a very complicated one. The persons involved number about 250. I think the noble Lord, Lord Charnwood, spoke of 300, but I believe that the number I have stated is correct. When territory that was formerly Hungarian was transferred to Transylvania a condition was inserted, to which Rumania assented, that the Hungarians within the added area might, if they liked, opt to remain Hungarian citizens, and the question of their rights or compensation for loss of rights was to come before the Mixed Arbitral Tribunal. Why not? I should have thought that this was really the only possible way of proceeding in a matter of this sort.

I do not think any noble Lord has yet brought to the attention of the noble and learned Earl what actually passed at the last meeting of the Council of the League. We know that up to that point no progress had been made. At one time the Council appealed to Hungary and Rumania to make concessions with a view to a direct settlement, and, they not accepting, this was really tantamount to an abandonment of the dispute so far as the Council were concerned. They had refused to reconstitute the Tribunal so as to be a Tribunal that would have adequate jurisdiction. I should like the noble and learned Earl to bear in mind that this was not the last offer made. M. Titulescu, who, as we know, is the very able representative of Rumania, proposed to Hungary that an Arbitral Commission, consisting of Sir Austen Chamberlain and two neutral members, should consider the claims of the optants, any compensation awarded being paid by the Hungarian Government out of the Reparations due to Rumania. Count Apponyi, representing Hungary, said that his Government would consider the proposal. So far as I know, that proposal is still under consideration. In a matter of this kind I would desire to see a settlement brought about by the most favourable means with due regard to the wishes and interests of both parties. One is bound to remember that the optant is an individual whose interests have been safeguarded in a particular way under the Treaty of Trianon. This is not so much a question between Hungary and Rumania as between individuals who might have been harshly treated under the Treaty and of provision for their security, or for compensation or whatever it may be. I think that these Mixed Arbitral Tribunals are included in almost every Treaty. In fact there is no other way of settling these difficulties.

The only further question that I should like to put to the noble and learned Earl—I think it right to put it now and not afterwards—is whether there is really involved here any question except that of jurisdiction. As the noble and learned Lord, Lord Phillimore, said, if it is a question of jurisdiction, surely, both in the interests of the League and in the cause of justice; those individuals (I do not want to call them Hungarians particularly) whose rights were protected on conditions accepted when Transylvania was transferred from one country to the other, are entitled to ask that they should have the benefit of the provisions so made. I should have thought that it was the duty of the Council of the League to carry out in a totally impartial spirit what appears to me to be the obligation imposed upon them of reconstituting the Tribunal so as to make it effective, even though one of the parties has withdrawn its representative. I do not think that this is an occasion for discussing the rival claims. It is a question of seeing that these optants can be heard before the competent Tribunal set up under the Treaty of Trianon itself.

LORD DANESFORT : My Lords, we are faced to-day with a position of great gravity which goes far beyond the immediate question that has been raised between Hungary and Rumania. We all desire the League

of Nations to grow in power and efficiency for the purpose of carrying out the two main objects for which I conceive it to have been established—namely, the avoidance and prevention of war as a means of settling disputes, and the encouragement of arbitration for the purpose of settling the differences that arise between nations. The situation to-day arouses in many minds grave doubts as to the value and efficiency of the League of Nations for the purpose of settling disputes between nations. If the Council does not take the steps which have been suggested to enable this Arbitral Tribunal to operate and thereby settle the dispute between Rumania and Hungary, then I fear that undoubtedly the Council of the League and the League itself will greatly suffer, both in prestige and their power for good. The question before us to-day is not the question of the merits of this dispute at all. Lord Thomson devoted a certain amount of his otherwise valuable speech to a discussion of the merits, and of the reasons which had led the Rumanians to pass an Agrarian Law, which, if effective, would largely override the provisions of some of the Articles of the Treaty.

He went on to urge the argument that in this matter we should be guided not so much by the justice of the case as by what he called considerations of expediency. I think that would be a very disastrous position for the League of Nations, or indeed anyone else, to take up. Here is a Treaty which provides that certain disputes shall be settled by arbitration, and which enables the Council of the League to fill up a vacancy on the Tribunal, and I venture to suggest to the noble Lord that it would be a really lamentable thing for the Council of the League, in deciding whether to assist in the creation of that Arbitral Tribunal, to be led astray by some ideas of their own as to the expediency of the proposal. I put aside the question of merits, and I hope that on further consideration Lord Thomson will not ask us to substitute expediency for justice. The sole question for us to-day is what is the best means of getting the Arbitral Tribunal to work. If it cannot be constituted owing to the withdrawal of the Rumanian arbitrator, without the help of the Council of the League—and up to now the Council have withheld that help—we trust the noble Earl will be able to reassure us and will be able to tell us that the Council will reconsider the matter. Perhaps I should put it this way: that we, through our representative at Geneva, will do our very best to get the Council to reconsider its decision.

Let us bear in mind that Hungary has made, I venture to think, every effort in its power to secure a fair settlement by negotiation and by agreement. Those efforts have failed, and the only possible mode now of settling this question is by means of arbitration. I do not wish to go over the ground which has already been gone over, but I may remind your Lordships of what is the real kernel of this matter—namely, that as long ago as March, 1927, after all efforts at negotiation had failed, Hungary appealed to the Council of the League to take steps to replace the Rumanian arbitrator and to make the Arbitral Tribunal effective. In the opinion of the most eminent jurists in this country—I may mention the names of Sir John Simon, Sir Leslie Scott, Sir Alfred Hopkinson, and many others—the Council was bound as an administrative act to take those steps and re-establish the Tribunal. Had they done so a decision would have been given and all further discussion would have been spared. That view, taken by eminent jurists of this country, has been reasserted by two noble Lords in this House, Lord Phillimore and Lord Parmoor. Unfortunately, the Council did not take that administrative step, and did not fill up the vacancy on the Tribunal. I see in some of the papers that in refusing to appoint two members, and to name a further arbitrator, the

Council say that they had certain high legal advice. We have never been told who their advisers were, but perhaps the noble Earl will be able to tell us this afternoon why they acted in opposition to the views of all the great legal authorities in this country.

That is not all. As one noble Lord said, the real question for the moment is whether this Arbitral Tribunal, if constituted, is competent to decide this question. Hungary said it was. Rumania said it was not, and thereupon the Hungarian Government made a proposal which I think the Council should at once have accepted—namely, that the matter should be referred to the International Court at The Hague to say, aye or no, is the Tribunal competent to decide the question. If it is not, there is an end to the matter. If, on the other hand, the Court at The Hague say that it is competent, then I take it that the Council would inevitably have to reconstitute the Tribunal, and I hope they will do so. That is what they have been urged to do by every speaker to-day—by Lord Thomson, who spoke as a friend of Rumania, by Lord Phillimore, and, I think, by Lord Charnwood. It has been urged upon the Government to do their utmost to see that the Council carries out the suggestion of the Hungarian Government, and sends the matter to the Court at The Hague, to say, aye or no, is the Tribunal when constituted fit to deal with this question. I have no reason to suppose that the Council will refuse that most reasonable suggestion. It is true the Rumanian Government might object, but if they have confidence in their case, why should they object? If they have no confidence in their case I can understand why they object to taking any step at all, either by going to The Hague or otherwise. This, however, is a matter in which the Rumanian Government ought not to dictate to the Council or to the League of Nations, or to anyone else, as to what should be done.

I want in a very few words to call attention to what the Council have done up to now. In September, 1927, they offered to fill this vacancy, but upon what condition—upon a condition which meant in point of fact a decision in favour of the Rumanian Government; in other words, to use their functions in a way in which they were in no wise entitled by any international instrument to use them—namely, as judges in this case—functions which properly belong, as we conceive, to a properly constituted Arbitral Tribunal. Having done that, they seek to impose upon the Hungarian Government this condition: “You must accept conditions which practically put you out of court, or else we will not fill up the vacancy on the Tribunal.” Is that a fair proposition? It seems to me that the Hungarian Government had no alternative in such circumstances but to reject it. The Rumanian Government, of course, jumped at it, because it was practically getting the Council to decide in its favour. I cannot believe that the Council, on mature consideration, can be proud of that decision, and I hope that the noble Earl to-day will not justify them in the offer they made.

Then came March, 1928, and upon that occasion the Council made, as I think, a proposal which was not unreasonable. They said that if the Rumanian Government would appoint its arbitrator they, the Council, would add two neutral members to the Tribunal, and then the Tribunal could operate and decide the question. The Hungarian Government accepted that, showing, as I think, their readiness to accept any reasonable proposal by which a decision could be reached. Again, the Rumanian Government rejected that proposal. Why? Were they afraid of these two neutrals being added to the Tribunal? Were they afraid of the Tribunal coming to a decision at all? It seems to me to look like it. However, the Council accepted the refusal of the Rumanian Government,

and did nothing further. Finally, we come to the meeting of June 8, 1928. I have read the shorthand notes of all that took place on that occasion, and it appears to me that it was a lamentable confession of weakness on the part of the Council of the League, a confession of paralysis, of incapacity to deal with the situation. They wound up by saying: "Let these two Governments"—which have been negotiating for I know not how many years, and have been unable, in spite of the willingness to settle on the part of the Hungarian Government, to come to a decision—"let them go on negotiating." They very nearly added that if these negotiations came to nothing they, the Council of the League, would do absolutely nothing further.

I do hope that the Council of the League, under the inspiration of our Government, and of those who are anxious to relieve the Council from a most invidious and difficult position, will adopt the suggestion made by Lord Newton, and enforced by almost every other speaker to-night—namely, that the competence of this Tribunal should be submitted to the International Court of Justice at The Hague, and, if that Court says that the Tribunal is a competent one, that then the Council will fill up the vacancy in the Tribunal and enable it to settle this long-standing question.

THE EARL OF BIRKENHEAD: My Lords, I hope it will not be supposed that the present moment should be regarded as a convenient one for examining the whole merits of the Treaty of Peace to which so much reference has been made. I do not stand here to say that that Treaty is permanently sacrosanct. I do not say that the moment when victory has been won is the moment at which a perfectly conceived peace is most likely to emerge. Nor do I suppose that such a peace would have emerged for us had the fortune of arms in the Great War gone differently. No observation, therefore, which I make must be interpreted as in any way examining the large question to which allusion has been made, as to whether or not some modification in these Treaty conditions at some period or other may or may not become desirable.

The noble Lord, Lord Danesfort, says this was a most grave matter. Evidently your Lordships so regarded it, for at that period of his speech I counted the numbers of your Lordships who were present. At that moment, after Notice duly circulated on the Paper, eighteen of your Lordships were taking part in the exposure of this grievance. Nor can I conceive it to be probable that all the eighteen shared the views of the noble Lord. To my certain knowledge at least four or five of them were present inspired by a tepid willingness to support His Majesty's Government. But I would venture to make this observation, that I have listened with great pain to some of the observations which have been made to-day, only by three or four of your Lordships, upon the subject of the Council of the League of Nations. I was never so great an enthusiast for the League of Nations as others have been, but I confess that it is with great anxiety that I listened to noble and learned Lords like Lord Phillimore and Lord Parmoor who, if not indeed the parents of the League, have always been its firm friends. I did not quite follow the infancy metaphor which the noble Lord (Lord Charnwood) who sits behind Lord Beauchamp developed, but there appeared to be an infant in the case, and I suppose of all the noble Lords in this House who have been enthusiastic supporters of the League of Nations none have been more conspicuous, none more consistent, than Lord Phillimore and Lord Parmoor.

When I hear them with almost parricidal tendencies criticising, scolding and admonishing the Council of the League I confess I think the attack both unnatural and unfair. The Council of the League is faced with very great responsibilities. It is all very well for noble Lords to ask,

why does not the British Government inspire them? I never find it very easy to inspire any one and I would like to hear Lord Danesfort going over and inspiring the Council of the League of Nations. What is Sir Austen Chamberlain to say to them? Is he to say: "You cannot take this decision; Lord Danesfort disapproves of it." They would reply at once: "But there are other nations involved. The League is not a kind of English preserve, a receiving station for the inspiration of Lord Danesfort. On the contrary, it consists of a large number of nations, each of whom has a right that its opinions should be separately considered." The less that we attempt to dictate to the Council of the League the more likely are we to retain our influence with them. Indeed, what right have we to dictate? We have the right as one Member of the Council, together with other equally responsible nations, of making our views known. Other right we have none, and, having set in motion the League of Nations, having created, having staked so much upon its usefulness, we must give it our support and not in an empty House by idle, if I may say so, by largely unfounded and rather petulant, criticisms perhaps defeat the very object which the Council has in view.

The particular case that is made to-day, if it is to be answered, as I must answer it on behalf of the Government with such sense of responsibility as I can, involves considerable examination of all the events which have led to this discussion. I am unable to agree with the noble Lord, Lord Newton, that the efforts of the Council to bring Hungary and Rumania to a settlement have been ineffectual. I agree, if I may draw a very slight shade of distinction, that up to the present moment they have not been successful. But I certainly am not without hope that your Lordships will come to the conclusion, when the facts are made plain, that the lack of success on the part of the Council is not due to the incompetence of the League but, as I say quite plainly, is due to the difficulty of dealing with both the parties to this dispute. In considering the action which could be taken and the recommendations which could be made, the Council had not only to consider Article 239 which has been referred to—

LORD PHILLIMORE : Article 236.

THE EARL OF BIRKENHEAD : I have in mind Article 239 of the Treaty of Trianon, which provides for the appointment by the Council of two deputy judges for the Rumanian-Hungarian Mixed Arbitral Tribunal. It also had to consider Article 11 of the same Treaty which, as the noble and learned Lord, Lord Phillimore, will remember, is at the same time Article 11 of the Covenant of the League. The Rumanian Government, submitted the dispute to the Council under Article 11 of the Covenant thus basing their request on the wider political issues involved. Thereupon the Hungarian Government submitted the dispute to the Council under Article 239 of the Treaty of Trianon and based their request upon the legal issues which they assumed and alleged to be involved.

In those circumstances, on August 16, 1922, the Hungarian Government applied to the Conference of Ambassadors in Paris in regard to the expropriation, undertaken by Rumania in ostensible connection with a scheme of agrarian reform, of the immovable property of persons who, while possessing rights of citizenship in the territories transferred to the kingdom of Rumania by the Treaty of Trianon, had opted for Hungarian nationality under Articles 63 or 64 of that Treaty and also under Article 3 of the Rumanian Minorities Treaty. The Conference of Ambassadors informed the Hungarian Government on August 31, 1922, that its claims related entirely to the stipulations of the Treaty between Rumania and the

Principal Allied and Associated Powers concerning minorities and should under the Treaty be referred to the League of Nations. When the Hungarian Government made a further request the Conference of Ambassadors informed that Government on February 27, 1923, that either Hungary or another Member of the League must, according to its constitution, take the initiative in bringing the matter before the Council. The Hungarian Government, therefore, submitted the dispute to the Council of the League stating that a satisfactory solution had not been obtained by direct negotiation and formulating certain demands of which your Lordships' House ought to be informed.

They are as follows—

“ (1) That the Council should deal with the substance of the question in view of the urgency of the matter, at its next session.

“ (2) That it should give a ruling on the substance of the question by declaring that the Rumanian legislative and administrative enactments in question were contrary to the Treaties ; by ensuring, as regards the future, that Rumania should act in conformity with the provisions of the Treaties ; by ordering that the immovable property of Hungarian optants should be restored to them and that it should in future be free from all charges contrary to the provisions of the Treaties ; and, finally, that full compensation for damage should be given to the injured parties.”

On those requisitions the Japanese representative, in his capacity as *rapporteur*, was requested in April, 1923, to prepare the ground for a further discussion before the session of the Council in July of that year, and the Council expressed the hope that before this session the two Governments would succeed in reaching an agreement. From some of the observations which your Lordships have heard to-day one would almost think that the Council was exceeding its functions in expressing a very reasonable hope that some friendly discussions might meet with a fruitful arrangement. With this object, the representatives of Hungary and Rumania proceeded, on the invitation of the Japanese representative, to Brussels on May 6, 1923, where negotiations took place which at one period seemed extremely promising and on which it was hoped that an agreement had been attained. On July 5, 1923, these negotiations which had taken place in Brussels were the subject of protracted discussion by the Council of the League. The Rumanian representative apparently regarded an agreement as having been finally concluded at that city whilst the Hungarian representative contended that no such agreement had been reached.

It is important to notice exactly what resolution was passed by the Council on this occasion. I read from the official record—

“ The Council, after examining the report by M. Adatci dated June 5, 1923, and the documents annexed thereto ; approves the report, takes note of the various declarations contained in the Minutes attached to the report of the Japanese representative, and hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighbouring two countries.

“ The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals ; and that the Rumanian Government will remain faithful to the Treaty, and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its good will to the interests of the Hungarian optants.”

It is all very well to say that expressions of hope and desires that reasonableness shall prevail are not very useful contributions to a situation of this kind ; but it must be remembered that prematurely and sharply to take a side may be a very much greater mischief.

It must be remembered that a body like the Council of the League of Nations can only function in circumstances of constant difficulty and can only reach a conclusion by a balancing of different competitive interests. I for one most warmly approve it, after negotiation which had so nearly reached a successful conclusion, for making a further attempt, by friendly admonition to both parties, to attain a settlement, and indeed this resolution was adopted by all the members of the Council, with the exception of the Hungarian Delegate. Surely one may draw some inference from that. As I have said the Council of the League have, I think both unwisely and unfairly, been criticised to-day. Are we not to observe that at this critical moment in this controversy the resolution for which they made themselves responsible was adopted by every member of the Council with the sole exception of the Hungarian Delegate.

LORD NEWTON : He is not a member.

THE EARL OF BIRKENHEAD : Then they were unanimous. As the noble Lord reminds me, the Hungarian Delegate not being himself a member, the Council was unanimous.

LORD CHARNWOOD : What date was that ?

THE EARL OF BIRKENHEAD : It was July 5, 1923. I think there must be some confusion about the Hungarian Delegate. My information from the Foreign Office is that he refrained from voting and stated that in his opinion the whole problem remained open.

VISCOUNT CECIL OF CHELWOOD : May I suggest a possible explanation ? Under the Article—I forget which—where the interests of a country which is a Member of the League are directly concerned that Member is summoned to the Council and has all the rights of a member of the Council for that purpose.

THE EARL OF BIRKENHEAD : That justifies the original statement which I made when I was corrected by the noble Lord. I was almost prepared to withdraw my statement but the explanation of the noble Viscount makes plain what actually happened. The Hungarian representative had been directly concerned and was invited to attend and, as my noble friend Lord Cecil reminded me, attended with all the rights of any other member. Therefore what I said was completely accurate. All the members of the Council, with the exception of the Hungarian Delegate, who had been specially summoned, were unanimous, but he refrained from voting and stated that in his opinion the whole problem remained open. He added amongst other observations that his Government reserved the right to take any further step which the Treaties and the Covenant of the League of Nations might allow in order to obtain justice for those whom he had the right and the duty to represent. I am in no way criticising either the attitude which he adopted or the observation by which he justified that attitude.

From December, 1923, onwards a number of applications from Hungarian nationals, all optants, as the phrase goes, owning lands in the territories transferred to Rumania were submitted to the Secretariat of the Rumano-Hungarian Mixed Arbitral Tribunal provided for in Article 239 of the Treaty of Trianon asking, amongst other matters, that the Tribunal should declare that the measures restricting their right of

ownership, which had been applied to the movable and immovable property by the Rumanian State, were contrary to the provision of Article 250 of the Treaty of Trianon, and that it should order the Rumanian State to make restitution. In 1925, the Rumanian Government submitted applications objecting to the jurisdiction of the Tribunal, but after hearing the counsel of the two parties between December 15 and December 23, 1926, the Tribunal, on January 10, 1927, declared itself competent, in virtue of Article 250, paragraph 3, of the Treaty of Trianon, and called upon the defendant State, Rumania, to forward her reply within a period of two months. On February 24, 1927, Rumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that, consequently, her arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals.

I think I have said enough to convince your Lordships that these two particular nationalities have not been very easy for the Council of the League of Nations to deal with. At the same time Rumania submitted to the Council in virtue of Article 11, paragraph 2, of the Covenant, a request to allow her to acquaint the Council with the reason on which her attitude was based. This question came before the Council on March 7, 1927. The Rumanian representative explained the reasons which had led the Rumanian Government to withdraw its arbitrator from the Tribunal. The Hungarian representative asked the Council to appoint, in accordance with the Treaty of Peace, two deputy members to enable the Tribunal to continue its work. The Council, on the proposal of the President, requested the British representative to report on this question at its next session. My colleague, Sir Austen Chamberlain, expressed his desire that two of his colleagues should be appointed to act with him for the purpose of examining the question. Accordingly the Council requested the representative of Japan and the representative of Chile to assist Sir Austen in preparing a report for the next session. The two parties to the dispute accepted this proposal, which was adopted by the Council. There again there would have appeared some hope that an accommodation might result.

On May 31, Sir Austen, on behalf of the Committee of Three, convened the Rumanian and Hungarian representatives in London. The Delegates of both countries stated at the outset that they could not definitely bind their Governments. The Committee first of all heard the additional statements of the two parties and certain particulars which they furnished. The Committee took the view—and I must say I think reasonably took the view—that it was their duty to try all possible means of reaching a solution by conciliation. In doing so they were satisfied that they were fulfilling the wishes of the Council and conforming to the established practice of that body. They, therefore, asked the Delegates to obtain from their respective Governments all possible concessions with a view to harmonious accommodation. On the proposal of the Committee the Delegates of the two Governments agreed to inform the Committee of the point of view of their respective Governments at the June session of the Council. When the Council assembled in June, 1927, the committee of Three met on several occasions at Geneva and maintained the closest contact with the representatives of the two Governments.

Looking at the problem as a whole, the Committee desired to find a solution which would, if possible, allay discontent. It could not forget that the matter had originally been submitted to the Council not under Article 239 of the Treaty of Trianon but under Article 11 of the Covenant, and that its intervention had been originally asked for—which I think some

of the speakers to-day have forgotten—on that occasion first of all by Rumania and then by Hungary. Both nations were, at any rate in the origin of this controversy, submissive to the jurisdiction——

LORD PHILLIMORE : Does the noble and learned Earl say that Hungary asked for intervention under Article 11 ?

THE EARL OF BIRKENHEAD : I certainly understand so. I am so informed by those who are responsible for these matters in the Foreign Office.

VISCOUNT CECIL OF CHELWOOD : You mean quite at the beginning.

THE EARL OF BIRKENHEAD : Yes.

LORD PHILLIMORE : I think Hungary confined herself to Article 239.

THE EARL OF BIRKENHEAD : I think the noble and learned Lord will find I am right. He can easily verify it and I shall be pleased to give him the authority on which I make the statement. In these circumstances and holding this view, the Council could not evade the duty imposed upon it and confine itself simply to the appointment of a substitute for the Rumanian member of the Mixed Arbitral Tribunal. The noble and learned Lord is quite right to take note of the significance of that because I agree with him that a good deal depends on it. If the statement on which I am instructed, and I believe competently instructed, is well founded, it becomes an element of very great importance in these discussions and one which I think has been very considerably ignored. If the Council had taken the view that it could so confine itself it would have failed to discharge its political duties as a mediator and conciliator in a dispute which extended far beyond the actual term in which it had been originally submitted by the two parties. Moreover, the Committee could not take a purely and strictly legal view of the Council's duties, especially as it realised that the appointment of a substitute for the Rumanian judge would not have finally ended a difference which had been successively submitted to three international authorities. What useful purpose indeed could have been served by the appointment of a substitute for the Rumanian judge ?

But there are other reasons not less weighty which influenced the Council in not playing a purely mechanical part. In 1923 the two parties had stated their points of view at great length and dealt with all aspects of the dispute both as regards substance and form. The Council had recommended them to do everything possible to prevent the question of the optants from becoming a disturbing influence in the relations between the two neighbouring countries. It recommended Hungary, as I have told your Lordships, to reassure her nationals, and Rumania to give evidence of good will. Would the question with which the Council have been dealing since their session in March, 1927, have arisen if the two parties had ever attempted to follow these recommendations ? The Committee of the Council during the session in June, 1927, submitted certain *formulae* to the two parties, always with a view to conciliation and in the hope that the two Governments would agree. The two parties rejected the compromise proposed by the Committee of Three, and the latter accordingly convened them again on September 2 with a view to a final attempt at conciliation.

During these fresh conversations the representatives of the two countries communicated further proposals to the Committee. The Hungarian representative renewed the offer made in March that the question

of jurisdiction of the Mixed Arbitral Tribunal should be referred to the Permanent Court of International Justice but declared that he was unable to make any new concession. This offer was not accepted by the Rumanian representative, who in his turn submitted certain *formulæ* based on the proposals made by the Committee of Three with a view to compromise. These *formulæ* were rejected by the Hungarian representative. In these circumstances the Committee of Three were compelled to abandon the hope of reaching a settlement by direct conciliation. I will undertake to say that no one who over that long period carefully studies the energy and the industry with which the Committee addressed themselves to that most difficult task will withdraw from a tribute of admiration for the qualities and patience they showed. Finding themselves against a blank wall they thereupon felt themselves obliged to seek a solution by other methods.

A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction became obviously of primary importance and accordingly the Committee asked the following questions:—

“ 1. Is the Rumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Rumanian Agrarian Law to Hungarian optants and nationals ?

“ 2. If the answer to that question be in the affirmative, to what extent and in what circumstances is it entitled to do so ?

The Committee, after examining these questions and having them examined by eminent legal authorities, arrived at their conclusions. When I am asked, as I understand I am asked, to give the names of the eminent legal authorities I profess myself entirely unable to do so, and if I knew their names I do not know that I should feel myself called upon to do so. If I am told by a Committee constituted as this is, with direct authority from the Council of the League, that they consulted eminent legal authorities, I feel myself quite at liberty to believe that they have consulted such eminent legal authorities.

LORD PHILLIMORE : Will the noble and learned Earl say why they did not, instead of consulting eminent legal authorities, consult the Permanent Court ?

THE EARL OF BIRKENHEAD : The noble and learned Lord knows just as well as I do that the circumstances in which you consult the Permanent Court are not the same as these. It might as well be asked why the Government of the day, instead of taking the advice of the Law Officers under the Statute which is appropriate, did not take the opinion of the Judicial Committee of the Privy Council. There are different ways of dealing with these matters. There are hundreds of matters in which a Committee of the Council are entitled and bound to take legal opinion which would be entirely inappropriate for the formality and delay of the Permanent Court.

If I may resume, the Committee after examining these questions and having them examined by eminent legal authorities, arrived at these conclusions:—

“ The Mixed Rumano-Hungarian Arbitral Tribunal owes its establishment to the Treaty of Trianon. It is an international Tribunal and its jurisdiction is therefore fixed by the terms of the Treaty which created it. It has no jurisdiction beyond that which the agreement of the contracting parties has conferred upon it. The limits of its jurisdiction are defined by Articles 239 and 250 of the Treaty of Trianon.

“ The question submitted to the Council for examination relates to the claims addressed under Article 250 to the Mixed Arbitral Tribunal by Hungarian nationals. The provisions of this Article prohibit the retention and liquidation, dealt with in Article 232 and in the Annex to Section IV of Part X of the Treaty, of the property of Hungarian nationals situated in the territory of the former Austro-Hungarian Monarchy. They also provide for the restitution to their owners of goods freed from any measure of this kind and from any other measure of disposal, of administration or of sequestration taken in the period which elapsed between the Armistice and the entry into force of the Treaty. They authorise the submission of claims, by claimants who are Hungarian nationals, to the Mixed Rumanian-Hungarian Arbitral Tribunal provided for in Article 239.

“ If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Articles 232 and 250 as a result of the application to the said property of the Rumanian Agrarian Law and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

“ The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless the case mentioned in the preceding paragraph arises. In this latter case, the jurisdiction of the Mixed Arbitral Tribunal would not be ousted on the ground that the application of an agrarian law was involved.”

Since these considerations showed that the claim of a Hungarian national for restitution of property in accordance with Article 250 of the Treaty of Trianon might come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim arose out of the application of the Rumanian Agrarian Law, the Committee of Three proceeded to define the principles that acceptance of the Treaty of Trianon had made equally obligatory for Rumania and for Hungary.

As these principles are of very great importance in the consideration of this question, I will quote *verbatim*—though I am sorry to appear tedious—the relevant portions of the Report submitted by the Committee of Three to the Council. No noble Lord ought to join in any reflection upon the Council who has not followed most carefully all the stages of this dispute and has not with equal care considered the representations made by the Committee, constituted as I have described, to the Council, upon which, as the only available material, the Council had to pronounce. The Report runs as follows :—

“ (1) The provisions of the peace settlement effected after the War of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

“ Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Rumanian freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Rumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of International Law. There is, however, no rule of International Law exempting Hungarian nationals from a general scheme of agrarian reform. The question of compensation, whatever its importance from other points of view, does not here come under consideration.

“(2) There must be no inequality between Rumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.

“Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Rumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals as such in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of discriminatory application of the Agrarian Law. The prohibition against the holding of immovable property by a Hungarian in the territories transferred to Rumania, even if applied to all foreigners, would not be in accordance with the obligation which Rumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

“(3) The words ‘retention and liquidation’ mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

“The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian.

“The Committee of the Council therefore ventures to suggest that the Council should make the following recommendations:—

‘(a) To request the two parties to conform to the three principles enumerated above;

‘(b) To request Rumania to reinstate her judge on the Mixed Arbitral Tribunal.’”

More reasonable recommendations than those I am utterly unable to conceive. They hold the balance equally between the parties, and I am well satisfied that the British representative should have played a conspicuous part in reaching such a sensible conclusion.

In submitting this Report to the Council, my right hon. colleague, Sir Austen Chamberlain, acting as *rappporteur*, explained that he would have been glad if the Report of the Committee of Three could have ended with these recommendations, inasmuch as, in the opinion of himself and his colleagues, the solution proposed was honourable to both parties alike and secured justice for all concerned. Whilst the Committee of Three attached great importance to the normal functioning of the Mixed Arbitral Tribunal, yet they were forced to admit that normal functioning would only occur with the consent and good will of both parties. In the event, therefore, of their proposals not being accepted by either of the parties or by both, the Committee made certain recommendations. Here again I think the Committee deserve commendation and not censure in the difficult position in which they were placed. Their recommendations were to this effect: (1), In the event of a refusal by Hungary, the Committee

considered that the Council would not be justified in appointing two deputy members in accordance with Article 239 of the Treaty of Trianon ; (2), in the event of a refusal by Rumania the Committee considered that the Council would be justified in taking appropriate measures to ensure the satisfactory working of the Mixed Arbitral Tribunal ; and (3), in the event of a refusal by both parties, the Committee considered that the Council would have discharged the duty laid upon it by Article 11 of the Covenant.

Let us observe the sequel in this tangled and long drawn-out story. The Hungarian representative refused to accept the principles outlined by the Committee of Three. The Rumanian representative, on the other hand, intimated that his government would accept those principles if they were accepted by Hungary and on the understanding that the acceptance of the conditions laid down for the working of the Tribunal would have the binding force of law on the Tribunal itself. Discussion of this Report by the Council showed that there were grave differences of opinion amongst the members of the Council, and it is of no use censuring people for having differences of opinion. They either accept or they do not accept. A wise man diagnoses such political or Parliamentary ailment. It is of no use scolding people because they honestly differ. It soon became apparent that honest differences did exist among the members of the Council. These differences centred mainly on the sanctions appended at the end of the Committee's Report, and the President of the Council finally proposed that the Report should be adopted, but without the sanctions at the end, and that so far as the two disputants were concerned they should be given time to examine the Report carefully and that they should not give their definite replies until the Council met in December, 1927.

At the next session of the Council the Rumanian representative was disabled from attending by illness, and with the full consent, as I understand, of the Hungarian representative, the matter was postponed by the Council. When the Council met again in March of this year the Rumanian representative affirmed the unconditional acceptance by his Government of the Report presented by the Committee of Three to the Council in September, 1927. The Hungarian representative said that his Government had taken into consideration the desire of the Council that a direct settlement should be reached between the two parties, and they had accordingly made certain suggestions in the hope that a practical solution might be reached. However, these tentative negotiations had proved, so they said, unsuccessful. After both the Hungarian and Rumanian representatives had again stated their respective cases at very adequate length, Sir Austen Chamberlain summed up the discussion by saying that the attempt to find a solution by direct negotiation between the parties had up to that time failed because Hungary refused to accept the principles enunciated in the Report of the Committee of Three, and Rumania made their acceptance by Hungary a condition of her agreement to any direct settlement. Moreover, no effort had been made by the parties to reconcile their different views in regard to the amount of compensation to be allotted or the sources from which the requisite funds should be provided. The Council was not entitled (so he advised) to impose a decision upon the parties ; it could only make a recommendation, and without the goodwill of the parties concerned no solution could be found.

Sir Austen Chamberlain then enquired whether his colleagues on the Council would think fit to recommend a certain proposal to both parties. This was that they should agree to the nomination by the Council

of two members belonging to States neutral during the War, who should be added to the Mixed Arbitral Tribunal as stated under the Treaty of Trianon ; that is to say, that the claims of the Hungarian subjects in question could be referred to this Tribunal of five members. This very reasonable proposal was warmly supported by all the other members of the Council. It was accepted by the Rumanian representative, but only on condition that the two new judges to be added to the Tribunal should be bound by the three principles enunciated in the Report presented by the Committee of Three to the Council in September, 1927, with the terms of which I have already acquainted your Lordships. This condition obviously stultified the whole proposal. The Hungarian representative, on the other hand, accepted this new proposal without reserve, but refused to agree to the condition attached thereto by the Rumanian representative. The Rumanian and Hungarian representatives were requested to submit this proposal to their respective Governments.

When the Council met again at the beginning of this month, the Hungarian representative reiterated the acceptance of Sir Austen Chamberlain's last proposal by his Government, and the Rumanian representative again regretted that his Government could not accept it. Thus it will be seen by your Lordships that the Hungarian Government had refused the solution suggested by the Council in March, 1927 ; the Rumanian Government that proposed in March, 1928. As each of these proposals required the consent of both parties, neither could be imposed on either of them against its will. The Council had declined to enforce what was described as a sanction on the refusal of Hungary to accept the proposal made in September, 1927, and did not think it proper to proceed to sanctions against the Rumanian Government for their refusal of the proposal made in March, 1928.

As the Council had considered the matter in all its aspects for a considerable period of time and had failed to find a solution acceptable to both parties, it adopted a Resolution as recently as the 8th of the present month, expressing the opinion that the dispute should be settled by the parties on the basis of the solutions recommended by the Council, declaring its adherence to its previous Resolutions, and urging both Governments to bring this long-standing dispute to a close by reciprocal concessions. After this Resolution had been adopted by the Council the Rumanian representative read out a proposal which his Government intended to make to the Hungarian Government, and I am not in a position to express an opinion upon the probability of that proposal leading to a harmonious conclusion. I am not particularly encouraged by the long history with which I have regaled your Lordships this afternoon.

In the various meetings of the Council and the Assembly of the League the words "conciliatory spirit" and "good will" are very frequently heard ; so frequently indeed that casual visitors have been both astonished and gratified by their frequent reiteration. The reasons for this phenomenon may be that those who participate in the work of the League sensibly realise that the Covenant is not yet, whatever it may become, a universal panacea for all the evils of political and international life, and that all disputes cannot be settled by the Council of the League unless good will and a conciliatory spirit are shown by those concerned. I hope that in any further discussion which may take place this lack of good will, which I am bound to say has been shown by the two Governments concerned, and which has led to the stultification of the efforts of the Council, will not be overlooked by those who may be inclined to adopt the *rôle* of critic.

When I am asked why the Committee which advised the Council has not recommended that this matter should be sent to the International Court at The Hague, I am bound to say with the utmost respect to the noble Lords who have made this suggestion, that I am disposed to think that a Committee consisting of the chosen representatives of three Powers, which had held more than twenty sessions, in which they devoted their exclusive attention to this matter, and the Council of the League reinforced by the wisdom of so many constituent nations acting through sophisticated individuals who, by this time, I should imagine, are beginning to know their own business, were probably better judges as to whether this was a desirable procedure than any one of your Lordship, however well disposed to the League, however zealous in this particular matter, can possibly hope to be. The League of Nations has great difficulties to face. It will not be assisted, it will on the other hand be greatly embarrassed, if in all departments of all the work noble Lords are to rise and say: "Why does not the Council of the League do this? Why does not the Council of the League do that?" Let us, on the contrary, in a more statesmanlike spirit, attempt to appreciate the gravity of their task, the earnestness of the effort which they are making to discharge it, and let us not yield too lightly to the great human temptation to become critics of the supposed shortcomings of others.

VISCOUNT CECIL OF CHELWOOD: My Lords, I hope you will allow me, even at this late hour, to say a few words in reference to this very important and interesting subject. Let me at the outset say how heartily I agree with what my noble friend said at the beginning of his observations, that no question of revision arises at all in this matter, and that I am quite satisfied that, whatever may happen in the far distant future with regard to the revision of the Treaty of Trianon, any attempt to promote its revision at the present time will certainly lead to failure and dispute, and not improbably to ever more serious consequences.

My noble friend more than once deprecated criticism of the actions of the League. I agree with him that any criticism of that kind should be of the most moderate and considerate character. The difficulty of the work of the League is very great. At the same time, I think he will agree with me that a certain amount of criticism is not bad for anybody, even for a League of Nations. Indeed I would go much further than that. I would say that the League of Nations rests upon public opinion. Without public opinion it can do nothing, and public opinion can only express itself by sometimes criticising what has been done, at other times suggesting what ought to be done. And therefore personally, with the greatest respect to him, I do not deprecate in any way criticism being made of the decisions of the League. I think it has far too great an authority and a prestige already behind it, and will gain far greater authority and prestige in the future, as I hope, for it to be afraid of any criticism—provided, of course, it is fair and moderate.

With reference to this particular question we must admit that the position is not a satisfactory one. I think the House is very greatly indebted to my noble friend for the elaborate care with which he has recounted all the relevant facts connected with the matter, but the broad result remains that in 1921 or 1922 this subject first became a subject of controversy between Hungary and Rumania, that a great number of different authorities have apparently made an effort to arrive at a settlement, and that it still remains unsettled. My noble friend said with great truth that the great weight of blame for that want of settlement must be borne by the parties, and in that observation—I think I have put it rather more crudely than he, with his skill of phrase—I most

heartily agree with him. The net result of a review of this controversy always shows that whenever a proposal was made which Hungary was prepared to accept, Rumania refused it, and whenever a proposal was made which Rumania was prepared to accept, Hungary refused it. That undoubtedly did cause a very grave difficulty.

But, at the same time, we have now to consider what can be done, and it is not so much for this House, I agree, to give directions to the League of Nations. That, of course, it cannot do. What it can do is to make suggestions as to the attitude which the Government of this country ought to take in the Council of the League. It is only on that aspect of the thing that I venture to make these few observations. I am not going to follow my noble friend, even if I were competent to do so, in the history of this question. I have no doubt he is perfectly accurate when he said that at one time Hungary suggested that the League of Nations should deal with the merits of the dispute, and later on, after they had submitted the matter to an Arbitral Tribunal, desired that the Arbitral Tribunal should deal with the merits. I do not think that matters at all. We have to deal with the situation as it is presented to the Council of the League at the present time.

Now, as I understand, the actual position is this. The matter was before the Arbitral Tribunal. Rumania withdrew her representative. Hungary thereupon made a definite application to the League to exercise its rights to appoint a member in place of the Rumanian member. That is one issue. Then I think my noble friend does make out quite clearly that there has been a kind of cross appeal by Rumania under Article 11 of the Covenant, that the Council should consider the merits of the question under their general powers to deal with any question that affects the good relations between any countries. So that there were two different subjects presented to the Council for their consideration. One went to the jurisdiction of the Tribunal—the question as to who ought to decide the merits of the dispute—the other concerned the merits of the dispute.

I should have thought that the logical and convenient way of dealing with it would have been first to settle the question of what was the Tribunal which ought to deal with the merits of the dispute before taking up the consideration of the merits of the dispute itself, and I confess that it does seem to me that on that point the suggestion which was made originally, I think, by my noble friend Lord Newton, and warmly supported by my noble friend Lord Thomson, and I think by every speaker that succeeded them, seems to me to be a just one. There is a dispute as to whether the Arbitral Tribunal has jurisdiction in dealing with the merits of this controversy. The Rumanians say the Arbitral Tribunal has not jurisdiction. The Hungarians say that it has. The Council, perhaps a little unwisely, expressed a rather hesitating opinion on the jurisdiction, at least so I understand following what my noble friend has said. Here is an issue between the parties, an issue on a pure point of the construction of a Statute. Is not that just the question to go to the Permanent Court? My noble friend suggested that after all the Council is a very able body. I agree. He said the Committee of the Council is well chosen. I have no doubt it is. The fact that it is presided over by my right hon. friend Sir Austen Chamberlain would naturally recommend it to our confidence. My noble friend says it has an opportunity of consulting unnamed legal experts. No doubt it has.

“Why,” he asks, “should not the Council decide this question just as well as a Court?” I think the answer is two-fold. In the first place, the Council is not really a very good body to decide a legal question, as I am sure my noble friend would agree when he has the opportunity

of studying the work of the Council. It is an admirable body for deciding general questions of expediency. I do not think it is a very good body for deciding purely legal questions. That is not its function. I do not attach much importance to the advice obtained from unnamed legal experts. You cannot tell how the question is presented to the legal experts. You do not know how it is considered by them. They are probably officials of the various Governments, admirable people, I have no doubt, and it is very unlikely that they would give a pure, absolutely legal mind to the consideration of the question. Moreover, they have none of the guarantees of a Court. They have not the matter argued before them. They have not the publicity of the whole matter. They have not to pledge their personal reputations to the justice of their decision. I have not the slightest doubt that you have a much better chance of obtaining an absolutely fair and competent decision from the Permanent Court than you have from a Committee of the Council aided by unknown legal experts. For that reason I should have thought that this difficult question which has arisen between these two countries as to whether under the construction of a Treaty a particular Arbitral Tribunal has or has not jurisdiction is exactly the kind of matter which ought usefully to go to the Permanent Court of International Justice. I cannot conceive any doubt about it by any one who has studied the documents, and I should be very much surprised to hear from my noble friend that, put in that way, he had any serious doubt on the point.

I know there are some people who think that the Council can only send such a matter for an advisory opinion, as it is called, on a unanimous decision of the Council. I would venture to remind my noble friend that it is part of the ordinary function of the Court. It has been much more frequently employed than such a jurisdiction as the jurisdiction of the Privy Council. I think they have given more advisory opinions than definite judgments; at any rate they have given a very large proportion of advisory opinions. It is a regular procedure that when the Council or Assembly are in doubt they can ask for an advisory opinion from the Court. Then if there are parties involved they argue the question just as is done when an actual decision is sought. That seems to me to be an ideal procedure, and, even admitting that these two States have not distinguished themselves by their reasonableness, I cannot help believing that they would accept the decision of the Court given in that way when it had been fairly argued by both sides; at any rate it is worth trying.

I was saying that there are some people who think that you cannot send a question to the Permanent Court for an advisory opinion unless you can get a unanimous decision of the Council. I do not know, and I do not pretend to express an opinion upon that, beyond saying that it has always seemed to me an extremely difficult question. But I should have thought you could, on balance, get an advisory opinion by a reference by the majority of the Council. At all events that is a matter to be considered, if you find that you cannot get a unanimous decision. If the whole weight of the leading members of the Council were employed in order to suggest that this was so emphatically a question for the Court as it appears to me it obviously is, I do not believe there would be any difficulty in getting a unanimous decision—perhaps without the assent of Rumania or Hungary as the case might be, who are, no doubt for the purpose members of the Council; but then I think you might have recourse to the powers under Article 15 and say that for that purpose their votes would not be counted.

I venture very respectfully to recommend to my noble friend and the Government that this aspect of the matter should be further con-

sidered. If we are left with the present apparent absolute *non possumus* on the part of the League, if after the matter has been discussed for years and years the League can do nothing more than simply wash its hands of the dispute altogether, I think that will be a very unfortunate thing, not so much for the reputation of the League, for I have confidence that the reputation of the League is strong enough to stand even an incident of that kind, but for the good understanding between the nations of Europe. The result will be a constant sore between these two countries from the question remaining undecided and undetermined; and who knows how bitter the feeling may become at any given moment? Therefore we ought to strain every nerve and to try every possible plan to reach a decision, and I think there is at any rate a possibility of reaching that decision by pressing very strongly indeed that the legal question should be submitted for the decision of the Court. I trust my noble friend will consider that.

LORD LAMINGTON: My Lords, after the exhaustive criticisms that have been offered by the noble Viscount on the legal side of the matter I wish to make only one point with reference to the remark of the noble Earl that he objected to criticisms being made of the Council of the League. It is because noble Lords value the work of the League of Nations and are anxious that nothing should be done to bring the League into discredit that they have spoken as they have this afternoon. It is our fear that the apparent remissness in not appointing a substitute for the Rumanian member of the Mixed Arbitral Tribunal will lead in the future to mistrust of the League. We believe in the League of Nations. We trust it and we do not want anything to be done which will impair its value. I understand the noble Earl to ask what would be the use if the Council of the League appointed a substitute. If the Council had done their duty in the eyes of the world, and had carried out the Covenant any one could have seen what use such action would have been. Therefore, I associate myself with the criticisms made by the noble Viscount, Lord Cecil. I think those criticisms are very valuable in further elucidating what the noble Earl described as a very mysterious tangle.

OSZK

Országos Széchényi Könyvtár

OSZK

OSZK

